Fort Bend County
Public Transportation Department

Disadvantaged Business Enterprise (DBE) Program

APPROVED BY FORT BEND COUNTY COMMISSIONERS COURT
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DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM
PURSUANT TO 49 CFR PART 26

§26.23 POLICY STATEMENT

Fort Bend County (herein referred to as the "County") has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26, for the Fort Bend County Public Transportation (FBCPT) Department. The County has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, the County has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of the County to ensure that DBEs, as defined in Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also our policy to:

1. Ensure nondiscrimination in the award and administration of DOT-assisted contracts;
2. Create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. Ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. Ensure only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. Help remove barriers to the participation of DBEs in DOT-assisted contracts; and
6. Assist the development of firms that can compete successfully in the marketplace outside the DBE Program.

FBCPT designates the Procurement and Contracts Manager as the Disadvantaged Business Enterprise Liaison Officer (DBELO). In that capacity, the DBELO is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the County in its financial assistance agreements with the Department of Transportation.

The County Commissioners Court has approved this document, and the DBELO will disseminate this policy statement to all affected County Departments. The DBELO will also distribute this statement to DBE and non-DBE business communities that perform work for the County on FTA-assisted contracts in the same period. This distribution will be accomplished through the publication of the program on the County's website and by regular or electronic mail to all affected parties.

_____ _____

KP George, County Judge Date

REVIEWED BY:

_____ _____

Perri L. D'Armond, Fort Bend County Public Transportation Director Date

SUBPART A - GENERAL REQUIREMENTS

§26.1 Objectives
The objectives are found in the policy statement on the first page of this program.

§26.3 Applicability
The County is the recipient of Federal transit funds authorized by the Safe Accountable Flexible Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), the Moving Ahead for Progress in the 21st Century Act (MAP-21) Fixing America's Surface Transportation (FAST) Act, and Infrastructure Investment and Jobs Act.

§26.5 Definitions
The County will adopt the definitions contained in 49 CFR Part 26 for this program.

§26.7 Non-discrimination Requirements
The County will 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 this part on the basis of race, color, sex, or national origin.

In administering its DBE program, the County will not directly or through contractual or other arrangements use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment or the objectives of the program concerning individuals of a particular race, color, sex, or national origin.

§26.11 Record Keeping

§26.11(a)
The County will transmit the Uniform Report of DBE Awards or Commitments and Payments at the intervals stated on the Appendix B to Part 26 Form.

§26.11(b)
The County will report DBE participation on a Semi-annual basis, using the Uniform Reporting of DBE Award or Commitments and Payments form. These reports will reflect payments actually made to DBEs on DOT-assisted contracts.

§26.11(c) Bidders List
The County will create a bidder list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. Information shall include firm name, address, status as a DBE or non-DBE, the age of the firm, and the annual gross receipts of the firm. The purpose of this requirement is to allow use of the bidder's list approach to calculate overall goals. The County will collect this information in the following ways:

In each formal solicitation, the County includes the vendor form and subcontractor participation form (Exhibit D) that includes all required information for each vendor to complete and submit to help maintain the bidder's list.

§26.13 Recipient and Contractor Assurances
The County has signed the following assurances applicable to all DOT-assisted contracts and their administration:

§26.13(a) Assurance
The County 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 County shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure non-discrimination in the award and administration of DOT-assisted contracts. The County'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 County of its inability to carry out its approved program, the Department may impose a sanction 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 (3 1 U.S.C. 3801 et seq.).

This language will appear in financial assistance agreements with sub-recipients.

§26.13(b) Contract Assurance
The County will ensure the following clause is placed in every DOT-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 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.

SUBPART B – ADMINISTRATIVE REQUIREMENTS

§26.21 DBE Program Updates/Changes
Since the County has received a grant of $250,000 or more in FTA planning, capital, and/or operating assistance in a federal fiscal year, the County will continue to carry out this program until all funds awarded to the Public Transportation Department from DOT financial assistance have been expended. The County will provide to DOT updates representing significant changes in the program.

§26.23 Policy Statement
The Policy Statement is elaborated on the first page of this program.

§26.25 Disadvantaged Business Enterprise Liaison Officer (DBELO)
The County has designated the following individual as our DBE Liaison Officer:

Fort Bend County Public Transportation Department
ATTN: Vilma Adams
301 Jackson Street
Rosenberg, TX 77469
281-633-7433
Transit@fortbendcountytx.gov

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that the County complies with all provisions of 49 CFR Part 26. The DBELO has direct, independent access to the Public Transportation Director concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in Exhibit A to this program.

The DBELO is responsible for developing, implementing, and monitoring the DBE program, in coordination with other appropriate officials. The DBELO has a staff of one to assist in the administration of the program. The duties and responsibilities include the following:

1. Gather and report statistical data and other information as required by DOT.
2. Review third party contracts and purchase requisitions for compliance with this program.
3. Work with all FBCPT's departments to set overall triennial goals.
4. Ensure bid notices and requests for proposals are available to DBEs in a timely manner.
5. Identify contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals attainment).
6. Analyze FBCPT's progress toward attainment and identify ways to improve progress.
7. Participate in the pre-bid meetings.
8. Advise the Public Transportation Director on DBE matters and achievement.
9. Provide DBEs with information and assistance in preparing bids, obtaining bonding, and insurance requirements.
10. Plan and participate in DBE training seminars.
11. Provide outreach to DBEs and community organizations to advise them of opportunities.
12. Maintain the updated directory on certified DBEs.
13. Review all bid and proposal documents for transit vehicles and ensure Transit Vehicle Manufacturers (TVM) Certification is included (Section 26.19).
14. Monitor work committed to DBEs at contract award and after that to ensure work is performed by DBEs and provide written certification of this activity. Written records will include running tally of actual attainment.
15. Ensure contract documents have required clauses.
16. Monitor prime contractor sub-contracts for required clauses.

17. Monitor contract to ensure sub-contractors are paid as required.
18. Investigate and report all allegations of non-payment by contractors.
19. Investigate and prepare recommendations on Good Faith Efforts.
20. Monitor the Texas Unified Certification Program (TUCP) list to determine if over concentration for DBEs in certain types of areas has occurred, and as applicable, develop written procedures to address.
21. Refer potential DBE firms to TUCP.

§26.27 DBE Financial Institutions

It is the policy of the County 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 on DOT-assisted contracts to make use of these institutions. Fort Bend County made efforts to identify DBE financial institutions by doing research on the internet and the TUCP directory for DBE-owned financial institutions in the local areas. As of the date of submission of this DBE Program, the County has not identified any DBE financial institutions.

§26.29 Prompt Payment Mechanisms

The County does not prohibit the use of holding retainage as applicable and applies the following prompt payment and monitoring mechanism, accordingly.

The County includes the following clause in each DOT-assisted prime contract:

Under this contract, the prime contractor agrees to pay each subcontractor for satisfactory performance of its contract within 30 days from the receipt of each payment the prime contractor receives from the County. The prime contractor further agrees to full payment of retainage to each subcontractor within 30 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the County. This clause applies to both DBE and non-DBE subcontracts.

To comply with the intent of this provision, the prime contractor must:

1. Include the above clause in the subcontractor's contracts.
2. Provide the name of the prime contractor, address, and phone number of its contact person to whom all invoice/billing statements must be sent.
3. Pay subcontractors and suppliers within 30 days of receipt of payment from the County.
4. Stipulate the reason(s) in writing to the subcontractor or supplier and the County for not paying an invoice within 30 days. Reasons for delay or non-payment require prior written approval and may take place only for good cause such as:
    a. Failure to provide all required documentation.
    b. Unsatisfactory job performance.
    c. Disputed work.
    d. Failure to comply with other material provisions of the contract.

e. Third-party claims filed or reasonable evidence that a claim will be filed.
f. Reasonable evidence that the contract cannot be completed for the unpaid balance of the contract sum or a reasonable amount of retainage.

5. Maintain records and documentation of payments to DBEs for three years following the performance of the contract. These records must be made available for inspection upon request by an authorized representative of the County or DOT. This reporting requirement also extends to any certified DBE subcontractor.

Subcontractor must:

1. Submit invoices or billing statements to the Prime Contractor's designated contact person in an appropriate format and promptly. The format and the timing of billing statements must be specified in the contract(s) between the Prime and the subcontractor(s).

DBELO shall:

1. Investigate all allegations of nonpayment by the contractor.
2. Provide a written statement of the finding to the complainant within 15 days of receipt of the complaint(s).
    a. If the finding is determined to be not valid, the County may withhold payments in the amount of the unpaid portion of the Prime Contractor's invoice.
3. Perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure the actual amount paid to DBE subcontractors equals the dollar amounts stated in the schedule of DBE participation.

§26.31 DBE Directory

The County participates as a non-certifying partner in the Texas Unified Certification Program (TUCP). As a non-certifying partner, the County agrees to comply with the TUCP Memorandum of Agreement that establishes the DBE Unified Certification Program in the State of Texas in accordance with 49 CFR Part 26. A copy of the TUCP Memorandum of Agreement is included as Attachment F10 in Exhibit H Memorandum of Understanding with TxDOT. Interested persons can obtain information by contacting or accessing the link below:

Texas Department of Transportation (TxDOT)
Civil Rights Division
125 E. 11th Street
Austin, TX 78701-2483
Tel: 800-558-9368
512-463-8588
Fax: 512-486-5539
Website: https://www.txdot.gov/inside-txdot/division/civil-rights/tucp.html

§26.33 Overconcentration
The County has not identified that overconcentration exists in the types of work that DBEs perform.

§26.35 Business Development Programs
The County has not established a Business Development Program.

§26.37 Monitoring and Enforcement Mechanisms
The County will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26.

1. The County will bring to the Department of Transportation's attention any false, fraudulent, or dishonest conduct in connection with the program so that DOT can take necessary action. 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) are provided in 49 CFR Part 26.107.

2. The County will consider similar action under its legal authorities, including responsibility determinations in future contracts. Exhibit I lists the regulation, provisions, and contract remedies available to us in the events of non-compliance with the DBE regulation by a participant in our procurement activities.

3. The County will provide a monitoring and enforcement mechanism to verify the work committed to DBEs at contract award is performed by the DBEs. This will be accomplished by:
    a. Reviewing contract records and engaging in active monitoring of worksites to ensure that work committed to DBEs at contract award, or subsequently (e.g., as the result of modification to the contract), is performed by the DBEs to which the work was committed. Worksite monitoring is performed by the DBELO.
    b. Requiring Prime Contractors to report DBE work completed in each monthly progress report along with an indication of the number of hours worked, costs incurred, and the amounts paid to DBE(s).
    c. Ensuring that DBE participation is credited toward the overall goal or contract goals only when payments are made to DBE firms.
    d. Requiring contractors to complete the Vendor Payment Report to capture all payments on FTA-funded contracts of DBE and non-DBE work performed along with their invoice(s).
    e. Providing a written certification that the County has reviewed contracting records, and worksites have been monitored to ensure that the DBEs performed the work committed to DBEs. Written certification shall be provided by the DBELO.

4. The County shall keep a running tally of actual DBE attainments (e.g., payments made to DBE firms), for work committed to them at the time of contract award.

5. The County may include the following mechanisms to ensure prompt payment compliance:
    a. Notify subcontractors (DBE and non-DBEs) by including language in bid documents and contracts related to the Prime Contractor's responsibility for prompt payment and encourage subcontractors to notify the County in writing of any possible violations to the prompt payment mechanism.
    b. Withhold payment from Prime Contractors that do not comply with the prompt payment provision detailed in §26.29 of this program, where the County has determined that delay of payment to the subcontractor is not justified.
    c. Stop work on the contract until compliance issues are resolved.
    d. Terminate the contract.

§26.39 Fostering Small Business Participation

The DBELO will review all bidding opportunities to determine the feasibility of structuring the contracting requirements to facilitate small business participation and 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 or subcontractors.

To actively foster small business participation, the County will refer individuals/small businesses interested to the City of Houston's Office of Business Opportunity, which uses the same size standards used by the Small Business Administration for verification that the business is indeed a small business. Once confirmed as a small business, the DBELO will add the firm to the Bidder's List, and they will be given opportunities to bid on service and supply contracts issued as demonstrated on the Small Business Profile in Exhibit B.

SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING

§26.43 Set-asides or Quotas

The County does not set-aside or use quotas in any way in the administration of the DBE program.

§26.45 Overall Goals

A description of the methodology to calculate the overall goal and the goal calculations can be found in Exhibit C to this program. This section of the program will be updated every three (3) years.

If the County does not anticipate awarding more than $250,000 in DOT-assisted contracts within the federal fiscal year, the County will not develop an overall goal; however, the existing DBE program will remain in effect and the County will seek to fulfill the objectives outlined in 49 CFR Part 26.1.

In establishing the overall goal, the County will consult with minorities, women's and general contractor groups, community organizations, and other officials or organizations

to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the County's efforts to establish a level playing field for the participation of DBEs.

When submitting the overall goal, the County will provide documentation of the consultation process.

The County will publish a notice informing the public that the proposed goal and its rational are available for inspection during normal business hours at the Fort Bend County Public Transportation office for 30 days following the date of the notice. DOT will accept comments on the goals for 45 days from the date of the notice. The notice will include addresses to which comments may be sent, will be posted on the Public Transportation's official website and published in the newspaper of record for Fort Bend County. If there is a proposed change to the goal following the review by FTA, the revised goal will be posted on Fort Bend County Public Transportation's website.

The County's overall goal submission to DOT will include a summary of information and comments received during this public participation process, including the County's responses.

In accordance with 49 CFR 26.45(f), the County will submit its overall goal to FTA on **August 1 every three (3) years.** The County will review the TUCP listing to obtain information concerning the availability of additional disadvantaged and non-disadvantaged businesses for participation in the program to ensure the goal continues to fit our circumstances appropriately.

The County will begin using the overall goal on October 1 of each year, unless DOT has issued other instructions. If the County establishes a separate goal on a project basis, the County will begin using the project goal on the date the FTA-assisted contract is awarded.

§26.47 Failure to Meet Overall Goals

The County cannot be penalized or treated as being in noncompliance if DBE participation falls short of the overall goal unless the County failed to administer the program in good faith. If the County does not have an approved DBE program or overall goal, or if the County fail to implement either, the County is noncompliant. The County must take certain actions to be regarded by the DOT as implementing our DBE program in good faith, as described in 49 CFR 26.47.

The County understands that to be in compliance with this part, an approved DBE Program and overall DBE goal, if applicable, must be maintained and administered in good faith.

The County understands that if the awards and commitments shown on the 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, the following actions must be taken in order to be regarded by the DOT as implementing this DBE Program in good faith:

a. Analyze in detail the reasons for the difference between the overall goal and the awards and commitments in that fiscal year;
b. Establish specific steps and milestones to correct the problems identified in the analysis to enable the goal for the new fiscal year to be fully met;
c. Prepare, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraph (a) and (b) of this section. The County will retain a copy of the analysis and corrective actions in records for a minimum of three years (3) and will make it available to FTA upon request.

§26.49 Transit Vehicle Manufacturers (TVM)

Only those 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, will be eligible to bid. If a manufacturer fails to implement the DBE Program in the manner described in this section and throughout 49 CFR part 26, they will be deemed as non-compliant, which will result in removal from FTA's certified TVMs list, resulting in that manufacturer becoming ineligible to bid.

The County will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section by requiring manufacturers to provide signed certification of compliance in bid and proposal documents. Alternatively, the County may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles instead of the manufacturer complying with this element of the program. Transit vehicles must be purchased from a DBE-certified transit vehicle manufacturer (TVM) and reported to FTA within 30 days of purchase.

§26.5l Means to Meet Goals

§26.5l (a-c) Breakout of Estimated Race-Neutral & Race-Conscious Participation

Each time the County submits its overall goal for review, the County will also provide our projection of the portion of the goal that is expected to be met through race-neutral means and the basis for that projection in conjunction with our overall goal. The breakout of estimated race-neutral and race-conscious participation is found in Exhibit C to this program. This section of the program will be revised every three (3) years.

§26.5l (d-g) Contract Goals

The County will establish contract goals to meet any portion of the overall goal the County does not project being able to meet using 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 our overall goal that is not projected to be met through the use of race-neutral means. The County may establish contract goals only on those DOT-assisted contracts that have subcontracting possibilities. The County will express its contract goals as a percentage of total amount of a DOT-assisted contract. The County need not set a contract goal on every DOT-assisted contract, and the percentage of contract goal will be adapted to the circumstances of each contract (e.g., type and location of work, availability

of DBEs to perform the particular kind of work). The contract goals must provide for participation by all certified DBEs and will not be subdivided into group-specific goals.

§26.53 Good Faith Efforts Procedures

§26.53(a) & (c) Demonstration of Good Faith Efforts
The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has made good faith efforts either meeting the contract goal or documenting its good faith efforts as provided in Exhibit G.

The DBELO is responsible for determining whether a bidder/offeror who has not met the contract goal has documented adequate good faith efforts to be regarded as responsive.

The DBELO will ensure that all information is complete and accurate, and adequately documents the bidder/offer's good faith efforts before the County commits to the performance of the contract by the bidder/offeror.

§26.53(b) Information to be Submitted
Award of a contract will be conditioned on meeting the requirements of this section. For each solicitation for which a contract goal has been established, the County will require the bidders/offerors to submit the following information with initial proposals:

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 and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the DBE firm that is participating in the contract as provided in the prime contractor's commitment; and
6. Evidence of good faith efforts if the contract goal cannot be met.

§26.53(d) Administrative Reconsideration
A bidder/offeror may request administrative reconsideration within five (5) days of being informed by the County that it is not responsive because it has not documented sufficient good faith efforts. The Bidder/offeror should make this request in writing and submit it to the County reconsideration official.

Fort Bend County Public Transportation Department
ATTN: Community Relations and Civil Rights Officer
301 Jackson Street
Rosenberg, TX 77469
281-633-7433

The Community Relations Manager will not have played any role in the original determination that the bidder/offerors did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will 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. The bidder/offeror will have the opportunity to meet in person with the County reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The County will 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.

The County reconsideration official will make the final determination within 15 business days of receipt of a written request for administrative reconsideration. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

§26.53(g) Good Faith Efforts for Prime Contractor
The County will require the prime contractor to make good faith efforts to replace a DBE subcontractor that is terminated. 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 established for the procurement. The good faith efforts shall be documented and submitted to the DBELO within 14 business days, and the contractor shall receive a written determination stating whether or not good faith efforts have been demonstrated.

§26.55 Counting DBE Participation
The County will only count DBE participation of the work performed by a DBE toward the DBE goals, as outlined in 49 CFR 26.55.

SUBPART D – CERTIFICATION STANDARDS

Certification Standards are not applicable to Fort Bend County.

§26.61 - 26.73 Certification
The County will rely on the Texas Unified Certification Program (TUCP) administered by the Texas Department of Transportation for certification compliance. The TUCP uses the certification standards of 49 CFR Part 26 Subpart D to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts.

For information about the certification process or to apply for certification, please contact:

Texas Department of Transportation (TxDOT)
Civil Rights Division
125 E. 11th Street
Austin, TX 78701-2483
Tel: 800-558-9368
512-463-8588
Fax: 512-486-5539
Website: https://www.txdot.gov/inside-txdot/division/civil-rights/tucp.html

SUBPART E – CERTIFICATION PROCEDURES

Certification Procedures are not applicable to Fort Bend County.

§26.89 Certification Appeals

Any firm or complainant may appeal a decision in a certification matter to DOT. Such appeal letters may be mailed to:

U.S. Department of Transportation
Departmental Office of Civil Rights
External Civil Rights Programs Division (S-33)
1200 New Jersey Avenue, S.E.
Washington. D.C. 20590
(202) 366-4754
TTY: (202) 366-9696
Fax: (202) 366-5575

SUBPART F – COMPLIANCE AND ENFORCEMENT

§26.109 Information, Confidentiality, Cooperation, and Intimidation or Retaliation

(a)Availability of Records

In responding to requests for information concerning any aspect of the DBE program, the County complies with provisions of the Texas Public Information Act, Tex. Gov't. Code Ann. §552.001 et. seq. The County may make available to the public any information concerning the DBE program as required by the Attorney General's Office.

To the extent allowed by law, the County will 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, the County 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 CFR Part 49 26.85.

(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 the appropriate administrative due process to other parties, the complainant must be advised to waive the privilege.

(c)Cooperation
All participants in the Department's DBE program are required to cooperate fully and promptly with DOT compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action.

(d)Intimidation and Retaliation
The County will 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 the County violates this prohibition, it will be deemed in noncompliance with this part.

Monitoring Payments to DBEs
The County will require prime contractors to maintain records and documents of payments to DBEs for three (3) years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of the County or DOT. This reporting requirement also extends to any certified DBE subcontractor.

The County will perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

CONTACT AND WEBSITE INFORMATION

For additional information regarding this document, please contact:

Mailing Address:
Fort Bend County Public Transportation Department
Disadvantaged Business Enterprise Liaison Officer (DBELO)
301 Jackson Street
Rosenberg, TX 77469

Toll Free:	866-751-TRIP (8747)
Office Number:	281-633-RIDE (7433)
Fax Number:	832-471-1843
Email:	Transit@fortbendcountytx.gov

Website: www.FBCTransit.org

EXHIBITS

Exhibit A: Fort Bend County Public Transportation Organizational Chart
Exhibit B: Small Business Profile
Exhibit C: Overall Goal and Methodology
Exhibit D: Subcontractor Participation
Exhibit E: Intent to Perform as a DBE Contractor/Subcontractor
Exhibit F: DBE Certification Application Form
Exhibit G: Demonstration of Good Faith Efforts
Exhibit H: Memorandum of Understanding with TxDOT
Exhibit I: 49 CFR Part 26

EXHBIT A

Fort Bend County Public Transportation Organizational Chart

Fort Bend Transit

Organization Chart

As of February 12, 2025

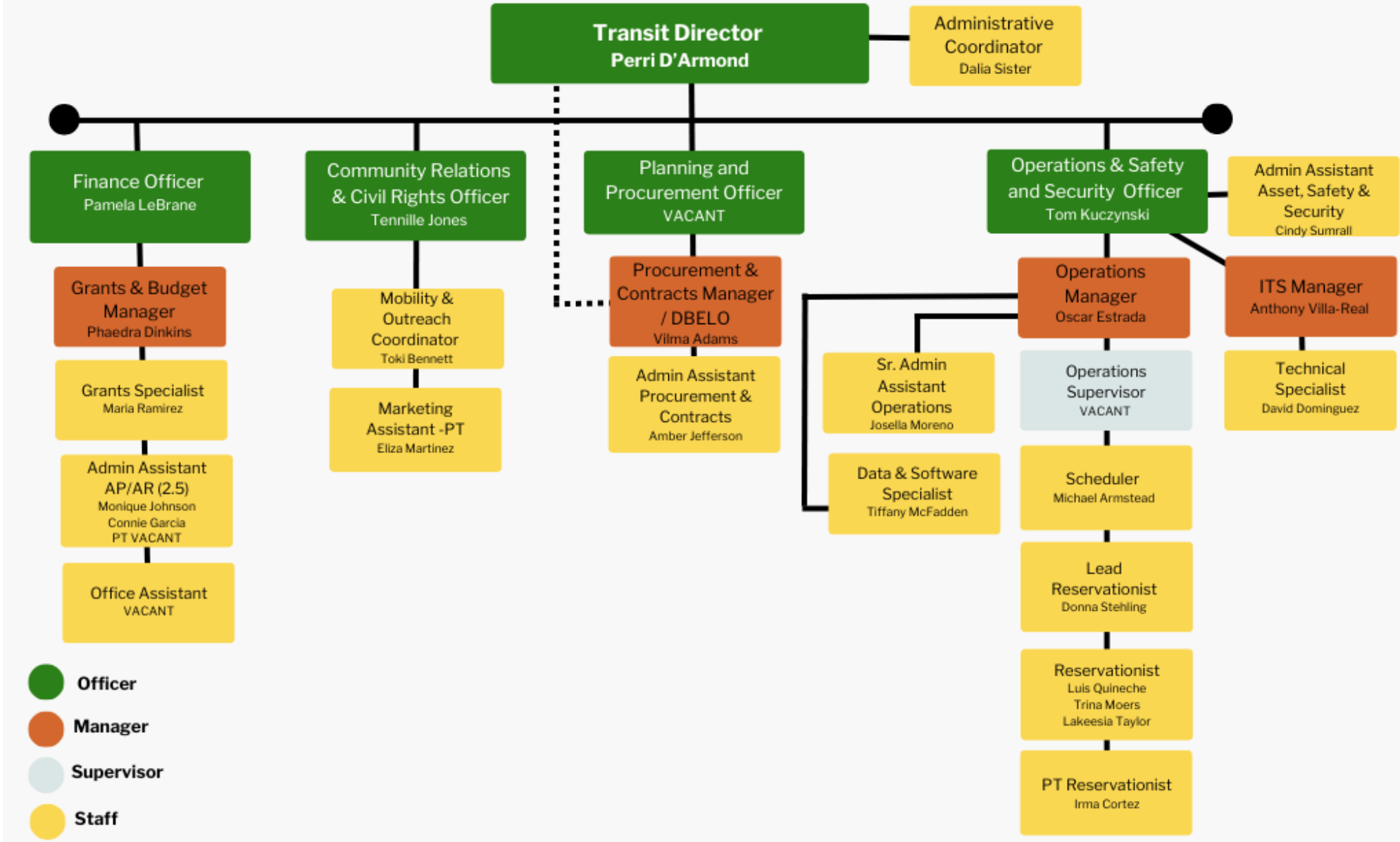

EXHIBIT B

Small Business Profile

Fort Bend County Public Transportation
Small Business Profile

Contact Information

Name: _____ Title: _____

Phone: _____ Fax: _____

Email: _____

Organization/Company Information

Name: _____

Address: _____

Phone: _____ Fax: _____

Ethnicity/Gender: _____

Are you certified? ☐ Yes ☐ No

If so, check all that apply:

- ☐ SBE - Small Business Enterprise
- ☐ DBE - Disadvantaged Business Enterprise
- ☐ HUB - Historically Underutilized Business
- ☐ Other: _____

If no, are you interested in becoming certified? ☐ Yes ☐ No

List as many North American Industry Classification System (NAICS) Codes that are applicable to your business description (http://www.census.gov/eos/www/naics/).

_____

_____

_____

_____

_____

Please return form either by mail or email to:
Fort Bend County Public Transportation, DBELO
301 Jackson Street, Richmond, TX 77469
Email: Transit@fortbendcountytx.gov

EXHIBIT C

Overall Goal and Methodology

FORT BEND COUNTY

PUBLIC TRANSPORTATION

DBE GOAL

FY2024 to FY2026

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Live Link to DBE Goal on Fort Bend County Website

https://www.fortbendcountytx.gov/government/departments/public-transportation/disadvantaged-business-enterprise-program/dbe-goal

INTRODUCTION

Fort Bend County Public Transportation (County) has completed their a review of the federally funded contracting opportunities for Disadvantaged Business Enterprises (DBE) for fiscal years 2024 through 2026.

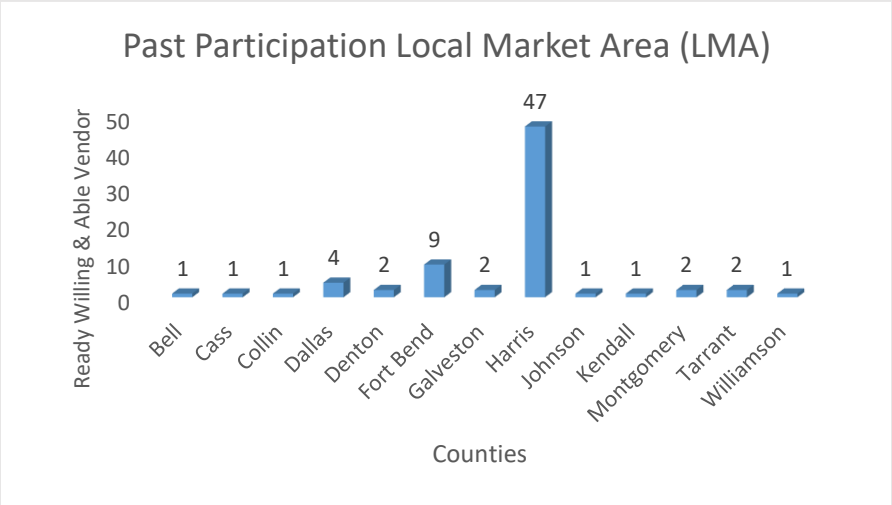
According to US DOT regulations 49 CFR PART 26, the County is required to establish a Race-Neutral/Race-Conscious DBE goal program. This goal is based on projected contracting opportunities and the availability of eligible ready, willing, and able to work DBEs, as well as, past contracting achievement.

An overall agency goal of 3.67% is proposed for contracting opportunities for the DBE program.

ESTABLISHED BASE FIGURE

To calculate the weighted base figure, the relative availability of DBE contractors within the Local Market Area (LMA) was determined. The LMA is defined by the U.S. Department of Transportation's Office of Small and Disadvantaged Business Utilization's (OSDBU) as the area in which the substantial majority of the contractors and subcontractors with which your agency does business with are located, and the area in which your agency spends the substantial majority of contracting dollars. Based on that definition and past similar contracting services, the substantial majority of contractors and subcontractors that were ready, willing, and able were located in Fort Bend County and Harris County. Graph 1 shows the LMA of past similar contracting services.

Graph 1: Local Market Area



The County used data from the following sources to identify the total number of available DBEs for each project.

- North American Industry Classification System(NAICS) Codes
  https://www.census.gov/naics/
- United States Census Bureau County Business Patterns 2021 Fort Bend County & Harris County
  https://data.census.gov/cedsci/advanced?g=0500000US48157,48201&tid=ACSST1Y2018.S0101&vintage=2018
- Texas Unified Certification Program (TUCP) DBE Directory
  https://txdot.txdotcms.com/Default.asp

The total number of firms and DBE firms available in both Fort Bend County and Harris County areas for these types of projects was determined from the NAICS code, Census Bureau County Business Pattern, and the TUCP DBE directory. The data obtained from all firms and DBEs was used to calculate the relative availability using Equation 1 below. Table 1 shows the data for the relative availability for all projects.

Equation 1: Relative Availability for Each Project

$$\frac{\textbf{\textit{Ready. Willing, and Able DBEs}}}{\begin{array}{c}\textbf{\textit{All Firms Ready, Willing, and Able}} \\ (\textbf{\textit{includes DBEs and non} - \textbf{\textit{DBEs}})\end{array}} = \textbf{\textit{Relative Availability}}$$

Table 1: Relative Availability for Each Project

No.	NAICS Codes	Projects	Ready, Willing, and Able DBEs	All Firms Ready, Willing, and Able (includes DBEs and non-DBEs)	Relative Availability
1	454310	Bulk Fuel	1	336	0.0030
2	236220	Construction Management	114	4186	0.0272
3	541310		0	1822	0.0000
4	541330		81	7240	0.0112
5	541850	Bus Wraps	4	211	0.0190
6	485111	Bus Service	0	0	0.0000
7	424720		0	520	0.0000
8	488410		0	939	0.0000
9	811111		4	7085	0.0006
10	485999		2	120	0.0167
11	485310		1	86	0.0116
12	485113		1	30	0.0333
13	541614	Financial & Transportation Planning	23	1212	0.0190
14	541611		44	2006	0.0219
15	541690	Ambassador Services	35	3296	0.0106
16	541512	Dispatch & Scheduling Software	184	7498	0.0245
17	541690	Pos-Award, Post Delivery & Bus Inspection Services	27	3296	0.0082
18	541613	Marketing	17	3855	0.0044
19	541820		7	528	0.0133
20	541910		16	383	0.0418
21	236220	Bus Shelter	0	4186	0.0000
22	238990	Gate/Fencing	10	6400	0.0016
23	237110	Construction Westpark P&R	77	1305	0.0590
24	237310		13	916	0.0142
25	237990		13	411	0.0316
26	238110		130	1931	0.0673
27	238120		38	475	0.0800
28	238220		20	9682	0.0021
29	238190		24	795	0.0302
30	238210		41	6499	0.0063
31	238290		11	812	0.0135
32	238320		28	1578	0.0177
33	238330		44	892	0.0493
34	238350		19	1598	0.0119
35	238990		48	6400	0.0075
36	238130		29	682	0.0425
37	238910		97	2818	0.0344
38	561730		87	6214	0.0140
				Overall availability of DBEs	**0.7495**

The project types were identified and the corresponding anticipated budgets for the contract terms were added to calculate the weight for each project (See **Equation 2** and **Table 2**). The County does not anticipate to have any subrecipient during this goal period. The County did not exclude any projects.

Equation 2: Weight for Each Project

$$\frac{Each\ Project\ Amount\ of\ FTA\ Assisted\ Funds}{Total\ Project\ Amount\ of\ FTA\ Assisted\ Funds} = Weight$$

Table 2: Weight for Each Project

No.	NAICS Codes	Projects	Project Amount of FTA Assisted Funds	Weight (% of total DOT Funds)
1	454310	Bulk Fuel	$ 2,626,250	0.0489
2	236220	Construction Management	$ 18,146	0.0003
3	541310			
4	541330			
5	541850	Bus Wraps	$ 282,606	0.0053
6	485111	Bus Service	$ 38,833,399	0.7227
7	424720			
8	488410			
9	811111			
10	485999			
11	485310			
12	485113			
13	541614	Financial & Transportation Planning	$ 1,325,000	0.0247
14	541611			
15	541690	Ambassador Services	$ 2,604,134	0.0485
16	541512	Dispatch & Scheduling Software	$ 500,000	0.0093
17	541690	Pos-Award, Post Delivery & Bus Inspection Services	$ 174,692	0.0033
18	541613	Marketing	$ 750,000	0.0140
19	541820			
20	541910			
21	236220	Bus Shelter	$ 16,040	0.0003
22	238990	Gate/Fencing	$ 10,000	0.0002
23	237110	Construction Westpark P&R	$ 190,380	0.0035
24	237310		$ 44,898	0.0008
25	237990		$ 638,447	0.0119
26	238110		$ 1,692,133	0.0315
27	238120			
28	238220		$ 142,690	0.0027
29	238190			
30	238210		$ 1,345,563	0.0250
31	238290		$ 32,153	0.0006
32	238320		$ 1,749,063	0.0326
33	238330			
34	238350			
35	238990			
36	238130			
37	238910		$ 449,240	0.0084
38	561730		$ 307,970	0.0057
		Total Project Amount of FTA Assisted Funds	***53,732,804***	***1***

According to OSDBU, the weighted based figure is not required by rule but it will make the goal calculation more accurate; See **Equation 3** for the formula used to calculate the Weighted Base Figure. The Total Weighted Base Figure is 5.79% (See **Table 3**).

Equation 3: Weighted Base Figure for Each Project

$$Relative\ Availability\ x\ Weight\ =\ Weighted\ Base\ Figure$$

Table 3: Total Weighted Base Figure

No.	NAICS Codes	Projects	Relative Availability	Weight	Weighted Base Figure
1	454310	Bulk Fuel	0.0030	0.0489	0.0001
2	236220	Construction Management	0.0272	0.0003	0.0000
3	541310		0.0000	0.0003	0.0000
4	541330		0.0112	0.0003	0.0000
5	541850	Bus Wraps	0.0190	0.0053	0.0001
6	485111	Bus Service	0.0000	0.7227	0.0000
7	424720		0.0000	0.7227	0.0000
8	488410		0.0000	0.7227	0.0000
9	811111		0.0006	0.7227	0.0004
10	485999		0.0167	0.7227	0.0120
11	485310		0.0116	0.7227	0.0084
12	485113		0.0333	0.7227	0.0241
13	541614	Financial & Transportation Planning	0.0190	0.0247	0.0005
14	541611		0.0219	0.0247	0.0005
15	541690	Ambassador Services	0.0106	0.0485	0.0005
16	541512	Dispatch & Scheduling Software	0.0245	0.0093	0.0002
17	541690	Pos-Award, Post Delivery & Bus Inspection Services	0.0082	0.0033	0.0000
18	541613	Marketing	0.0044	0.0140	0.0001
19	541820		0.0133	0.0140	0.0002
20	541910		0.0418	0.0140	0.0006
21	236220	Bus Shelter	0.0000	0.0003	0.0000
22	238990	Gate/Fencing	0.0016	0.0002	0.0000
23	237110	Construction Westpark P&R	0.0590	0.0035	0.0002
24	237310		0.0142	0.0008	0.0000
25	237990		0.0316	0.0119	0.0004
26	238110		0.0673	0.0315	0.0021
27	238120		0.0800	0.0315	0.0025
28	238220		0.0021	0.0027	0.0000
29	238190		0.0302	0.0027	0.0001
30	238210		0.0063	0.0250	0.0002
31	238290		0.0135	0.0006	0.0000
32	238320		0.0177	0.0326	0.0006
33	238330		0.0493	0.0326	0.0016
34	238350		0.0119	0.0326	0.0004
35	238990		0.0075	0.0326	0.0002
36	238130		0.0425	0.0326	0.0014
37	238910		0.0344	0.0084	0.0003
38	561730		0.0140	0.0057	0.0001
				Total	**0.0579**
				Expressed as a %	**5.79%**

ADJUSTED GOAL

The County's adjusted DBE goal is based on past participation for fiscal years 2017 through 2022 due to the strong similarities of contracting opportunities between FY2018 – FY2020 and FY2021 – FY2023. The goal setting process is more accurate if the median (instead of the average or mean) of past participation is used to make adjustment because the process of determing the median excludes all outlier (adnormally high or abnormally low) past participation percentages. Based on DBE participation for the past six (6) fiscal years (See **Table 4**), a median of **1.56%** was determined (See **Equation 4**). To ensure past participation is not given a disproportionate weight, the average of the Weighted Based Figure (See **Table 3**) and the Past Participation Median Goal (See **Equation 4**) was used to calculate the new adjusted goal for fiscal years 2024 through 2026, **3.67%** (See **Equation 5**).

Table 4: Past Participation DBE Goal

Fiscal Year	DBE % Goal	DBE % Achieved
2022	3.89%	9.67%
2021	3.89%	13.75%
2020	4.00%	1.95%
2019	4.00%	1.17%
2018	4.00%	0.00%
2017	4.00%	0.08%

Equation 4: Median Goal

$$\boldsymbol{Median = \frac{(1.95\% + 1.17\%)}{2} = 1.56\%}$$

Equation 5: Adjusted DBE Goal

$$\boldsymbol{Adjusted\ Goal = \frac{(Weighted\ Base\ Figure + Median\ Goal)}{2} = \frac{(5.79\% + 1.56\%)}{2}}$$
$$\boldsymbol{= 3.67\%}$$

The County identified two disparity studies performed in the past five (5) years in the local market area - Port of Houston Authority Disparty Study in 2020 and Harris County Disparity Study in 2021. The County determined that these studies will not be used to adjust the availability figure because the main focus of these reports were on Minority/Women Business Enterprise (M/WBE) data. Furthermore, these studies may skew the availabilities of certified DBEs due to the different requirements and/or criterias.

RACE-NEUTRAL AND RACE-CONSCIOUS PARTICIPATION

The County's DBE goal has been 100% race-neutral. The race-neutral attainment for the past six (6) fiscal years was examined to determine the maximum race-neutral participation. The County used FY2019 achievement of 1.17% and FY2020 achievement of 1.95% to determine the median (See **Equations 4, 5, and Table 5**).

Table 5: DBE Goal vs. Achievement

Fiscal Year	DBE % Goal	DBE % Achieved
2022	3.89%	9.67%
2021	3.89%	13.75%
2020	4.00%	1.95%
2019	4.00%	1.17%
2018	4.00%	0.00%
2017	4.00%	0.08%

The County's method for determining the race-neutral and race-conscious portion is consistent with the guidelines in OSDBU *Tips for Goal-setting in the DBE program.* The County first determined the median as explained above in **Equation 4**, then determined the mean of the difference between the race-neutral achievement and goal for the two years used to calculate the median. The mean difference between achievement and goals for these two years was added to the race-neutral median to determine the feasibility of achieving through race-neutral means.

Equation 6: Race-Neutral Allocation

$$\textbf{\textit{Race} - \textit{Neutral Allocation}} = \frac{(\textbf{\textit{FY2019 Achievement}} + \textbf{\textit{FY2020 Achievement}})}{2} + \frac{(\textbf{\textit{FY2019 Goal}} - \textbf{\textit{FY2019 DBE Achievement}}) + (\textbf{\textit{FY2020 Goal}} - \textbf{\textit{FY2020 DBE Achievement}})}{2}$$

$$= \frac{(1.17 + 1.95)}{2} + \frac{(4.00 - 1.17) + (4.00 - 1.95)}{2}$$

$$= 1.56 + \frac{(2.83 + 2.05)}{2}$$

$$= 1.56 + 2.44$$

$$= 4.00\%$$

Based on the results of the calculation in **Equation 6** and the majority of the race-neutral attainment was through DBE Prime Contractors, the County determined the DBE goal for FY2024 through FY2026 can be met at 100% race-neutral.

OUTREACH/CONSULTATION

The County hosted a DBE Goal webinar on June 7, 2023 followed by a survey. There was no comments received during the webinar. Partnering organizations were invited (See Table 6) and encouraged to extend the invitation to their network. Small businesses in our database were also invited to attend the webinar (See Table 7). The webinar was used to consult with minority, women, general contractor groups, and community organizations to assist in the development of the DBE goal. Based on the surveys and webinar, none of the businesses that responded identified any past discrimination.

Table 6: The County Small Business Partnering Organization

Organization Name	Contact First Nam	Contact Last Name	Contact phone	Contact Email Address
HCCS	Veronica	Douglas	713-718-5278	veronica.douglas@hccs.edu
(City of Houston) Office of Business Opportunity	Marsha	Murray	832-393-0600	director.obo@houstontx.gov
Houston Minority Supplier Development Council	Ingrid	Robinson	713-271-7805	info@hmsdc.org
Houston Black Chamber of Commerce	Tiko	Reynolds-Hausman	713-660-8299	info@ghbcc.com
Houston Hispanic Chamber of Commerce	Carolina	Petriciolet	713-644-7070	info@houstonhispanicchamber.com
Fort Bend Chamber of Commerce	Stacy	Bynes	281-491-0800	info@fortbendcc.org

Table 7

Small Business Invitees	
Spawglass	Corporate Outfitters, LTD
Bass Construction Co., Inc.	Debner
First Transit, Inc.	Westmatic Corporation
Vesta Rea & Associates, LLC	3G Chemical Solutions, LLC
717 Media Group	Ipax
Pavlov Advertising, LLC	Sigma Surveillance, Inc.
Huitt-Zollars, Inc.	Turbo Images
Sowells Consulting Engineers, LLC	Securitas Technology Corporation
Zarinkelk Engineering Services, Inc.	Queen City Engineering & Design PLLC
Reladyne	Alfred Benesch & Company
Safety-Kleen Systems, Inc.	America's Favorite Printer
Sun Coast Resources Inc.	Sunset Glass Tinting
Point Blank Enterprises, Inc.	ESA Solutions, LLC
Safety Vision, LLC	Houston Security 101
Transit Safety & Security Solutions, Inc.	Acerra Technologies
TRC Engineering Services, LLC	Safe Fleet
Heneco Engineering & Consulting, LLC	Lockwood, Andrews & Newnam, Inc.
Core Office Interiors	PCS Telecom, Inc.

Houston Community College System (HCCS) is a viable partner in community outreach to small, disadvantaged and minority-owned businesses. HCCS' Small Business Development Program was created to provide opportunities for local small businesses to participate in contracting and procurement.

The City of Houston Office of Business Opportunity is an agency committed to promoting the growth and success of local small businesses, with special emphasis on historically underutilized groups by ensuring their meaningful participation in the government procurement process.

Houston Minority Supplier Development Council, established in 1973, is a non-profit organization for minority businesses helping them to grow their businesses successfully by providing necessary trainings, workshops, and certification programs.

Greater Houston Black Chamber of Commerce (GHBC), formerly the Negro Chamber of Commerce, was established in 1935. The GHBC continues to represent the interest and promote greater unity among the African-American business community.

Houston Hispanic Chamber of Commerce is the leading advocate for Hispanic business and civic interests in the Greater Houston area. Through its issue advocacy, its media platforms with an audience reach of more than 3 million people, and its robust membership network, the Chamber is the leading united voice for its members and all of the Hispanic Houston area.

Fort Bend Chamber of Commerce (FBCC) has, for over 40 years, fulfilled the mission to serve as the advocate for business excellence in Fort Bend County. With over 1,200 business members, the FBCC is comprised of local, national, and global; as well as small, medium, and large and Fortune 500 ranked businesses and organizations.

Attachment A includes the response to the surveys that were sent out before and after the webinar. The survey results were analyzed and, based on the feedback, the County determined the results of the public consultation should be noted. However, analysis of the data determined that an adjustment of the base figure was not needed.

PUBLIC COMMENT

The public comment period was opened for 45 days. It began on May 31, 2023 and ended on July 15, 2023. The County's DBE Goal, 3.67% for FY2024-2026 was published in the Fort Bend Independent (See Attachment B) and also posted on the County's Public Transportation Department webpage (See Attachment C). During the 45 day comment period, the County did not receive any comments from the public, therefore, there was no adjustment to the proposed DBE Goal.

#1

COMPLETE

Collector:	Email Invitation 1 (Email)
Started:	Thursday, May 04, 2023 10:42:59 AM
Last Modified:	Thursday, May 04, 2023 7:45:18 PM
Time Spent:	09:02:18
Email:	tanaz@tanches.com
IP Address:	66.196.241.194

Page 1: Market Research for DBE Goal Methodology for FY2024 - FY2026

Q1

What is the name of your company?

TANCHES GLOBAL MANAGEMENT INC.

Q2

Are you a Small Business?

Yes

Q3

What services do you provide?

IT- TECHNOLOGY HARDWARE, SOFTWARE, SERVICES

Q4

What are your company's NAICS codes?

Other (please specify):
541519, 541512

Q5

Are you a certified DBE vendor?

Yes

Q6

If you are not a DBE vendor, are you interested in becoming a DBE vendor?

N/A

Q7

Have you heard about Fort Bend County Public Transportation?

No

Q8

Have you experienced discrimination on any Fort Bend County Department Of Transportation assisted contracts?

N/A

Q9

What are some barriers you experienced when applying to Department of Transportation contracts, if applicable?

Respondent skipped this question

Q10

Is your business capable of performing work in the Fort Bend County area?

Yes

Q11

Would you like to be added to Fort Bend County Public Transportation's vendors list?

Yes

Q12

How does your company typically become aware of contracting opportunities?

Respondent skipped this question

Q13

Please provide any additional comments/information below, including your name, phone number, and an email if you would like to be added to our vendors list.

Respondent skipped this question

#1

COMPLETE

Collector:	Email Invitation 1 (Email)
Started:	Thursday, May 04, 2023 7:02:18 AM
Last Modified:	Thursday, May 04, 2023 7:07:00 AM
Time Spent:	00:04:42
Email:	alicia@jimerson.net
IP Address:	206.54.210.199

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Q1

What is the name of your company?

Jimerson underground inc

Q2 **Yes**

Are you a Small Business?

Q3

What services do you provide?

Constrction
Underground utilities

Q4 **Not sure**

What are your company's NAICS codes?

Q5 **Yes**

Are you a certified DBE vendor?

Q6 **Respondent skipped this question**

If you are not a DBE vendor, are you interested in becoming a DBE vendor?

Q7 **Yes**

Have you heard about Fort Bend County Public Transportation?

Q8

Have you experienced discrimination on any Fort Bend County Department Of Transportation assisted contracts?

No

Q9

What are some barriers you experienced when applying to Department of Transportation contracts, if applicable?

None
Our prices are not competitive

Q10

Is your business capable of performing work in the Fort Bend County area?

Yes

Q11

Would you like to be added to Fort Bend County Public Transportation's vendors list?

Yes

Q12

How does your company typically become aware of contracting opportunities?

Amtek
Civcast
Building Connected

Q13

Please provide any additional comments/information below, including your name, phone number, and an email if you would like to be added to our vendors list.

281-261-0976
Dennis Wolford
dennis@jimerson.net
alicia@jimerson.net

#2

COMPLETE

Collector:	Email Invitation 1 (Email)
Started:	Thursday, May 04, 2023 8:39:07 AM
Last Modified:	Thursday, May 04, 2023 8:43:28 AM
Time Spent:	00:04:21
Email:	houstonelectricalcontractors@gmail.com
IP Address:	67.44.192.17

Page 1: Market Research for DBE Goal Methodology for FY2024 - FY2026

Q1

What is the name of your company?

Houston Electrical Contractors

Q2

Are you a Small Business?

Yes

Q3

What services do you provide?

Electricians

Q4

What are your company's NAICS codes?

Other (please specify):
238210

Q5

Are you a certified DBE vendor?

No

Q6

If you are not a DBE vendor, are you interested in becoming a DBE vendor?

N/A

Q7

Have you heard about Fort Bend County Public Transportation?

No

Q8

Have you experienced discrimination on any Fort Bend County Department Of Transportation assisted contracts?

N/A

Q9

What are some barriers you experienced when applying to Department of Transportation contracts, if applicable?

N/A

Q10

Is your business capable of performing work in the Fort Bend County area?

Yes

Q11

Would you like to be added to Fort Bend County Public Transportation's vendors list?

Yes

Q12

How does your company typically become aware of contracting opportunities?

Email

Q13

Please provide any additional comments/information below, including your name, phone number, and an email if you would like to be added to our vendors list.

Julian Trevino
Houston Electrical Contractors LLC
houstonelectricalcontractors@gmail.com
(832) 403-1350

#3

COMPLETE

Collector:	Email Invitation 1 (Email)
Started:	Thursday, May 04, 2023 8:19:26 PM
Last Modified:	Thursday, May 04, 2023 8:22:44 PM
Time Spent:	00:03:18
Email:	rjconstcoinc@earthlink.net
IP Address:	73.155.4.148

Page 1: Market Research for DBE Goal Methodology for FY2024 - FY2026

Q1

What is the name of your company?

R J Construction Company, Inc.

Q2 **Yes**

Are you a Small Business?

Q3

What services do you provide?

Water/Wastewater infrastructure; all components

Q4 **Not sure**

What are your company's NAICS codes?

Q5 **Yes**

Are you a certified DBE vendor?

Q6 **N/A**

If you are not a DBE vendor, are you interested in becoming a DBE vendor?

Q7 **No**

Have you heard about Fort Bend County Public Transportation?

Q8

Have you experienced discrimination on any Fort Bend County Department Of Transportation assisted contracts?

No

Q9

What are some barriers you experienced when applying to Department of Transportation contracts, if applicable?

n/a

Q10

Is your business capable of performing work in the Fort Bend County area?

Yes

Q11

Would you like to be added to Fort Bend County Public Transportation's vendors list?

Yes

Q12

How does your company typically become aware of contracting opportunities?

public bid notices via Civcast; etc.

Q13

Please provide any additional comments/information below, including your name, phone number, and an email if you would like to be added to our vendors list.

Robert Joseph
rjconstcoinc@earthlink.net
713-906-0730

#4

COMPLETE

Collector:	Email Invitation 1 (Email)
Started:	Friday, May 05, 2023 3:35:36 PM
Last Modified:	Friday, May 05, 2023 3:39:41 PM
Time Spent:	00:04:05
Email:	royaloaksenterprisesllc@gmail.com
IP Address:	98.44.2.109

Page 1: Market Research for DBE Goal Methodology for FY2024 - FY2026

Q1

What is the name of your company?

Royal Oak Enterprises, LLC dba ROE Construction

Q2

Are you a Small Business?

Yes

Q3

What services do you provide?

Construction- with a focus on site work, civil and paving

Q4

What are your company's NAICS codes?

Other (please specify):
237310, 237110, 238990

Q5

Are you a certified DBE vendor?

No

Q6

If you are not a DBE vendor, are you interested in becoming a DBE vendor?

Yes

Q7

Have you heard about Fort Bend County Public Transportation?

No

Q8

Have you experienced discrimination on any Fort Bend County Department Of Transportation assisted contracts?

N/A

Q9

What are some barriers you experienced when applying to Department of Transportation contracts, if applicable?

Respondent skipped this question

Q10

Is your business capable of performing work in the Fort Bend County area?

Yes

Q11

Would you like to be added to Fort Bend County Public Transportation's vendors list?

Yes

Q12

How does your company typically become aware of contracting opportunities?

Bonfire, Civcast, ConstructConnect, BuildingConnected, PlanHub

Q13

Please provide any additional comments/information below, including your name, phone number, and an email if you would like to be added to our vendors list.

Deanna Burghli
713-692-6252
Deanna@ROE-Construction.com

#5

COMPLETE

Collector:	Email Invitation 1 (Email)
Started:	Wednesday, May 10, 2023 5:10:01 AM
Last Modified:	Wednesday, May 10, 2023 5:20:26 AM
Time Spent:	00:10:25
Email:	morg335@yahoo.com
IP Address:	76.30.93.155

Page 1: Market Research for DBE Goal Methodology for FY2024 - FY2026

Q1

What is the name of your company?

STAR AMSTON GLOBAL LTD

Q2

Are you a Small Business?

Yes

Q3

What services do you provide?

Construction

Q4

What are your company's NAICS codes?

Other (please specify):
Nails code 237310 238110 236118

Q5

Are you a certified DBE vendor?

Yes

Q6

If you are not a DBE vendor, are you interested in becoming a DBE vendor?

Yes

Q7

Have you heard about Fort Bend County Public Transportation?

Yes

Q8

Have you experienced discrimination on any Fort Bend County Department Of Transportation assisted contracts?

No

Q9

What are some barriers you experienced when applying to Department of Transportation contracts, if applicable?

None

Q10

Is your business capable of performing work in the Fort Bend County area?

Yes

Q11

Would you like to be added to Fort Bend County Public Transportation's vendors list?

Yes

Q12

How does your company typically become aware of contracting opportunities?

Solicitation for bid

Q13

Please provide any additional comments/information below, including your name, phone number, and an email if you would like to be added to our vendors list.

Michael Morgan
Starglob@yahoo.com

832-715-0537

#6

COMPLETE

Collector:	Email Invitation 1 (Email)
Started:	Wednesday, May 10, 2023 9:57:03 AM
Last Modified:	Wednesday, May 10, 2023 10:06:33 AM
Time Spent:	00:09:29
Email:	ike@resicominc.com
IP Address:	98.57.20.126

Page 1: Market Research for DBE Goal Methodology for FY2024 - FY2026

Q1

What is the name of your company?

Resicom, Inc.

Q2

Are you a Small Business?

Yes

Q3

What services do you provide?

Civil Construction- Utilities, Paving, Park/Play ground construction, Erosion control etc.

Building Construction.

Q4

What are your company's NAICS codes?

Not sure

Q5

Are you a certified DBE vendor?

Yes

Q6

If you are not a DBE vendor, are you interested in becoming a DBE vendor?

Respondent skipped this question

Q7

Have you heard about Fort Bend County Public Transportation?

Yes

Q8

Have you experienced discrimination on any Fort Bend County Department Of Transportation assisted contracts?

No

Q9

What are some barriers you experienced when applying to Department of Transportation contracts, if applicable?

Respondent skipped this question

Q10

Is your business capable of performing work in the Fort Bend County area?

Yes

Q11

Would you like to be added to Fort Bend County Public Transportation's vendors list?

Yes

Q12

How does your company typically become aware of contracting opportunities?

Email invites, CivCast publications,

Q13

Please provide any additional comments/information below, including your name, phone number, and an email if you would like to be added to our vendors list.

Ike Anya
713-269-9085
ike@resicominc.com

#7

COMPLETE

Collector:	Email Invitation 1 (Email)
Started:	Thursday, May 11, 2023 10:18:21 AM
Last Modified:	Thursday, May 11, 2023 10:22:59 AM
Time Spent:	00:04:38
Email:	jtii1construction@gmail.com
IP Address:	24.72.190.30

Page 1: Market Research for DBE Goal Methodology for FY2024 - FY2026

Q1

What is the name of your company?

J THOMAS II CONSTRUCTION, LLC

Q2

Are you a Small Business?

Yes

Q3

What services do you provide?

PAINTING, DRYWALL FLOORING SIDEWALKS & PARKING LOT STRIPING.

Q4

What are your company's NAICS codes?

Other (please specify):
238310, 237310, 238330

Q5

Are you a certified DBE vendor?

Yes

Q6

If you are not a DBE vendor, are you interested in becoming a DBE vendor?

N/A

Q7

Have you heard about Fort Bend County Public Transportation?

No

Q8

Have you experienced discrimination on any Fort Bend County Department Of Transportation assisted contracts?

N/A

Q9

What are some barriers you experienced when applying to Department of Transportation contracts, if applicable?

Some of the persons make it difficult for you to get past them in reference to you speaking with someone who could or could not help you.

Q10

Is your business capable of performing work in the Fort Bend County area?

Yes

Q11

Would you like to be added to Fort Bend County Public Transportation's vendors list?

Yes

Q12

How does your company typically become aware of contracting opportunities?

Email listing

Q13

Please provide any additional comments/information below, including your name, phone number, and an email if you would like to be added to our vendors list.

YVONNE ROBINSON
979-922-2480
EMAIL: jtii1construction@gmail.com

#8

COMPLETE

Collector:	Email Invitation 1 (Email)
Started:	Friday, May 12, 2023 12:27:57 PM
Last Modified:	Friday, May 12, 2023 12:30:48 PM
Time Spent:	00:02:51
Email:	lisa@tli-holdings.com
IP Address:	172.56.49.4

Page 1: Market Research for DBE Goal Methodology for FY2024 - FY2026

Q1

What is the name of your company?

Torrey Lifestyle Investments, LLC

Q2

Are you a Small Business?

Yes

Q3

What services do you provide?

Signage

Q4

What are your company's NAICS codes?

Other (please specify):
339950, 423440, 541850

Q5

Are you a certified DBE vendor?

No

Q6

If you are not a DBE vendor, are you interested in becoming a DBE vendor?

Respondent skipped this question

Q7

Have you heard about Fort Bend County Public Transportation?

No

Q8

Have you experienced discrimination on any Fort Bend County Department Of Transportation assisted contracts?

No

Q9

What are some barriers you experienced when applying to Department of Transportation contracts, if applicable?

Respondent skipped this question

Q10

Is your business capable of performing work in the Fort Bend County area?

Yes

Q11

Would you like to be added to Fort Bend County Public Transportation's vendors list?

Yes

Q12

How does your company typically become aware of contracting opportunities?

bonfire or other search engines

Q13

Please provide any additional comments/information below, including your name, phone number, and an email if you would like to be added to our vendors list.

Respondent skipped this question

penalties, and cost; and any property sold shall be subject to t
therein, to redeem the said property, or their interest therein,
any other and further rights to which the defendants or anyon
sale to be made by me to satisfy the judgment(s) rendered in
and costs of suit, and the proceeds of said sales to be applied
law directs.

RECENT CHANGES IN THE PROPERTY TAX CODE
HAVE A STATEMENT FROM THE FORT BEND COU
PERSON/FIRM/COMPANY PURCHASING PROPERT
TO ANY TAXING ENTITY WITHIN THE COUNTY.
PROPERTY YOU PURCHASE WITHOUT THIS CER

TO OBTAIN A CERTIFICATE, PLEASE CONTACT
LEAST TWO WEEKS PRIOR TO THE SALE.

Dated at Richmond, Texas, May 10, 2023

By

Notes:

The Minimum Bid is the lesser of the amount awarded in
the Minimum Bid for a person owning an interest in the
the aggregate amount of the judgments against the prope
CANCELLATION WITHOUT PRIOR NOTICE. THE
HAVE BEEN ASSESSED SINCE THE DATE OF THE
GOGGAN BLAIR & SAMPSON, LLP, attorney for pla

FORT BEND TRANSIT
Disadvantaged Business Enterprise (DBE)Goal & Methodology
FY 2024 – 2026 Goal
NOTICE OF PUBLIC COMMENT

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Comments will be accepted until July 15, 2023 at 5:00 pm. Comments must be submitted in writing to:

Disadvantaged Business Enterprise Liaison Officer (DBELO)

Fort Bend Transit
3737 Bamore Road
Rosenberg, TX 77471
Transit@fortbendcountytx.gov
281-633-7433

Plans, specifications, and bidding documents may be obtained by registe
Public Purchase www.publicpurchase.com.

Sealed submittals, (1) original and one (1) electronic PDF copy, shall be de
to the City of Sugar Land, Office of the City Secretary, 2700 Town Center Bo
North, Suite 122, Sugar Land, Texas, 77479, on or before **2:00 p.m. on Th**
July 27, 2023, at which time only names of the firms will be read. Sub
received after the opening date and time will not be considered.

Questions regarding this submittal must be received on or before 3:(
Wednesday, July 12, 2023. Please post all questions on Public Purchas
publicpurchase.com.

Notice of award of contract shall be given by the City within one hund
twenty (120) days following the date of submittals.

NOTICE OF PUBLIC HEARING
PROPOSED ADOPTION OF THE CITY OF SUGAR LAND MOBILITY MASTER PLAN

Planning and Zoning Commission Public Hearing: 6:30 p.m., June 2
City of Sugar Land City Council Chamber, 2700 Town Center Boulevar
hosted via live stream at http://www.sugarlandtx.gov/1238/SLTV-16-Li
or https://www.youtube.com/sugarlandtxgov/live and Sugar Land
subscribers can also tune-in on Channel 16, to hear all persons interest
proposed adoption of the City of Sugar Land Mobility Master Plan.

The Mobility Master Plan is a guiding document and implementa
that describes the policies and actionable items necessary to accom
mobility-related goals of the City's Comprehensive Plan. The plan can
at https://www.sugarlandtx.gov/1834/Mobility-Master- Plan .

The agenda item for this meeting will be placed on the City of Su
website at www.sugarlandtx.gov under "Meeting Agendas" Planning ar
Commission no later than Friday, June 9, 2023. Request details o
feedback on the recommendation for adoption at www.sugarla
PublicHearingComment or contact City of Sugar Land Planning & Dev
Services Department (281) 275-2218.

FORT BEND TRANSIT
Disadvantaged Business Enterprise (DBE)Goal & Methodology
FY 2024 – 2026 Goal
NOTICE OF PUBLIC COMMENT

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Disadvantaged Business Enterprise Liaison Officer (DBELO)

Fort Bend Transit
3737 Bamore Road
Rosenberg, TX 77471
Transit@fortbendcountytx.gov
281-633-7433

Notice of award of contract shall be given by the City within one hundred and twenty (120) days following the date of submittals.

FORT BEND TRANSIT
Disadvantaged Business Enterprise (DBE)Goal & Methodology
FY 2024 – 2026 Goal
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Fort Bend Transit
3737 Bamore Road
Rosenberg, TX 77471
Transit@fortbendcountytx.gov
281-633-7433

Fort Bend County
Public Transportation Department
NOTICE OF PUBLIC COMMENT

These Programs of Projects will be funded with grant support from the United States Department of Transportation Section 5310 of the Fixing America's Surface Transportation Act (FAST Act). This notice is to inform the public about the Program of Projects.

Tables below describe the FY2021 and FY2022 Seniors and Individuals with Disabilities Formula Grant project list:

Fort Bend County Public Transportation
FY2021 Section 5310 Program of Projects

PROJECT	AMOUNT
Transportation Services	1,100,000
FTA Federal Share	1,100,000
Local Share	0
TDC Share	220,000

Fort Bend County Public Transportation
FY2022 Section 5310 Program of Projects

PROJECT	AMOUNT
Transportation Services	1,100,000
FTA Federal Share	1,100,000
Local Share	0
TDC Share	220,000

Capital projects are reimbursed at 100% using Transportation Development Credits (TDCs) as the local match. Should TDCs be unavailable, the match will be made with local funds.

The public comment period is your opportunity to provide comment on the above Programs of Projects. Throughout the comment period, written comments and/or requests for public meeting/hearing may be submitted to Fort Bend Transit, Finance & Administration Manager, 301 Jackson Street, Richmond, TX 77469, or via email to Transit@fortbendcountytx.gov. Comments/requests will be accepted until Thursday, June 29, 2023, at 5:00 pm. If no changes are made as a result of public comments, then this plan will be considered final. Project lists are subject to further approval by the Fort Bend County Commissioner's Court.

Todas las partes interesadas están invitadas a hablar sobre el tema de CDBG
los Planes de acción anuales en audiencias públicas sobre:

Miércoles, 5 de julio de 2023
6:00 PM
Sala de conferencias de planificación
Edificio de Servicios de Desarrollo/Recursos Humanos
1522 Texas Parkway, Ciudad de Misuri, Texas 77489

Los residentes también pueden enviar comentarios a Departamento d
Servicios de Desarrollo de la Ciudad de Missouri City en 1522 Texas Parkwa
Missouri City, TX 77489 (Atención: CDBG). Los residentes pueden enviar su
comentarios por fax a la Ciudad al (281) 403-8962, o enviar sus comentario
por correo electrónico a CDBG@missouricitytx.gov.

CDBG Fondo del programa

El objetivo nacional del programa CDBG es desarrollar comunidades urbana
viables proporcionando viviendas decentes, un entorno de vida adecuado
ampliando las oportunidades económicas principalmente para personas d
ingresos bajos y moderados. Los objetivos de CDBG incluyen:

1. Mejorar del entorno urbano en áreas de ingresos bajos y moderados;
2. Eliminar las influencias devastadoras y el deterioro de la propiedad
vecindarios e instalaciones públicas en áreas de ingresos bajos y moderados;
3. Garantizar una vivienda digna, segura e higiénica para los residentes d
ingresos bajos y moderados.

Las actividades elegibles incluyen, pero no se limitan a: construcción
mejoras de instalaciones públicas; accesibilidad para discapacitados
financiamiento operativo para agencias sin fines de lucro que prestan
servicios principalmente a personas de bajos ingresos; rehabilitación de
viviendas ocupadas por sus propietarios; asistencia para el desarrollo de
viviendas, cumplimiento de los códigos de la ciudad; limpieza y demolición
mejoras de infraestructura; actividades de desarrollo empresarial y creación
de empleo.

Nota: De conformidad con la Ley de Estadounidenses con Discapacidades
esta instalación es accesible para sillas de ruedas y hay espacios de
estacionamiento accesibles disponibles. Las solicitudes de adaptaciones
especiales o servicios de interpretación deben realizarse al menos 48 horas
antes de esta reunión. Comuníquese con el Departamento de Servicios
de Desarrollo al 281-403-8541 o por fax al 281-208-8962. Hay información
específica disponible en City Hall, 1522 Texas Parkway, Missouri City, Texas
de lunes a viernes de 8:00 a.m. a 4:00 p.m., con cita previa o puede llamar
al 281-403-8541, o puede visitar el sitio web en: http://www.missouricitytx
gov/251/CDBG.

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Public Transportation Department
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PROJECT	**AMOUNT**
Transportation Services	1,100,000
FTA Federal Share	1,100,000
Local Share	0
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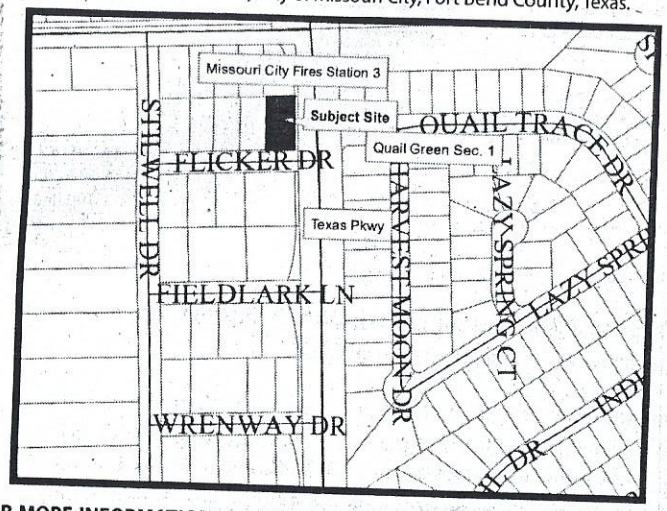
ing on, Monday, July 17, 2023, at 6:30 p.m. at the City Hall Complex; Missouri City, City Council Chambers, 1522 Texas Parkway (FM-2234), Missouri City, Texas 77489.

PURPOSE: To receive comments for or against a request by Fort Bend MUD No. 26 for a SUP, Specific Use Permit on an approximate 0.24 acre of land to allow for the location of a public utility regulator station - lift station, and to the extent such zoning deviates from the Future Land Use and Character map of the Comprehensive Plan, to provide for an amendment therefrom.

SITE LOCATION: The subject site is located west of Texas Parkway, south of Missouri City Fire Station No. 3, and north of Flicker Drive.

SITE LEGAL DESCRIPTION: The subject location can be described as being approximately 0.24 acres of land being the remainder of Lot 6, Block 1, Fieldcrest Subdivision, Volume 396, Page 223; Fort Bend County Deed Records, in the David Bright Survey, Abstract No. 13, City of Missouri City, Fort Bend County, Texas.



FOR MORE INFORMATION: Additional information and a map of the subject site are available for review at City Hall, Missouri City, Texas on Monday through Friday from 8:00 a.m. to 4:00 p.m. You may call 281-403-8600 or email the Development Services Department-Planning Division at MCTXplanning@missouricitytx.gov for information

FORT BEND TRANSIT
Disadvantaged Business Enterprise (DBE)Goal & Methodology
FY 2024 – 2026 Goal
NOTICE OF PUBLIC COMMENT

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Comments on the proposed overall goal is encouraged and will be used for informational purposes to develop the final established goal. The methodology used to determine the goal will be available for public inspection during normal business hours, Monday through Friday, at the Fort Bend Transit office at 3737 Bamore Road until June 30, 2023.

Comments will be accepted until July 15, 2023 at 5:00 pm. Comments must be submitted in writing to:

Disadvantaged Business Enterprise Liaison Officer (DBELO)

Fort Bend Transit
3737 Bamore Road
Rosenberg, TX 77471
Transit@fortbendcountytx.gov
281-633-7433

The CITY reserves the right to reject any or all responses, waive informalities, cancel the above solicitation, and make awards that are in the best interest of the CITY. All costs incurred in the development of a response to this solicitation (directly or indirectly) are the responsibility of the interested party(ies) and not the CITY.

missouri CITY TEXAS

LEGAL NOTICE

The City of Missouri City, Texas ("CITY") is accepting sealed responses from interested companies that can provide custodial services as specified in Request for Proposal ("RFP") 23-347 City-Wide Janitorial Services.

Interested parties can access RFP 23-347 on the State of Texas Electronic State Business Daily Search website, or they can request a copy by sending an e-mail to Bids@MissouriCitytx.gov.

Sealed responses must be delivered in accordance with the requirements specified in the above referenced solicitation by 3 P.M. Central Daylight Time ("CDT") August 4, 2023, to:

The City of Missouri City, Texas
Attn: City Secretary's Office
Subject: RFP 23-347 (Do Not Open)
1522 Texas Parkway
Missouri City, Texas 77489

Interested companies are highly encouraged (but are not required) to attend a pre-proposal conference scheduled for 9 A.M. CDT at the following location:

City Hall Council Chambers (2nd Floor)
City of Missouri City, Texas
1522 Texas Parkway
Missouri City, Texas 77489

Information regarding site visits can be found in Exhibit B Procurement Schedule. The CITY reserves the right to reject any or all responses, waive informalities, cancel the above solicitation, and make awards that are in the best interest of the CITY. All costs incurred in the development of a response to this solicitation (directly or indirectly) are the responsibility of the interested party(ies) and not the CITY.

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Please access the Fort Bend County website (https://www.fortbendcountytx.gov/government/departments/public-transportation/disadvantaged-business-enterprise-program/dbe-goal) for additional information on the Goal Methodology.

Fort Bend Transit provides the opportunity for public participation through inquiry and consultation with various contractor groups and community organizations.

Comments on the proposed overall goal is encouraged and will be used for informational purposes to develop the final established goal. The methodology used to determine the goal will be available for public inspection during normal business hours, Monday through Friday, at the Fort Bend Transit office at 3737 Bamore Road until June 30, 2023.

Comments will be accepted until July 15, 2023 at 5:00 pm. Comments must be submitted in writing to:

Disadvantaged Business Enterprise Liaison Officer (DBELO)

Fort Bend Transit
3737 Bamore Road
Rosenberg, TX 77471
Transit@fortbendcountytx.gov
281-633-7433

ch the defendants or anyone interested therein may be entitled,
lisfy the judgment(s) rendered in the above styled and
of suit, and the proceeds of said sales to be applied to the
the law directs.

W REQUIRE PURCHASERS OF TAX SALE PROPERTY
NTY TAX ASSESSOR-COLLECTOR CERTIFYING THAT
TY AT A TAX SALE OWES NO DELINQUENT PROPERTY
Y. YOU WILL NOT RECEIVE A TAX SALE DEED TO
RTIFICATE.

R FORT BEND COUNTY TAX ASSESSOR-COLLECTOR

Nabil Shike
County, Texas

judgment plus interest and costs or the adjudged value.
n the property or for a person who is a party to the suit (other
against the property plus all costs of suit and sale. ALL SALES
CE. THERE MAY BE ADDITIONAL TAXES DUE ON THE
E DATE OF THE JUDGMENT. For more information, contact
PSON, LLP, attorney for plaintiffs, at (713) 844-3576

DBE Goal

- Disadvantaged Business Enterprise Goal for FY 2021 - 2023 (English)
- Disadvantaged Business Enterprise Goal for FY 2021 - 2023 (Spanish)

Notice of Public Comment:

Fort Bend Transit

Disadvantaged Business Enterprise (DBE) Goal & Methodology

FY 2024 – 2026 Goal

Notice of Public Comment

Fort Bend Transit (FBT) has completed the review of federally funded contracting opportunities for Disadvantaged Business Enterprises (DBE) for fiscal years 2024 through 2026.

According to US DOT regulations 49 CFR PART 26, FBT is required to establish a Race-Neutral/Race-Conscious DBE goal program. This goal is based on projected contracting opportunities and the availability of eligible ready, willing, and able to work DBEs, as well as, past contracting achievement.

An overall agency goal of **3.67%** is proposed for contracting opportunities for the DBE program.

ESTABLISHED BASE FIGURE

To calculate the weighted base figure, the relative availability of DBE contractors within the Local Market Area (LMA) was determined. The LMA is defined by the U.S. Department of Transportation's Office of Small and Disadvantaged Business Utilization's (OSDBU) as the area in which the substantial majority of the contractors and subcontractors with which your agency does business with are located, and the area in which your agency spends the substantial majority of contracting dollars. Based on that definition and past similar contracting services, the substantial majority of contractors and subcontractors that were ready, willing, and able were located in Fort Bend County and Harris County. **Graph 1** shows the LMA of past similar contracting services.

Graph 1: Local Market Area

FBT used data from the following sources to identify the total number of available DBEs for each project.

- North American Industry Classification System(NAICS) Codes

  https://www.census.gov/naics/

- United States Census Bureau County Business Patterns 2021 Fort Bend County & Harris County

  https://data.census.gov/cedsci/advanced?g=0500000US48157,48201&tid=ACSST1Y2018.S0101&vintage=2018

- Texas Unified Certification Program (TUCP) DBE Directory

  https://txdot.txdotcms.com/Default.asp

The total number of firms and DBE firms available in both Fort Bend County and Harris County areas for these types of projects was determined from the NAICS code, Census Bureau County Business Pattern, and the TUCP DBE directory. The data obtained from all firms and DBEs was used to calculate the relative availability using **Equation 1** below. **Table 1** shows the data for the relative availability for all projects.

Equation 1: Relative Availability for Each Project

$$Relative\ Availability = \frac{Ready, willing, and\ able\ DBEs}{\begin{matrix} All\ firms\ ready, willing, and\ able \\ (includes\ DBEs\ and\ non-DBEs) \end{matrix}}$$

Table 1: Relative Availability for Each Project

No.	NAICS Codes	Projects	Number of DBEs available to perform this work	Number of all firms available (including DBEs)	Relative Availability
1	454310	Bulk Fuel	1	336	0.0030
2	236220	Construction Management	114	4186	0.0272
3	541310		0	1822	0.0000
4	541330		81	7240	0.0112
5	541850	Bus Wraps	4	211	0.0190
6	485111	Bus Service	0	0	0.0000
7	424720		0	520	0.0000
8	488410		0	939	0.0000
9	811111		4	7085	0.0006
10	485999		2	120	0.0167
11	485310		1	86	0.0116
12	485113		1	30	0.0333
13	541614	Financial & Transportation Planning	23	1212	0.0190
14	541611		44	2006	0.0219
15	541690	Ambassador Services	35	3296	0.0106
16	541512	Dispatch & Scheduling Software	184	7498	0.0245
17	541690	Pos-Award, Post Delivery & Bus Inspection Services	27	3296	0.0082
18	541613	Marketing	17	3855	0.0044
19	541820		7	528	0.0133
20	541910		16	383	0.0418
21	236220	Bus Shelter	0	4186	0.0000
22	238990	Gate/Fencing	10	6400	0.0016
23	237110	Construction Westpark P&R	77	1305	0.0590
24	237310		13	916	0.0142
25	237990		13	411	0.0316
26	238110		130	1931	0.0673
27	238120		38	475	0.0800
28	238220		20	9682	0.0021
29	238190		24	795	0.0302
30	238210		41	6499	0.0063
31	238290		11	812	0.0135
32	238320		28	1578	0.0177
33	238330		44	892	0.0493
34	238350		19	1598	0.0119
35	238990		48	6400	0.0075
36	238130		29	682	0.0425
37	238910		97	2818	0.0344
38	561730		87	6214	0.0140
				Overall availability of DBEs	0.7495

The project types were identified and the corresponding anticipated budgets for the contract terms were added to calculate the weight for each project (See **Equation 2** and **Table 2**). FBT does not anticipate to have any subrecipient during this goal period. FBT did not exclude any projects.

Equation 2: Weight for Each Project

$$Weight = \frac{Each\ project\ amount\ of\ FTA\ assisted\ funds}{Total\ project\ amount\ of\ FTA\ assisted\ funds}$$

Table 2: Weight for Each Project

No.	NAICS Codes	Projects	Amount of FTA assisted funds on project:	% of total DOT funds (weight)
1	454310	Bulk Fuel	$ 2,626,250.00	0.0489
2	236220	Construction Management	$ 18,145.95	0.0003
3	541310			
4	541330			
5	541850	Bus Wraps	$ 282,606.00	0.0053
6	485111	Bus Service	$ 38,833,399.00	0.7227
7	424720			
8	488410			
9	811111			
10	485999			
11	485310			
12	485113			
13	541614	Financial & Transportation Planning	$ 1,325,000.00	0.0247
14	541611			
15	541690	Ambassador Services	$ 2,604,134.00	0.0485
16	541512	Dispatch & Scheduling Software	$ 500,000.00	0.0093
17	541690	Pos-Award, Post Delivery & Bus Inspection Services	$ 174,692.00	0.0033
18	541613	Marketing	$ 750,000.00	0.0140
19	541820			
20	541910			
21	236220	Bus Shelter	$ 16,040.00	0.0003
22	238990	Gate/Fencing	$ 10,000.00	0.0002
23	237110	Construction Westpark P&R	$ 190,380.00	0.0035
24	237310		$ 44,898.00	0.0008
25	237990		$ 638,447.00	0.0119
26	238110		$ 1,692,133.00	0.0315
27	238120			
28	238220		$ 142,690.00	0.0027
29	238190			
30	238210		$ 1,345,563.00	0.0250
31	238290		$ 32,153.00	0.0006
32	238320		$ 1,749,063.20	0.0326
33	238330			
34	238350			
35	238990			
36	238130			
37	238910		$ 449,240.00	0.0084
38	561730		$ 307,970.00	0.0057
Total FTA assisted Project Funds			**$ 53,732,804.15**	**1**

According to OSDBU, the weighted based figure is not required by rule but it will make the goal calculation more accurate; See **Equation 3** for the formula used to calculate the Weighted Base Figure. The Total Weighted Base Figure is 5.79% (See **Table 3**).

Equation 3: Weighted Base Figure for Each Project

$$Weighted\ Base\ Figure = Relative\ Availability * Weight$$

Table 3: Total Weighted Base Figure

No.	NAICS Codes	Projects	Relative Availability	Weight	Weighted Base Figure
1	454310	Bulk Fuel	0.0030	0.0489	0.0001
2	236220	Construction Management	0.0272	0.0003	0.0000
3	541310		0.0000	0.0003	0.0000
4	541330		0.0112	0.0003	0.0000
5	541850	Bus Wraps	0.0190	0.0053	0.0001
6	485111	Bus Service	0.0000	0.7227	0.0000
7	424720		0.0000	0.7227	0.0000
8	488410		0.0000	0.7227	0.0000
9	811111		0.0006	0.7227	0.0004
10	485999		0.0167	0.7227	0.0120
11	485310		0.0116	0.7227	0.0084
12	485113		0.0333	0.7227	0.0241
13	541614	Financial & Transportation Planning	0.0190	0.0247	0.0005
14	541611		0.0219	0.0247	0.0005
15	541690	Ambassador Services	0.0106	0.0485	0.0005
16	541512	Dispatch & Scheduling Software	0.0245	0.0093	0.0002
17	541690	Pos-Award, Post Delivery & Bus Inspection Services	0.0082	0.0033	0.0000
18	541613	Marketing	0.0044	0.0140	0.0001
19	541820		0.0133	0.0140	0.0002
20	541910		0.0418	0.0140	0.0006
21	236220	Bus Shelter	0.0000	0.0003	0.0000
22	238990	Gate/Fencing	0.0016	0.0002	0.0000
23	237110	Construction Westpark P&R	0.0590	0.0035	0.0002
24	237310		0.0142	0.0008	0.0000
25	237990		0.0316	0.0119	0.0004
26	238110		0.0673	0.0315	0.0021
27	238120		0.0800	0.0315	0.0025
28	238220		0.0021	0.0027	0.0000
29	238190		0.0302	0.0027	0.0001
30	238210		0.0063	0.0250	0.0002
31	238290		0.0135	0.0006	0.0000
32	238320		0.0177	0.0326	0.0006
33	238330		0.0493	0.0326	0.0016
34	238350		0.0119	0.0326	0.0004
35	238990		0.0075	0.0326	0.0002
36	238130		0.0425	0.0326	0.0014
37	238910		0.0344	0.0084	0.0003
38	561730		0.0140	0.0057	0.0001
				Total	0.0579
				Expressed as a %	5.79%

FBT's adjusted DBE goal is based on past participation for fiscal years 2017 through 2022 due to the strong similarities of contracting opportunities between FY2018 – FY2020 and FY2021 – FY2023. The goal setting process is more accurate if the median (instead of the average or mean) of past participation is used to make adjustment because the process of determing the median excludes all outlier (adnormally high or abnormally low) past participation percentages. Based on DBE participation for the past six (6) fiscal years (See **Table 4**), a median of **1.56%** was determined (See **Equation 4**). To ensure past participation is not given a disproportionate weight, the average of the Weighted Based Figure (See **Table 3**) and the Past Participation Median Goal (See **Equation 4**) was used to calculate the new adjusted goal for fiscal years 2024 through 2026, **3.67%** (See **Equation 5**).

Table 4: Past Participation DBE Goal

Fiscal Year	DBE % Goal	DBE % Achieved
2022	3.89%	9.67%
2021	3.89%	13.75%
2020	4.00%	1.95%
2019	4.00%	1.17%
2018	4.00%	0.00%
2017	4.00%	0.08%

Equation 4: Median Goal

$$Median = \frac{(1.95\% + 1.17\%)}{2} = 1.56\%$$

Equation 5: Adjusted DBE Goal

$$Adjusted\ Goal = \frac{(Weighted\ Base\ Figure + Median\ Goal)}{2} = \frac{(5.79\% + 1.56\%)}{2} = 3.67\%$$

PUBLIC PARTICIPATION

Fort Bend Transit provides the opportunity for public participation through inquiry and consultation with various contractor groups and community organizations.

Comments on the proposed overall goals are encouraged and will be used for informational purposes to develop the final established goal. The methodology used to determine the goal will be available for public inspection during normal business hours, Monday through Friday, at the Fort Bend Transit office at 3737 Bamore Road until June 30, 2023.

Comments will be accepted until July 15, 2023 at 5:00 pm. Comments must be submitted in writing to:

Disadvantaged Business Enterprise Liaison Officer (DBELO)

Fort Bend Transit

3737 Bamore Road

Rosenberg, TX 77471

Transit@fortbendcountytx.gov

281-633-7433

Download our Mobile App

eNotifications Sign Up

CONTACT US

281-342-3411

301 Jackson St
Richmond, TX 77469 United States

View on Google Maps

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EXHIBIT D

Subcontractor Participation Form

Fort Bend County Public Transportation
Subcontractor/Subvendor Participation

Instructions: The Offeror/Prime Contractor shall complete this form by listing: Names of **all** subcontractors/subvendors proposed on this project, Status as a DBE or Non-DBE, $ or % amount of Total Prime Contract, Description of work to be performed/product to be provided, and Contact information. The subcontractors/subvendors listed on this form as DBEs must be currently certified under the Texas Unified Certification Program (TUCP) as a DBE (or will be at the time this solicitation is due). Additionally, for each DBE subcontractor/subvendor listed on this form, the Offeror/Prime Contractor must complete the Intent to Perform as a DBE Contractor or DBE Subcontractor/Subvendor Form agreeing to the information.

Name of Offeror/Prime Contractor: _____

Project Name: _____

IFB/RFP/RFQ Number: _____

1	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**
2	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**
3	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**
4	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**

Upon execution of a contract with Fort Bend County Public Transportation, the undersigned will enter into a formal agreement with DBE subcontractors/subvendors for work listed in this schedule. The undersigned agrees to the terms of this schedule by signing below and submitting the Intent to Perform as a DBE Contractor form (as completed by the DBE subcontractors/subvendors). If you are a DBE Offeror/Prime Contractor, you also certify that no more than 70% of the work for this project will be subcontracted.

Printed Name of Authorized Representative of Offeror/Prime Contractor | Signature | Date Signed

Fort Bend County Public Transportation
Subcontractor/Subvendor Participation

Continuation of Page 1 -- For Use if Necessary

5	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**
6	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**
7	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**
8	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**
9	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**
10	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**
11	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**
12	**Name of Subcontractor/Subvendor**	**Phone Number**	**$/% Amt of Total Prime Contract**	**Work to be performed/product to be provided**
	Contact Person's Name	**Email Address**	**DBE or Non-DBE**	**Address**

EXHIBIT E

Intent to Perform as a DBE Contractor/Subcontractor Form

Fort Bend County Public Transportation

INTENT TO PERFORM AS A DBE CONTRACTOR OR DBE SUBCONTRACTOR/SUBVENDOR

A separate form should be completed for each DBE firm. (Offeror/Prime Contractor and/or Subcontractor/Subvendor)

Name of **Offeror/Prime Contractor**: _____

Name of Subcontractor/Subvendor: *(if applicable)* _____

Project Name: _____

IFB/RFP/RFQ Number: _____

1. The **DBE Offeror/Prime Contractor or DBE Subcontractor/Subvendor** *(whichever is applicable)* named above must be currently certified under the Texas Unified Certification Program (TUCP) as a DBE (or will be certified at the time this solicitation is due), and asserts that said qualification is met with the ethnic code: _____.

Ethnic Codes:			
A) Black American Male	B) Black American Female	C) Hispanic American Male	D) Hispanic American Female
E) Native American Male	F) Native American Female	G) Asian Pacific American Male	H) Asian Pacific American Female
I) SubContinent Asian American Male	J) SubContinent Asian American Female	K) Non Minority Female	

2. The **DBE Offeror/Prime Contractor or DBE Subcontractor/Subvendor** *(whichever is applicable)* named above is prepared to perform the following described work with their own workforce and/or supply the material listed in connection with the above project.

_____

This work will be performed at the following price $ _____ (and/or _____ % of the total prime contract amount).

(If this form is being completed relative to a Subcontractor/Subvendor, note that this amount should be the same $/% amount that is completed on the Subcontractor/Subvendor Participation Form.)

_____ _____ _____

Printed Name of Offeror/Prime Contractor Authorized Representative | Signature of Authorized Representative | Date Signed

---

Name of Firm that is DBE Certified (if different from Offeror/Prime Contractor): _____

(Subcontractor/Subvendor)

_____ _____ _____

Printed Name of Authorized Representative | Signature of Authorized Representative | Date Signed

EXHIBIT F

DBE 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 ($56.42 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 offederal 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/tab le-smal1-busi ness-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: CERTIFTCATION TNFORMATION

A. Basic Contact Information

(I) 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 ofincorporation 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.
(1 1) 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 ofUSDOT's final agency decision(s).

Section 2: GENERAL INFORMATION

A. Business profile:

(I) 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 finn'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 finn, 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 ill1Y 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

(l) 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 resumes 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 finn 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.

AFFTDAVIT & 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?**
D DBE **D** ACDBE Names of certifying agencies: _____

(8) 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? **D** 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? **D** Yes **D** 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):*
D Started new business **D** Bought existing business **D** Inherited business **D** Secured concession
D Merger or consolidation **D** Other *(explain)* _____

(6) Is your firm "for profit"? **D** Yes ☐No- Federal Tax ID# _____

® **STOP!** If your firm is NOT for-profit, then you do NOT qualify for this program and should not fill out this application.

(7) Type of Legal Business Structure: *(check all that apply):*

D Sole Proprietorship **D** Limited Liability Partnership
D Partnership ☐Corporation
D Limited Liability Company **D** Joint Venture (Identify all JV partners _____)
D Applying as an ACDBE **D** 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. <u>Relationships and Dealings with Other Businesses</u>

(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?
D Yes **D** 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? **D** Yes **D** No
(b) Existed as a subsidiary of any other firm? **D** Yes **D** No
(c) Existed as a partnership in which one or more of the partners are/were other firms? **D** Yes **D** No
(d) Owned any percentage of any other firm? **D** Yes **D** No
(e) Had any subsidiaries? **D** Yes **D** No
(f) Served as a subcontractor with another firm constituting more than 25% of your firm's receipts? **D** Yes **D** 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: D Male D Female

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

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

(7) **U.S. Citizenship:**

D U.S. Citizen
D 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:

D Started business myself
D It was a gift from: _____
D I bought it from: _____
D I inherited it from: _____
D 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? D Yes D 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.)* D Yes D 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)? D Yes D 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? 0 Yes O 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:** _____

(5) Gender: D Male D Female

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

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

(7) **U.S. Citizenship:**

D U.S. Citizen
D 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:
D Started business myself
D It was a gift from: _____
D I bought it from: _____
D I inherited it from: _____
D 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? D Yes D 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.)* D Yes D 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)? D Yes D 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?
D Yes **D** 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.)*
D Yes **D** 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) Name: _____ Title: _____ Percent Owned: _____				Minority Owner (49% or less) Name: _____ Title: _____ Percent Owned: _____			
Sets policy for company direction/scope of operations		A	F	S	N	A	F	S	N
Bidding and estimating		A	F	S	N	A	F	S	N
Major purchasing decisions		A	F	S	N	A	F	S	N
Marketing and sales		A	F	S	N	A	F	S	N
Supervises field operations		A	F	S	N	A	F	S	N
Attend bid opening and lettings		A	F	S	N	A	F	S	N
Perform office management (billing, accounts receivable/payable, etc.)		A	F	S	N	A	F	S	N
Hires and fires management staff		A	F	S	N	A	F	S	N
Hire and fire field staff or crew		A	F	S	N	A	F	S	N
Designates profits spending or investment		A	F	S	N	A	F	S	N
Obligates business by contract/credit		A	F	S	N	A	F	S	N
Purchase equipment		A	F	S	N	A	F	S	N
Signs business checks		A	F	S	N	A	F	S	N

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 Name: _____ Title: _____ Race and Gender: _____ Percent Owned:				Officer/Director/Manager/ Key Personnel Name: _____ Title: _____ Race and Gender: _____ Percent Owned:			
Sets policy for company direction/scope of operations	A	F	S	N	A	F	S	N
Bidding and estimating	A	F	S	N	A.F		S	N
Major purchasing decisions	A	F	S	N	A.F		S	N
Marketing and sales	A	F	S	N	A.F		S	N
Supervises field operations	A	F	S	N	A.F		S	N
Attend bid opening and lettings	A	F	S	N	A.F		S	N
Perform office management (billing, accounts receivable/payable, etc.)	A	F	S	N	A	F	S	N
Hires and fires management staff	A	F	S	N	A.F		S	N
Hire and fire field staff or crew	A	F	S	N	A.F		S	N
Designates profits spending or investment	A	F	S	N	A.F		S	N
Obligates business by contract/credit	A	F	S	N	A.F		S	N
Purchase equipment	A	F	S	N	A·1F		S	N
Signs business checks	A	F	S	N	A.F		S	N

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? D Yes D 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:

Concession Space	Address / Location at Airport	Value of Property or Lease	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 concession

Name of Concession	Location	Type of Concession	Start Date of Concession

AFFIDAVIT OF CERTIFICATION

This form must be signed and notarized for <u>each</u> 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):

D Female **D** Black American **D** Hispanic American
D Native American **D** Asian-Pacific American
D Subcontinent Asian American **D** 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 $I .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 _____ _____
(DBE/ACDBE Applicant) (Date)

<u>NOTARY CERTIFICATE</u>

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

 Resumes (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 oflncorporation *(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 affirm, if'less than three years)*

Suppliers

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

EXHIBIT G

Demonstration of Good Faith Efforts

Fort Bend County Public Transportation
Demonstration of Good Faith Efforts[1]

FORM 1: DISADVANTAGED BUSINESS ENTERPRISE (DBE) UTILIZATION

The undersigned bidder/offeror has satisfied the requirements of the bid specification in the following manner (please check the appropriate space):

□ The bidder/offeror is committed to a minimum of __% DBE utilization on this contract.

□ The bidder/offeror (if unable to meet the DBE goal of ___%) is committed to a minimum of ___% DBE utilization on this contract and submitted documentation demonstrating good faith efforts.

Name of Bidder/Offeror's firm: _____

State Registration No.: _____

Printed Name: _____

Signature: _____

Title: _____ Date: _____

[1] *Forms 1 and 2 will be provided as part of solicitation documents.*

Fort Bend County Public Transportation
Demonstration of Good Faith Efforts[2]

FORM 2: LETTER OF INTENT

Name of Bidder/Offeror's Firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Name of DBE firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Phone Number: _____

Description of work to be performed by DBE firm:

_____

_____

_____

The bidder/offeror is committed to utilizing the above-named DBE firm for the work described above. The estimated dollar value of this work is $_____.

AFFIRMATION

The above-named DBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

Printed Name: _____ Signature: _____

Title: _____ Date: _____

If the bidder/offeror does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.

[2] Must complete form for each DBE.

EXHIBIT H

Memorandum of Understanding with TxDOT

Texas Department of Transportation®
DEWITT C. GREER STATE HIGHWAY BLDG. • 125 E. 11TH STREET • AUSTIN, TEXAS 78701-2483 • (512) 463-8585

February 10, 2014

The Honorable Robert E. Hebert
Judge of Fort Bend County
401 Jackson
Richmond, TX 77469

Dear Judge Hebert:

The attached Memorandum of Understanding (MOU) regarding the adoption of the Texas Department of Transportation's federally-approved Disadvantaged Business Enterprise Program by the Fort Bend County has been fully executed.

Attached are two original copies of said MOU for your files.

Sincerely,

Gloria Brown

Gloria Brown
Business Development Section
Office of Civil Rights

Texas Department of Transportation

MEMORANDUM OF UNDERSTANDING REGARDING THE ADOPTION OF THE TEXAS DEPARTMENT OF TRANSPORTATION'S FEDERALLY-APPROVED DISADVANTAGED BUSINESS ENTERPRISE PROGRAM BY Fort Bend County

This Memorandum of Understanding (MOU) is by and between the **TEXAS DEPARTMENT OF TRANSPORTATION (TxDOT),** an agency of the State of Texas; and Fort Bend County, a political subdivision of the State of Texas.

Whereas, from time to time Fort Bend County receives federal funds from the Federal Highway Administration (FHWA) through TxDOT to assist Fort Bend County with the construction and design of projects partially or wholly funded through FHWA; and

Whereas, Fort Bend County, as a sub-recipient of federal funds, is required by 49 CFR 26, to implement a program for disadvantaged business enterprises (DBEs), as defined by 49 CFR 26 (DBE Program); and

Whereas, TxDOT has implemented a Disadvantaged Business Enterprise Program (DBE Program) that is approved by the FHWA pursuant to 49 CFR part 26; and

Whereas, certain aspects of Fort Bend County 's procurement of construction and design services are subject to review and/or concurrence by TxDOT as a condition of receiving federal funds from FHWA through TxDOT; and

Whereas, Fort Bend County and TxDOT undertake substantially similar roadway construction projects and design projects and construct and design their respective projects using substantially the same pool of contractors; and

Whereas, Fort Bend County desires to implement a federally compliant DBE Program by adopting the TxDOT approved program, as recommended by FHWA; and

Whereas, TxDOT and Fort Bend County find it appropriate to enter into this MOU to memorialize the obligations, expectations and rights each has as related to Fort Bend County 's adoption of the TxDOT DBE's Program to meet the federal requirements;

Now, therefore, TxDOT and Fort Bend County, in consideration of the mutual promises, covenants and conditions made herein, agree to and acknowledge the following:

(1) TxDOT has developed a DBE Program and annually establishes a DBE goal for Texas that is federally approved and compliant with 49 CFR 26 and other applicable laws and regulations.

(2) Fort Bend County is a sub-recipient of federal assistance for construction projects and design projects and, in accordance with 49 CFR § 26.21, must comply with a federally approved DBE Program. The Fort Bend County receives its federal assistance through TxDOT. As a sub-recipient, Fort Bend County has the option of developing its own program or adopting and operating under TxDOT's federally approved DBE Program. The FHWA recommends that sub-recipients, such as Fort Bend County, adopt the DBE program, administered through TxDOT, and Fort Bend County by its prescribed protocol adopted the TxDOT DBE Program as of the date when adoption occurred.

(3) This MOU evidences FHWA's and TxDOT's consent to the adoption of the TxDOT DBE Program by Fort Bend County to achieve its DBE participation in federally assisted Construction and Design Projects.

(4) The parties will work together in good faith to assure effective and efficient implementation of the DBE Program for Fort Bend County and for TxDOT.

(5) Fort Bend County and TxDOT have agreed upon the following delegation of responsibilities and obligations in the administration of the DBE Program adopted by Fort Bend County :

(a) Fort Bend County will be responsible for project monitoring and data reporting to TxDOT. Fort Bend County will furnish to TxDOT any required DBE contractor compliance reports, documents or other information as may be required from time to time to comply with federal regulations. TxDOT will provide the necessary and appropriate reporting forms, to Fort Bend County .

(b) Fort Bend County will recommend contract-specific DBE goals consistent with TxDOT's DBE guidelines and in consideration of the local market, project size, and nature of the good(s) or service(s) to be acquired. Fort Bend County 's recommendation may be that no DBE goals are set on any particular project or portion of a project or that proposed DBE goals be modified. Fort Bend County and TxDOT will work together to achieve a mutually acceptable goal, however, TxDOT will retain final decision-making authority regarding DBE goals.

(c) TxDOT will cooperate with Fort Bend County in an effort to meet the timing and other requirements of Fort Bend County projects.

(d) Fort Bend County will be solely responsible for the solicitation and structuring of bids and bid documents to procure goods and services for its projects that use federal funds and will be responsible for all costs and expenses incurred in its procurements.

(e) The DBEs eligible to participate on TxDOT construction projects or design projects also will be eligible to participate on Fort Bend County construction projects or design projects subject to the DBE Program. The DBEs will be listed on TxDOT's website under the Texas Unified Certification Program (TUCP).

(f) Fort Bend County will conduct reviews and provide reports with recommendations to TxDOT concerning any DBE Program compliance issues that may arise due to project specific requirements such as Good Faith Effort (GFE), Commercially Useful Function (CUF), etc. Fort Bend County and TxDOT will work together to achieve a mutually acceptable goal, however, TxDOT will retain final decision-making authority on those issues and reserves the right to perform compliance reviews. Fort Bend County shall provide TxDOT with a listing of sanctions that will be assessed against contractors for violation of federal DBE regulations and its procedures for investigation of violations and assessment of sanctions for documented violations. Fort Bend County will require contractors for its FHWA federally assisted projects to use the attached forms as follows:

Attachment 1 – Disadvantaged Business Enterprise (DBE) Program Commitment Agreement Form SMS 4901

Attachment 2 – DBE Monthly Progress Report Form SMS 4903

Attachment 3 – DBE Final Report Form SMS 4904

Attachment 4 – Prompt Payment Certification Form (Federal-air Projects) 2177

(g) Fort Bend County will designate a liaison officer to coordinate efforts with TxDOT's DBE Program administrators and to respond to questions from the public and private sector regarding Fort Bend County 's administration of the DBE Program through TxDOT.

(h) Fort Bend County will be responsible for providing TxDOT with DBE project awards and DBE Commitments, monthly DBE reports, DBE Final Reports, DBE shortfall reports, and annual and updated goal analysis and reports.

(i) TxDOT will be responsible for maintaining a directory of firms eligible to participate in the DBE Program, and providing business development and outreach programs. Fort Bend County and TxDOT will work cooperatively to provide supportive services and outreach to DBE firms in Fort Bend County area.

(j) Fort Bend County will submit DBE semi-annual progress reports to TxDOT.

(k) Fort Bend County will participate in TxDOT sponsored training classes to include topics on Title VI of the Civil Rights Act of 1964, DBE Annual Goals, DBE Goal Setting for Construction Projects and Design Projects, DBE Contract Provisions, and DBE Contract Compliance, which may include issues such as DBE Commitments, DBE Substitution, and Final DBE Clearance. TxDOT will include DBE contractors performing work on Fort Bend County projects in the DBE Education and Outreach Programs.

(l) The Executive Director of Fort Bend County will implement all federal requirements, including those stated in Attachments A through F, which are incorporated as though fully set out herein for all purposes.

(m) In accordance with 23 CFR 200.1, Fort Bend County shall develop procedures for the collection of statistical data (race, color, religion, sex, and national origin) of participants in , and beneficiaries of Sate highway programs, i.e., relocatees, impacted citizens and affected communities; develop a program to conduct Title VI review of program areas; and conduct annual reviews of special emphasis program areas to determine the effectiveness of program area activities at all levels. TxDOT, in accordance with federal law, may conduct compliance reviews by TxDOT's Office of Civil Rights (OCR).

(n) Fort Bend County will comply with 49 CFR 26.29 as stated in Attachment F.

(6) In the event there is a disagreement between TxDOT and Fort Bend County about the implementation of the TxDOT DBE Program by Fort Bend County the parties agree to meet within ten (10) days of receiving a written request from the other party of a desire to meet to resolve any disagreement. The parties will make good faith efforts to resolve any disagreement as efficiently as is reasonably possible in consultation with FHWA. Non-compliance by Fort Bend County can result in restitution of federal funds to TxDOT and withholding of further federal funds upon consultation with FHWA.

(7) This MOU becomes effective upon execution by all parties and automatically renews each year unless a party notifies the other parties of its intent to terminate the agreement.

(8) If this MOU is terminated for any reason, Fort Bend County will be allowed reasonable time in which to seek approval from FHWA for an alternative DBE Program, without being deemed non- compliant with 49 CFR Part 26.

(9) This MOU applies only to projects for which Fort Bend County is a sub-recipient of federal funds through TxDOT. Fort Bend County may also implement a Minority and Women-Owned Small Business Enterprise (M/W/SBE) policy and program that applies to projects for which it is not a sub-recipient of federal funds through TxDOT and which are not subject to the TxDOT DBE Program. Fort Bend County may, at its option, use some aspects of the TxDOT DBE Program and other similar programs in implementing its other policies and programs for its non-federally funded projects.

(10) The following attachments to this MOU are also incorporated as if fully set out herein for all purposes:

Attachment A – FHWA Memorandum HCR-1/HIF-1 (relating to access required by the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973);

Attachment B – SPECIAL PROVISION – LOCAL GOVERNMENT / RMA / NON-STANDARD CONTRACTS

Attachment C – 49 CFR §26.13 (contractual assurances)

Attachment D – DBE Program Compliance Guidance for Local Government Agencies

Attachment E – FHWA Form 1273

Attachment F – Texas Department of Transportation (TxDOT) Disadvantaged Business Enterprise (DBE) Program with attachments as follows:

- Attachment F1 – DBE Regulations: 49 CFR Part 26
- Attachment F2 – DBE Special Provisions 000-1966
- Attachment F3 – TxDOT's Organizational Chart
- Attachment F4 – Measurement and Payment Special Provision 009-007
- Attachment F5 – Texas Unified Certification Program (TUCP) DBE directory example and website address to the directory
- Attachment F6 – DBE Goal Methodology
- Attachment F7 – DBE Bidder Certification
- Attachment F8 – DBE Joint Check Approval Form
- Attachment F9 – TUCP Standard Operating Procedures (SOP)
- Attachment F10 – TUCP Memorandum of Agreement (MOA)
- Attachment F11 – Forms list

(11) The following procedure shall be observed by the parties in regard to any notifications:

(a) Any notice required or permitted to be given under this MOU shall be in writing and may be effected by personal delivery, by hand delivery through a courier or a delivery service, or by

registered or certified mail, postage prepaid, return receipt requested, addressed to the proper party, at the following address:

Fort Bend County

Robert E. Hebert
County Judge

Hand Delivery:

401 Jackson, Richmond, Tx 77469

Registered or Certified Mail (Return receipt requested):

401 Jackson, Richmond, Tx 77469

TEXAS DEPARTMENT OF TRANSPORTATION
DBE Liaison
Office of Civil Rights
Address: 125 E. 11th Street
Austin, Texas 78701

(b) Notice by personal delivery or hand delivery shall be deemed effective immediately upon delivery, provided notice is given as required by Paragraph (a) hereof. Notice by registered or certified mail shall be deemed effective three (3) days after deposit in a U.S. mailbox or U.S. Post Office, provided notice is given as required by Paragraph (a) hereof.

(c) Either party hereto may change its address by giving notice as provided herein.

(12) This MOU may be modified or amended only by written instrument, signed by both

Fort Bend County and the TxDOT and dated subsequent to the effective date(s) of this MOU. Except as authorized by the respective parties, no official, employee, agent, or representative of the parties has any authority, either express or implied, to modify or amend this MOU.

(13) The provisions of this MOU are severable. If any clause, sentence, provision, paragraph, or article of this MOU, or the application of this MOU to any person or circumstance is held by any court of competent jurisdiction to be invalid, illegal, or unenforceable for any reason, such invalidity, illegality, or unenforceability shall not impair, invalidate, nullify, or otherwise affect the remainder of this MOU, but the effect thereof shall be limited to the clause, sentence, provision, paragraph, or article so held to be invalid, illegal, or unenforceable, and the application of such clause, sentence, provision, paragraph, or article to other persons or circumstances shall not be affected; provided, however, Fort Bend County and TxDOT may mutually agree to terminate this MOU.

(14) The following provisions apply in regard to construction of this MOU:

(a) Words of any gender in this MOU shall be construed to include the other, and words in either number shall be construed to include the other, unless the context in this MOU clearly requires otherwise.

(b) When any period of time is stated in this MOU, the time shall be computed to exclude the first day and include the last day of the period. If the last day of any period falls on a Saturday, Sunday, or national holiday, or state or county holiday, these days shall be omitted from the computation. All hours stated in this MOU are stated in Central Standard Time or in Central Daylight Savings Time, as applicable.

(15) This MOU shall not be construed in any way as a waiver by the parties of any immunity from suit or liability that parties may have by operation of law, and the parties hereby retain all of their respective affirmative defenses.

EXECUTED in duplicate originals by TxDOT and Fort Bend County, acting through each duly authorized official and effective on the latest date signed.

The signatories below confirm that they have the authority to execute this MOU and bind their principles.

TEXAS DEPARTMENT OF TRANSPORTATION

By: James M Bass
James Bass
Executive Director (Interim)

Date: 2/5/14

Fort Bend County

By: Robert E. Hebert
Robert E. Hebert
County Judge

Date: January 7, 2014

Attachment 1

Texas Department of Transportation

Disadvantaged Business Enterprise (DBE) Program Commitment Agreement Form

This commitment is subject to the award and receipt of a signed contract from the Texas Department of Transportation for the subject project.

Project #:	**County:**	**Contract-CSJ:**

Items of work to be performed (attach a list of work items if more room is required):

Bid Item #	Item Description	Unit of Measure	Unit Price	Quantity	Total Per Item
				Total	

The contractor certifies by signature on this agreement that subcontracts will be executed between the prime contractor and the DBE subcontractors as listed on the agreement form. If a DBE Subcontractor is unable to perform the work as listed on this agreement form, the prime contractor will follow the substitution/replacement approval process as outlined in the Contract DBE Special Provision.

IMPORTANT: The signatures of the prime contractor and the DBE, and the total commitment amount must always be on the same page.

Prime Contractor:	Name/Title (please print):
Address:	Signature:
Phone: Fax:	
E-mail:	Date:
DBE:	Name/Title (please print):
Vendor No.:	
Address:	Signature:
Phone: Fax:	
E-mail:	Date:
Subcontractor (if the DBE will be a second tier sub):	Name/Title (please print):
Address:	Signature:
Phone: Fax:	
E-mail:	Date:

The Texas Department of Transportation maintains the information collected through this form. With few exceptions, you are entitled on request to be informed about the information that we collect about you. Under §§552.021 and 552.023 of the Texas Government Code, you also are entitled to receive and review the information. Under §559.004 of the Government Code, you are also entitled to have us correct information about you that is incorrect.

To ensure prompt and efficient handling of your project file we are requesting that all commitments to be presented to the Office of Civil Rights, using this basic format.

Attachment 2

Texas Department of Transportation
DBE Monthly Progress Report

Form SMS 4903
(Rev. 07/08)
Page 1 of 1

Project: _____ Contract CSJ: _____

County: _____ District: _____

Letting Date: _____ For Month of (Mo./Yr.): _____

Contractor: _____ Contract Amount: _____

DBE Goal: _____ % DBE Goal Dollars: _____

Vendor Number	Name of DBE Sub/Supplier	* RC or RN	** DBE $ Amt Paid for Work Performed this Period (X)	*** $ Amt Paid to Non-DBE 2nd Tier Subs and Haulers (Y)	Amt Paid to DBEs to Date (X-Y)	For TxDOT use Only

* Race Conscious or Race Neutral.

** Goal/commitment progress report amount and/or race-neutral amount. **Do not subtract** non-DBE second-tier subcontractors and haulers from this column.

*** Report amount of payment DBE subcontractors paid to non-DBE subcontractors/haulers.

If using a non-DBE hauling firm that leases from DBE truck owner-operators, payments made to each owner-operator must be reported separately.

Any changes to the DBE commitments approved by the department must be reported to the area engineer.

Submission of this report for periods of negative DBE activity is required. This report is required until all DBE subcontracting or material supply activity is completed.

I hereby certify that the above is a true and correct statement of the amounts paid to the DBE firms listed above.

Signature: _____ Date: _____
Company Official

This report must be sent to the area engineer's office within 15 days following the end of the calendar month.

The Texas Department of Transportation maintains the information collected through this form. With few exceptions, you are entitled on request to be informed about the information that is collected about you. Under §§552.021 and 552.023 of the Texas Government Code, you also are entitled to receive and review the information. Under §559.004 of the Government Code, you are also entitled to have us correct information about you that is incorrect.

Attachment 3

Texas Department of Transportation

DBE Final Report

Form SMS 4904
(Rev. 07/08)
Page 1 of 1

The DBE final report form should be filled out by the contractor and submitted to the appropriate district office upon completion of the project. One copy of the report must be submitted to the area engineer's office. The report should reflect all DBE activity on the project. The report will aid in expediting the final estimate for payment. If the DBE goal requirements were not met, documentation supporting good faith efforts must be submitted.

Project: _____ Contract CSJ: _____

County: _____ Control Project: _____

Letting Date: _____ DBE Goal: _____ %

Contractor: _____ Contract Amount: _____

Vendor number	Name of DBE Sub/Supplier	*RC or RN	** DBE goal – total $ amt pd to date	*** $ amt pd to non-DBE 2nd tier subs & haulers	For TxDOT Use Only

* Race Conscious or Race Neutral.

** Goal/commitment progress report amount and/or race-neutral amount. Do not subtract non-DBE second-tier subcontractors and haulers from this column.

*** DBE subcontractors paid to non-DBE subcontractors/haulers.

This is to certify that _____ % of the work was completed by Disadvantaged Business Enterprises as stated above.

By _____ Per: _____

Name of General Contractor — Contractor's Signature

Subscribed and sworn to before me, this _____ day of _____, A.D. _____

_____ _____

Notary Public — County

My commission expires: _____

The Texas Department of Transportation maintains the information collected through this form. With few exceptions, you are entitled on request, to be informed about the information that is collected about you. Under §§552.021 and 552.023 of the Texas Government Code, you also are entitled to receive and review the information. Under §559.004 of the Government Code, you are also entitled to have us correct information about you that is incorrect.

Attachment 4

Prompt Payment Certification
(Federal-Aid Projects)

Form 2177
(Rev. 7/2007)
(GSD-EPC)

In accordance with the requirements of Article 6.e of the DBE special provision and the prompt payment clause under Article 9.6.B and related special provisions, submit this certification form to the Engineer prior to the end of the month following the month payments were received from the department and the month following the month when final acceptance occurred, at the end of the project. (Final submission may be made prior to final acceptance if all subcontractor work and supplier material furnished for the project is complete and the subcontractors and suppliers final payments have been made in full.) The Engineer may withhold payments or suspend work for failure to submit this form or provide prompt payment in accordance with the contract. This certification is applicable to materials the Contractor purchases to remain as part of the final project and to first tier subcontractors on the project and associated project specific locations. (Subcontractors and suppliers are to comply with the prompt payment requirements.)

Certification

"I certify that to the best of my knowledge and with the exception of those subcontractors or suppliers listed below, all subcontractors and suppliers have been paid in accordance with the contract (10 days after receiving payment for the work performed by the subcontractor) and that any retainage held on a subcontractor or supplier's work has been released within 10 days after satisfactory completion of all of the subcontractors' or suppliers' work."

Project Number: _____ CCSJ: _____

Estimate Period: _____ (Month) _____ (Year) or _____ (Final Subcontractor and Supplier Payment Date)

_____ (Signature) _____ (Title) _____ (Date)

Printed Name: _____

The following firms have not been paid for reasons listed:

Firm	* Reason for Non-Payment

*Only reasons based on dispute on subcontractor or supplier noncompliance may be accepted.

This certification is for the department's information only and does not place any obligations on the part of the department with regard to any part, including but not limited to, any subcontractor and Contractor's surety.

Clarification of FHWA's Oversight Role in Accessibility

Memorandum

U.S. Department of Transportation

Federal Highway Administration

Subject: **ACTION:** Clarification of FHWA's Oversight Role in Accessibility

Date: 9-12-06

From: Frederick D. Isler
Associate Administrator for Civil Rights
King W. Gee
Associate Administrator for Infrastructure

Reply to Attn of: HCR-1
HIF-1

To: Associate Administrators
Chief Counsel
Chief Financial Officer
Directors of Field Services
Resource Center Director and Operations Managers
Division Administrators
Federal Lands Highway Division Engineers

The Federal Highway Administration (FHWA) recognizes the need for the transportation system to be accessible to all users. The purpose of this memorandum is to clarify FHWA's role and responsibility to oversee compliance on pedestrian access required by the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). Since 1978, FHWA has promoted accessible transportation systems through technical assistance and guidance on ADA and Section 504. In addition, accessibility improvements are eligible for Federal-aid funding.

The FHWA is responsible for implementation of pedestrian access requirements from the ADA and Section 504. This is accomplished through stewardship and oversight over all Federal, State, and local governmental agencies ("public agencies") that build and maintain highways and roadways, whether or not they use Federal funds on a particular project.

Policy

In February 2000, the FHWA issued a policy providing technical guidance to integrate facilities for pedestrians, including persons with disabilities, into the transportation infrastructure. The guidance can be found at www.fhwa.dot.gov/environment/bikeped/design.htm#d4.

The ADA and Section 504 do not require public agencies to provide pedestrian facilities. However, where pedestrian facilities exist they must be accessible. Furthermore, when public agencies construct improvements providing access for pedestrians, the completed project also must meet accessibility requirements for persons with disabilities to the maximum extent feasible.

Planning

Title 23 requires that long-range transportation plans and transportation improvement programs, in both statewide and metropolitan planning processes, provide for the development and integrated management and operation of accessible transportation systems and facilities.

Additionally, State DOTs and Metropolitan Planning Organizations (MPOs) must certify (at least biennially for State DOTs and annually for MPOs) that the transportation planning process is being carried out or conducted in accordance with all FHWA, Federal Transit Administration and other

applicable Federal statutory and regulatory requirements [see 23 CFR 450.220 and 23 CFR 450.334, respectively]. Further, 23 CFR 450.316(b)(3) requires the metropolitan planning process to identify actions necessary to comply with the ADA and Section 504.

Transition Plans

The ADA and Section 504 require State and local governments with 50 or more employees to perform a self-evaluation of their current services, policies, and practices that do not or may not meet ADA requirements. The public agency must develop a Transition Plan addressing these deficiencies. This plan assesses the needs of persons with disabilities, and then schedules the required pedestrian accessibility upgrades. The Transition Plan is to be updated periodically, with its needs reflected in the processes utilized by State DOTs, MPOs, and transit agencies to develop the Statewide Transportation Improvement Programs and metropolitan Transportation Improvement Programs.

Projects

Public agencies should work to meet accessibility requirements throughout the project delivery process. Issues surrounding pedestrian accessibility should be addressed at the earliest stage possible to reduce or prevent conflicts with other right-of-way, planning, environmental, and design considerations. This could include the acquisition of right-of-way and use of special plan details for specific locations to remove barriers. Projects requiring pedestrian accessibility include projects for new construction and projects altering existing street and highway facilities.

New Construction

All projects for new construction that provide pedestrian facilities must incorporate accessible pedestrian features to the extent technically feasible, without regard to cost. The development process should ensure accessibility requirements are incorporated in the project.

Alterations

Alterations shall incorporate accessibility improvements to existing pedestrian facilities to the extent that those improvements are in the scope of the project and are technically feasible, without regard to cost. Projects altering the usability of the roadway must incorporate accessible pedestrian improvements at the same time as the alterations to the roadway occur. See **Kinney v. Yerusalim**, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 511 U.S.C. 1033 (1994). Alterations are changes to a facility in the public right-of-way that affect or could affect access, circulation, or use by persons with disabilities.

The FHWA has determined that alterations are projects that could affect the structure, grade, function, and use of the roadway. Alteration projects include reconstruction, major rehabilitation, structural resurfacing, widening, signal installation, pedestrian signal installation, and projects of similar scale and effect.

Maintenance

Maintenance activities are not considered alterations. Therefore, maintenance projects do not require simultaneous improvements to pedestrian accessibility under the ADA and Section 504. The U.S. Department of Justice (DOJ) and the courts consider maintenance activities to include filling potholes. The FHWA has determined that maintenance activities include actions that are intended to preserve the system, retard future deterioration, and maintain the functional condition of the roadway without increasing the structural capacity. Maintenance activities include, but are not limited to, thin surface overlays (nonstructural), joint repair, pavement patching (filling potholes), shoulder repair, signing, striping, minor signal upgrades, and repairs to drainage systems.

As part of maintenance operations, public agencies' standards and practices must ensure that the day-to-day operations keep the path of travel open and usable for persons with disabilities, throughout the year. This includes snow and debris removal, maintenance of pedestrian traffic in work zones, and correction of other disruptions. Identified accessibility needs should be noted and incorporated into the transition plan.

Accessibility Design Criteria for Sidewalks, Street Crossings, and Trails

Sidewalks and Street Crossings

Where sidewalks are provided, public agencies shall provide pedestrian access features such as continuous, unobstructed sidewalks, and curb cuts with detectable warnings at highway and street crossings. 28 CFR 35.151(c), referencing 28 CFR Part 36, App. A, ADA Accessibility Guidelines (ADAAG). The FHWA encourages the use of ADAAG standards. If pedestrian signals are provided, they must have a reasonable and consistent plan to be accessible to persons with visual disabilities.

Sidewalks and street crossings generally should use the guidelines the Access Board is proposing for public rights-of-way. The FHWA distributed an information memorandum on November 20, 2001, stating that ***Designing Sidewalks and Trails, Part II, Best Practices Design Guide*** can be used to design and construct accessible pedestrian facilities. This report provides information on how to implement the requirements of Title II of the ADA. *Designing Sidewalks and Trails for Access* is the most comprehensive report available for designing sidewalks and street crossings and contains compatible information on providing accessibility with information published by the Access Board in the ADAAG. This report can be found at www.fhwa.dot.gov/environment/sidewalk2.

When the Access Board completes guidelines for public rights-of-way and they are adopted by the United States Department of Transportation and DOJ as standards under the ADA and Section 504, they will supersede the currently used standards and criteria.

When Federal-aid highway program funds are used for parking facilities, or buildings such as transit facilities, rest areas, information centers, transportation museums, historic preservation projects, or other projects where pedestrians are expected, the project must meet the current applicable accessibility standards, whether or not the project is within the public right-of-way. The ADAAG includes special provisions for building alterations and for historic preservation projects.

Shared Use Paths and Trails

The design standards for shared use paths and trails are specific to the function of the path or trail:

- Shared use paths and pedestrian trails that function as sidewalks shall meet the same requirements as sidewalks. Where shared use paths and pedestrian trails cross highways or streets, the crossing also shall meet the same requirements as street crossings, including the provision of detectable warnings.

- Shared use paths and pedestrian trails that function as trails should meet the accessibility guidelines proposed in the Access Board's *Regulatory Negotiation Committee on Accessibility for Outdoor Developed Areas Final Report* found at www.access-board.gov/outdoor/outdoor-rec-rpt.htm. This report also has guidelines for Outdoor Recreation Access Routes (routes connecting accessible elements within a picnic area, camping area, or a designated trailhead).

- Recreational trails primarily designed and constructed for use by equestrians, mountain bicyclists, snowmobile users, or off-highway vehicle users, are exempt from accessibility requirements even though they have occasional pedestrian use.

Most trailside and trailhead structural facilities (parking areas, restrooms) must meet the ADAAG standards.

Technical Feasibility and Cost

When constructing a new transportation facility or altering an existing transportation facility, a public agency should consider what is included within the scope of the project. For elements that are within the scope of the project, the ADAAG provides that "Any features of a...facility that are being altered and can be made accessible shall be made accessible [i.e., made to conform with ADAAG] within the scope of the alteration." ADAAG 4.1.6(j). The only exception to this rule is where conformity with ADAAG is "technically infeasible," meaning that "existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame [e.g., in the case of a highway project, a bridge support]; or because other existing physical or site constraints prohibit modification of addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility." ADAAG 4.1.6(j).

Where making an alteration that meets accessibility requirements is technically infeasible, the public agency must ensure that the alteration provides accessibility to the "maximum extent feasible." If a public agency believes that full ADAAG compliance is technically infeasible, the public agency should document that the proposed solution to the problem meets the "maximum extent feasible" test. With respect to any element of an alteration that is within the scope of the project and is not technically infeasible, DOJ guidance provides that under ADAAG standards "cost is not a factor." DOJ Technical Assistance Manual for Title II of the ADA, II-6.3100(4). Consequently, if the accessibility improvement is technically feasible, the public agency must bear the cost of fully meeting ADAAG standards.

However, cost may be a factor in determining whether to undertake a stand-alone accessibility

improvement identified in a Transition Plan. For example, if an existing highway, not scheduled for an alteration, is listed in the public agency's Transition Plan as needing curb cuts, the public agency may consider costs that are "unduly burdensome." The test for being unduly burdensome is the proportion of the cost for accessibility improvements compared to the agency's overall budget, not simply the project cost.
If the project alters any aspect of the pedestrian route, it must be replaced with accessible facilities. Additional work outside of the scope and limits of the project altering a facility is at the discretion of the agency. However, any features not conforming to ADA requirements outside the project scope should be added to the Transition Plan.

FHWA Responsibilities

The FHWA is responsible for ensuring public agencies meet the requirements of the ADA and Section 504 for pedestrian access for persons with disabilities. Under DOJ regulations, FHWA divisions must work with their State DOTs, MPOs, and local public agencies to ensure ADA and Section 504 requirements are incorporated in all program activities for all projects within the public right-of-way regardless of funding source. Program activities include project planning, design, construction, and maintenance. Furthermore, FHWA is responsible for ensuring accessibility requirements for projects that are not within public right-of-way, but use funding through FHWA. This includes parking areas, information centers, buildings, shared use paths, and trails. Divisions have a legal responsibility to work with State agencies or other recipients to ensure ADA and Section 504 requirements are incorporated into all projects using funding through FHWA.
For all projects that use Federal funds as part of the financing arrangements, the division offices need to periodically:

- Review those projects, where they have oversight responsibilities, for accommodation of pedestrians. The divisions shall not approve Federal funding for projects that do not adequately provide pedestrian access for persons with disabilities where the project scope and limits include pedestrian facilities in the public right-of-way.

- Review the Stewardship Agreement to ensure pedestrian accessibility requirements are included, as appropriate.

- Review the State DOT, MPO, and/or local jurisdiction processes, procedures, guidelines, and/or policies that address ADA in transportation planning and programming processes and how accessibility commitments are addressed in transportation investment decisions.

- Assist transportation agencies in updating their Transition Plans. The United States Department of Transportation Section 504 regulation requires FHWA to monitor the compliance of the self-evaluation and Transition Plan of Federal-aid recipients (49 CFR 27.11). The ADA deadline for completing the accessibility improvements within the Transition Plan was in 1995. For those State and local governments that have not performed the self-evaluation and prepared a plan, it is critical that they complete the process.

- Encourage and facilitate training for FHWA personnel on accessible pedestrian features.

- Ensure pedestrian accessibility compliance through periodic program reviews of recipients' highway planning, design, and construction activities.

- In addition, the Federal Lands Highway Divisions should ensure that each direct Federal construction project fulfills both policy guidance on pedestrian access and meets the minimum ADA and Section 504 accessibility requirements.

For all highway, street and trail facilities, regardless of whether Federal funds are involved, the division offices need to:

- Perform onsite review of complaints about accessibility and report the findings of the review to HCR-1.

- Make presentations and offer training on pedestrian accessibility at meetings, conferences, etc.

- In contacts with State and local officials, encourage them to develop procedures for incorporating pedestrian accessibility into their projects.

Additional Information and Resources

A Web site with questions and answers concerning recurring issues, training opportunities, and background legal information on FHWA's responsibilities under the ADA and Section 504 is located at http://www.fhwa.dot.gov/civilrights/index.htm. This memorandum has been reviewed and approved by the U.S. Department of Transportation General Counsel as consistent with applicable disability law.

Questions concerning these obligations may be directed to:

- For Accessibility Policy: Candace Groudine, Bob Cosgrove, Office of Civil Rights
- For Design Standards: William A. Prosser, Office of Program Administration
- For Trails: Christopher Douwes, Office of Natural and Human Environment
- For Construction and Maintenance: Christopher Newman, Office of Asset Management
- For Legal: Lisa MacPhee, Office of the Chief Counsel

This page last modified on March 6, 2007

Questions and Answers About ADA/Section 504

These questions and answers are presented to help FHWA and its State and local transportation department partners better understand roles and responsibilities to provide accessible transportation facilities under the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 (Section 504). These questions and answers are derived from extensive experience and input from the FHWA Offices of Civil Rights, Infrastructure, Chief Counsel, and Planning, Environment, and Realty. Like all guidance material, these questions and answers are not, in themselves, legally binding and do not constitute regulations. These Q&As explain the FHWA's position on the implementation of the ADA and Section 504. These questions and answers have been reviewed and approved by the U.S. Department of Transportation General Counsel as consistent with applicable disability law.

The FHWA Offices of Civil Rights, Infrastructure, Chief Counsel, and Planning, Environment, and Realty developed these questions and answers and approved them as consistent with the language and intent of the ADA and Section 504. The questions and answers outlined in this document are to be applied to Federal, State, and local governmental agencies; hereafter called "public agencies" or "agencies."

Public Agencies covered by ADA and Section 504

1. What authority requires public agencies to make public right of way accessible for all pedestrians with disabilities?
2. What do these statutes require public agencies to do?
3. Does the ADA require public agencies to provide pedestrian facilities?
4. What is FHWA's responsibility for assuring access for persons with disabilities?
5. What public agencies must provide accessible pedestrian walkways for persons with disabilities?
6. Can a public agency make private individuals or businesses responsible for ADA and Section 504 mandated pedestrian access?
7. What United States Department of Justice (USDOJ) and United States Department of Transportation (USDOT) regulations govern accessibility requirements?
8. What is FHWA's authority to implement ADA and Section 504 requirements?
9. What is the public right of way?

Transition plans

10. What authority requires public agencies to make transition plans?
11. What should a transition plan include?
12. How does the transition plan relate to a public agency's transportation planning process?
13. What public agencies must make a transition plan?
14. When should the FHWA review an agency's transition plan?
15. When and how should a transition plan be updated?

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17. What projects constitute an alteration to the public right of way?
18. What activities are not considered to be alterations?

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19. Does a project altering a public right of way require simultaneous accessibility improvements?

20. When does the scope of an alteration project trigger accessibility improvements for people with disabilities?

21. Do maintenance activities require simultaneous improvements of the facility to meet ADA standards?

22. When should accessible design elements be incorporated into projects in the public right of way?

Cost

23. How does cost factor into a public agency's decision in its transition plan concerning which existing facilities must comply with ADA and Section 504 pedestrian access requirements?

24. For a new project planned outside of the transition plan, with ADA accessibility improvements required to make the facility readily accessible and useable by individuals with disabilities, can cost be a reason not to complete an ADA-required accessibility improvement?

25. For an alteration project planned outside of the transition plan, with ADA accessibility improvements required within the scope of the project, can cost be a reason to decide what ADA-required improvements will be completed?

26. What role does the "maximum extent feasible" standard play for ADA accessibility requirements in altered projects?

27. What should a public agency do when it does not control all of the public right of way required to provide access for persons with disabilities?

28. Can a public agency delay compliance with the ADA and Section 504 on alteration projects through a systematic approach to schedule projects?

Elements of Accessible Design

29. What are the elements of an accessible design?

Funding

30. What sources of funding may be used to comply with ADA and Section 504 requirements?

Maintenance

31. What obligation does a public agency have regarding snow removal in its walkways?

32. What day-to-day maintenance is a public agency responsible for under the ADA?

Criteria

33. What accessibility training is available?

34. Where is information on the criteria to be used in developing accessible facilities?

Public Agencies covered by ADA and Section 504

1. *What authority requires public agencies to make public right-of-way accessible for all pedestrians with disabilities?*
Public rights-of-ways and facilities are required to be accessible to persons with disabilities through the following statutes: Section 504 of the Rehabilitation Act of 1973 (Section 504) (29 U.S.C. §794) and Title II of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. §§ 12131-12164). The laws work together to achieve this goal. (9-12-06)

2. *What do these statutes require public agencies to do?*
These statutes prohibit public agencies from discriminating against persons with disabilities by excluding them from services, programs, or activities. These statutes mean that the agency must provide pedestrian access for persons with disabilities to the agency's streets and sidewalks, whenever a pedestrian facility

exists. Regulations implement this requirement by imposing standards for accessible features such as curb cuts, ramps, continuous sidewalks, and detectable warnings. (9-12-06)

3. *Does the ADA require public agencies to provide pedestrian facilities?*
No. However, when a public agency provides a pedestrian facility, it must be accessible to persons with disabilities to the extent technically feasible.

4. *What is FHWA's responsibility for assuring access for persons with disabilities?*
FHWA is responsible for ensuring access for persons with disabilities in four areas:

   1. For surface transportation projects under direct FHWA control (e.g., Federal Lands projects): FHWA is responsible for ensuring that project planning, design, construction, and operations adequately address pedestrian access for people who have disabilities.

   2. For Federally funded surface transportation projects that provide pedestrian facilities within the public right-of-way: FHWA is responsible for ensuring that the public agencies' project planning, design, and construction programs provide pedestrian access for persons with disabilities. FHWA-funded projects outside of the public right-of-way, such as Transportation Enhancement projects, must also adhere to these requirements.

   3. For pedestrian facilities within the public right-of-way, or any other FHWA enhancement project, regardless of funding source: FHWA is responsible for investigating complaints. 28 CFR §§ 35.170 – 35.190.

   4. FHWA should provide or encourage accessibility training for Federal, State, and local agencies and their contractors.

   FHWA does not have ADA oversight responsibilities for projects outside of the public right-of-way that do not use Federal surface transportation program funds. (9-12-06)

5. *What public agencies must provide accessible pedestrian walkways for persons with disabilities?*
All State and local governmental agencies must provide pedestrian access for persons with disabilities in compliance with ADA Title II. 42 U.S.C. §12131(1). Federal, State, and local governments must provide pedestrian access for persons with disabilities in compliance with Section 504 standards. 29 U.S.C. §794(a). (9-12-06)

6. *Can a public agency make private individuals or businesses responsible for ADA and Section 504 mandated pedestrian access?*
No. The public agency is responsible for providing access for persons with disabilities. Private entities with joint responsibility for a public right-of-way, such as a private tenant on public property, are responsible for accessibility for persons with disabilities on the public right-of-way under Title II of ADA. The lease or other document creating this legal relationship should commit the private party to ensuring accessibility. In addition, public/private partnership relationships for the public right-of-way retain accessibility obligations to persons with disabilities under Title II. If the private entity eventually takes over the right-of-way in its entirety, then the private entity becomes responsible for accessibility for persons with disabilities under the private entity's obligations under Title III of the ADA. (9-12-06)

7. *What United States Department of Justice (DOJ) and United States Department of Transportation (DOT) regulations govern accessibility requirements?*
The DOJ ADA regulation is 28 CFR Part 35. The DOT Section 504 regulation at 49 CFR Part 27 governs public agencies, with the ADA incorporated at 49 CFR §27.19. Additional regulations drafted specifically for recipients of the Federal Transit Administration are at 49 CFR Part 37. (9-12-06)

8. *What is FHWA's authority to implement ADA and Section 504 requirements?*
The DOJ regulations designate the DOT as the agency responsible for overseeing public agencies' compliance with the ADA. 28 CFR §35.190(b)(8). The DOT has delegated to the FHWA the responsibility to ensure ADA compliance in the public right-of-way and on projects using surface transportation funds. (9-12-06)

9. *What is the public right-of-way?*
The public right-of-way consists of everything between right-of-way limits, including travel lanes, medians, planting strips, sidewalks, and other facilities. (9-12-06)

Transition plans

10. *What authority requires public agencies to make transition plans?*
The ADA requires public agencies with more than 50 employees to make a transition plan. 28 CFR §35.150(d). (9-12-06)

11. *What should a transition plan include?*
The transition plan must include a schedule for providing access features, including curb ramps for walkways. 28 CFR §35.150(d)(2). The schedule should first provide for pedestrian access upgrades to State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas. 28 CFR §35.150(d)(2). The transition plan should accomplish the following four tasks:
    1. identify physical obstacles in the public agency's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
    2. describe in detail the methods that will be used to make the facilities accessible;
    3. specify the schedule for taking the steps necessary to upgrade pedestrian access to meet ADA and Section 504 requirements in each year following the transition plan; and
    4. indicate the official responsible for implementation of the plan. 28 CFR §35.150(d)(3). (9-12-06)

12. *How does the transition plan relate to a public agency's transportation planning process?*
The ADA transition plan is intended to identify system needs and integrate them with the State's planning process. The transition plan and its identified needs should be fully integrated into the public agency's Statewide Transportation Improvement Program (STIP) and metropolitan Transportation Improvement Program (TIP). Agencies should incorporate accessibility improvements into the transportation program on an ongoing basis in a variety of ways:
    1. Any construction project that is programmed must meet accessibility requirements when built.
    2. Accessibility improvements identified in the transition plan that are not within the scope of an alteration project should be incorporated into the overall transportation planning process. This can be accomplished through the development of stand-alone accessibility projects.
    3. As a means to identify ADA compliance needs, during scheduling maintenance activities, the agencies should identify ADA accessibility needs and incorporate them into the overall transportation planning process. (9-12-06)

13. *What public agencies must make a transition plan?*
The ADA requires any public agency with more than 50 employees to make a transition plan setting forth the steps necessary to make its facilities accessible to persons with disabilities. 28 CFR §35.150(d). (9-12-06)

14. *When should the FHWA review an agency's transition plan?*
DOT Section 504 regulation requires FHWA to monitor the compliance of the self-evaluation and transition plans of Federal-aid recipients (49 CFR §27.11). The FHWA Division offices should review pedestrian access compliance with the ADA and Section 504 as part of its routine oversight activities as defined in their stewardship plan. (9-12-06)

15. *When and how should a transition plan be updated?*
An agency's transition plan should have been completed by January 26, 1992, and should be based on updates of the self-evaluation conducted to comply with the requirements of Section 504. 28 CFR §35.105. The plan should be updated periodically to ensure the ongoing needs of the community continue to be met. The transition plan should be coordinated appropriately with the STIP and the TIP. Changes to the plan shall be made available to the public for comment. The public agency should specifically target any local community groups representing persons with disabilities for comment, to ensure that the agency is meeting the local priorities of the persons with disabilities in that community. If a public agency has never completed a transition plan, the Division should inform the public agency to complete a transition plan now and review that public agency's completed transition plan.
The ADA deadline for completing the improvements listed in the transition plans was January 26, 1995. For those State and localities that have not completed their self-evaluation and transition plans, it is critical that they complete this process. (9-12-06)

Projects Covered by the ADA and Section 504

16. *What projects must provide pedestrian access for persons with disabilities?*
Any project for construction or alteration of a facility that provides access to pedestrians must be made accessible to persons with disabilities. 42 U.S.C. §§ 12131 - 12134; 28 CFR §§ 35.150, 35.151; **Kinney v. Yerusalim**, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994). (9-12-06)

17. *What projects constitute an alteration to the public right-of-way?*
An alteration is a change to a facility in the public right-of-way that affects or could affect access, circulation, or use. Projects altering the use of the public right-of-way must incorporate pedestrian access improvements within the scope of the project to meet the requirements of the ADA and Section 504. These projects have the potential to affect the structure, grade, or use of the roadway. Alterations include items such as reconstruction, major rehabilitation, widening, resurfacing (e.g. structural overlays and mill and fill), signal

installation and upgrades, and projects of similar scale and effect. (9-12-06)

18. *What activities are not considered to be alterations?*
The DOJ does not consider maintenance activities, such as filling potholes, to be alterations. The DOJ does consider resurfacing beyond normal maintenance to be an alteration. DOJ's ADA Title II Technical Assistance Manual, § II-6.6000, 1993.
The FHWA has determined that maintenance activities include actions that are intended to preserve the system, retard future deterioration, and maintain the functional condition of the roadway without increasing the structural capacity. These activities include, but are not limited to, thin surface treatments (nonstructural), joint repair, pavement patching (filling potholes), shoulder repair, signing, striping, minor signal upgrades, and repairs to drainage systems. (9-12-06)

Timing of Accessibility Improvements

19. *Does a project altering a public right-of-way require simultaneous accessibility improvements?*
Yes. An alteration project must be planned, designed, and constructed so that the accessibility improvements within the scope of the project occur at the same time as the alteration. 29 CFR § 35.151; **Kinney v. Yerusalim**, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994).
The ADA does not stipulate how to perform simultaneous accessibility improvements. For example, a public agency may select specialty contractors to perform different specialized tasks prior to completion of the alteration project or concurrently with an ongoing project. (9-12-06)

20. *When does the scope of an alteration project trigger accessibility improvements for people with disabilities?*
The scope of an alteration project is determined by the extent the alteration project directly changes or affects the public right-of-way within the project limits. The public agency must improve the accessibility of only that portion of the public right-of-way changed or affected by the alteration. If a project resurfaces the street, for accessibility purposes the curbs and pavement at the pedestrian crosswalk are in the scope of the project, but the sidewalks are not. Any of the features disturbed by the construction must be replaced so that they are accessible. All remaining access improvements within the public right-of-way shall occur within the schedule provided in the public agency's planning process. (9-12-06)

21. *Do maintenance activities require simultaneous improvements of the facility to meet ADA standards?*
No. Maintenance activities do not require simultaneous improvements to pedestrian accessibility under the ADA and Section 504. However, in the development of the maintenance scope of work identified accessibility needs should be incorporated into the transition process. (9-12-06)

22. *When should accessible design elements be incorporated into projects in the public right-of-way?*
FHWA encourages the consideration of pedestrian needs in all construction, reconstruction, and rehabilitation projects. If a public agency provides pedestrian facilities, those facilities must be accessible to persons with disabilities. A public agency is not relieved of its obligation to make its pedestrian facilities accessible if no individual with a disability is known to live in a particular area. This is true regardless of its funding source. DOJ's ADA Title II Technical Assistance Manual, § II-5.1000, 1993. (9-12-06)

Cost

23. *How does cost factor into a public agency's decision in its transition plan concerning which existing facilities must comply with ADA and Section 504 pedestrian access requirements?*
For existing facilities requiring accessibility improvements as scheduled in the transition plans, the public agency must provide accessibility improvements unless the cost of the upgrades is unduly burdensome. The test for being unduly burdensome is the proportion of the cost for accessibility improvements compared to the agency's overall budget, not simply the project cost. 28 CFR Part 35, App. A, discussion at §35.150, ¶¶ 4 – 7. The decision that pedestrian access would be unduly burdensome must be made by the head of a public agency or that official's designee, accompanied by a written statement of the reasons for the decision. 28 CFR §35.150(a)(3). (9-12-06)

24. *For a new project planned outside of the transition plan, with ADA accessibility improvements required to make the facility readily accessible and useable by individuals with disabilities, can cost be a reason not to complete an ADA-required accessibility improvement?*
No. Cost may not be a reason to fail to construct or delay constructing a new facility so that the facility is readily accessible to and useable by persons with disabilities under the ADAAG standards. 28 CFR §35.151(a); see DOJ Technical Assistance Manual for Title II of the ADA, II-6.3100(3). (9-12-06)

25. *For an alteration project planned outside of the transition plan, with ADA accessibility improvements required within the scope of the project, can cost be a reason to decide what ADA-required improvements will be completed?*
No. Cost may not be a reason for a public entity to fail to complete an ADA-required improvement within the

scope of an alteration project under the ADAAG standards. A public agency must complete any ADA-required accessibility improvements within the scope of an alteration project to the maximum extent feasible. 28 CFR §35.151(b); DOJ Technical Assistance Manual for Title II of the ADA, II-6.3100(4). (9-12-06)

26. *What role does the "maximum extent feasible" standard play for ADA accessibility requirements in altered projects?*
In an alteration project, the public agency must incorporate the ADA accessibility standards to the maximum extent feasible. 28 CFR §35.151(b). The feasibility meant by this standard is physical possibility only. A public agency is exempt from meeting the ADA standards in the rare instance where physical terrain or site conditions restrict constructing or altering the facility to the standard. ADA Accessibility Guidelines 4.1.6(1)(j). Cost is not a factor in determining whether meeting standards has been completed to the maximum extent feasible. DOJ's ADA Title II Technical Assistance Manual, § II-6.3200(3)-(4), 1993. No particular decisionmaking process is required to determine that an accessibility improvement is not technically feasible, but the best practice is to document the decision to enable the public agency to explain the decision in any later compliance review. (9-12-06)

27. *What should a public agency do when it does not control all of the public right-of-way required to provide access for persons with disabilities?*
The public agency should work jointly with all others with interests in the highway, street, or walkway to ensure that pedestrian access improvements occur at the same time as any alteration or new project. The ADA encourages this cooperation by making each of the public agencies involved subject to complaints or lawsuits for failure to meet the ADA and Section 504 requirements. 28 CFR §§ 35.170 – 35.178. (9-12-06)

28. *Can a public agency delay compliance with the ADA and Section 504 on alteration projects through a systematic approach to schedule projects?*
No. All pedestrian access upgrades within the scope of the project must occur at the same time as the alteration. **Kinney v. Yerusalim**, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994). (9-12-06)

Elements of Accessible Design

29. *What are the elements of an accessible design?*
Public agencies have the choice of whether to follow the standards in the ADA Accessibility Guidelines (ADAAG) or the Uniform Federal Accessibility Standards (UFAS). 28 CFR §35.151(c); (appendix A to 28 CFR Part 36). FHWA encourages public agencies to use ADAAG. Under the ADAAG standards, an accessible design to a highway, street, or walkway includes accessible sidewalks and curb ramps with detectable warnings. 28 CFR §35.151(c) and (e) (curb ramps), ADAAG 4.3-4.5 (accessible routes), 4.7 (curb ramps with detectable warnings), 4.29 (detectable warnings). Continuously maintained sidewalks are required by the case of **Barden v. City of Sacramento**, 292 F.3d 1073 (9th Cir. 2002), cert. denied, 123 S.Ct. 2639 (2003). Accessible pedestrian signals and signs must be considered, with a reasonable and consistent plan to facilitate safe street crossings. 28 CFR §35.151(c); 23 U.S.C. §217(g)(2). (9-12-06)

Funding

30. *What sources of funding may be used to comply with ADA and Section 504 requirements?*

Federal Funding Opportunities for Pedestrian Projects and Programs

ACTIVITY	NHS	STP	HSIP	RHC	TE	CMAQ	RTP	FTA	TrE	BRI	402	PLA	TCSP	FLH	BYW	SRTS
Pedestrian plan		*	*			*						*	*			
Paved shoulders	*	*	*	*	*	*				*			*	*	*	
Shared-use path/trail	*	*	*		*	*	*			*			*	*	*	*

Recreational trail							*							*		
Spot improvement program		*	*		*	*							*			*
Maps		*			*	*					*		*			*
Trail/highway intersection	*	*	*		*	*	*						*	*	*	*
Sidewalks, new or retrofit	*	*	*	*	*	*		*	*	*			*	*	*	*
Crosswalks, new or retrofit	*	*	*	*	*	*		*	*				*	*	*	*
Signal improvements	*	*	*	*	*	*							*			*
Curb cuts and ramps	*	*	*	*	*	*							*			*
Traffic calming		*	*	*									*			*
Safety brochure/book		*			*	*					*		*			*
Training	*	*	*		*	*	*				*		*			*

NHS National Highway System

STP Surface Transportation Program

HSIP Highway Safety Improvement Program

RHC Railway-Highway Crossing Program

TrE Transit Enhancements

BRI Bridge (HBRRP)

402 State and Community Traffic Safety Program

PLA State/Metropolitan Planning Funds

TE Transportation Enhancement Activities	**TCSP** Transportation and Community and System Preservation Program
CMAQ Congestion Mitigation/Air Quality Program	**FLH** Federal Lands Highways Program
RTP Recreational Trails Program	**BYW** Scenic Byways
FTA Federal Transit Capital, Urban & Rural Funds	**SRTS** Safe Routes to School

32. Each program has its own specific requirements and provisions. Further details on these sources of funding may be found in the following memo: *Flexible Funding for Highways and Transit and Funding for Bicycle & Pedestrian Programs,* February 6, 2006, at www.fhwa.dot.gov/hep/flexfund.htm. (9-12-06)

Maintenance

31. *What obligation does a public agency have regarding snow removal in its walkways?*
A public agency must maintain its walkways in an accessible condition, with only isolated or temporary interruptions in accessibility. 28 CFR §35.133. Part of this maintenance obligation includes reasonable snow removal efforts. (9-12-06)

32. *What day-to-day maintenance is a public agency responsible for under the ADA?*
As part of maintenance operations, public agencies' standards and practices must ensure that the day-to-day operations keep the path of travel on pedestrian facilities open and usable for persons with disabilities, throughout the year. This includes snow removal, as noted above, as well as debris removal, maintenance of accessible pedestrian walkways in work zones, and correction of other disruptions. ADAAG 4.1.1(4). Identified accessibility needs should be noted and incorporated into the transition plan. (9-12-06)

Criteria

33. *What accessibility training is available?*
FHWA has the following training courses available:
    1. National Highway Institute: Pedestrian Facility Design, Course Number 142045. See www.nhi.fhwa.dot.gov/training/brows_catalog.aspx, and search for Course 142045.
    2. Association of Pedestrian and Bicycle Professionals/FHWA: Designing Pedestrian Facilities for Accessibility. See www.apbp.org or contact: Judy Paul at 609-249-0020.
    3. Resource Center Civil Rights Team: Designing Pedestrian Facilities for Accessibility. Contact: Deborah Johnson at 410-962-0089.

34. *Where is information on the criteria to be used in developing accessible facilities?*
The following list of documents contains resources from several agencies and organizations
US Access Board: The Access Board is the Federal agency responsible for developing ADA design standards. The following publications on accessible pedestrian design are available on the Board's Web site at www.access-board.gov:

- Accessibility Guidelines (ADAAG)
- Notice of Availability of Draft Public Rights-of-Way Guidelines
- Accessibility Guidelines Accessible Public Rights-of-Way Design Guide
- Pedestrian Access to Roundabouts
- Detectable Warnings: Synthesis of US and International Practice
- Accessible Pedestrian Signals
- Advisory Committee Report: *Building a True Community*
- Accessible Public Rights-of-Way

- Interfacing Accessible Pedestrian Signals and Traffic Signal
- Controllers

Call 1-800-872-2253, 1-800-993-2822 (TDD) to order the US Access Board Video, *Accessible Sidewalks: Design Issues for Pedestrians with Disabilities*

- Program 1: Pedestrians who use wheelchairs
- Program 2: Pedestrians who have ambulatory impairments
- Program 3: Pedestrians who have low vision
- Program 4: Pedestrians who are blind

The Federal Highway Administration: Pedestrian documents and reports are available at www.fhwa.dot.gov/environment/bikeped/publications.htm. A bicycle and pedestrian publications order form is at www.fhwa.dot.gov/environment/bikeped/order.htm.
Research and best practices design publications on pedestrian accessibility:

- *Designing Sidewalks and Trails for Access, Part I, A Review of Existing Guidelines,* www.fhwa.dot.gov/environment/sidewalks/ (electronic formats only: hard copies out of print).
- *Designing Sidewalks and Trails for Access, Part II, Best Practices Guide,* www.fhwa.dot.gov/environment/sidewalk2/ (electronic formats only: hard copies out of print, HTML version incorporates all the changes listed in the errata sheet: www.fhwa.dot.gov/environment/bikeped/errata.htm).
- Design Guidance Accommodating Bicycle and Pedestrian Travel:
- A Recommended Approach, A DOT Policy Statement on Integrating Bicycling and Walking into Transportation Infrastructure.
- *Manual on Uniform Traffic Control Devices (MUTCD)* provides the standards for traffic control devices and includes guidance on Accessible Pedestrian Signals, Chapter 4E. and Temporary Traffic Control Elements, Chapter 6D. The MUTCD is available at http://mutcd.fhwa.dot.gov.
- Detectable Warnings Memorandum (July 30, 2004).
- Detectable Warnings Memorandum (May 6, 2002): FHWA and the US Access Board encourage the use of the latest recommended design for truncated domes.

Accessible Pedestrian Signals

- Synthesis and Guide to Best Practices Web site - this Web site provides overall information on installation criteria and design considerations.
- Synthesis and Guide to Best Practices Article - this article provides the latest recommended technical specifications for installing accessible pedestrian signals.
- FHWA Pedestrian and Bicycle Safety - includes pedestrian and bicycle safety resources. http://safety.fhwa.dot.gov/ped_bike/ped/index.htm.
- FHWA Pedestrian and Bicycle Safety Research - provides information on issues and research related to improving pedestrian and bicyclist safety. www.tfhrc.gov/safety/pedbike/index.htm.

Other DOT Web sites

- U.S. Department of Transportation Accessibility Web site - The Department is committed to building a transportation system that provides access for all Americans. See www.dot.gov/citizen_services/disability/disability.html.
- Bureau of Transportation Statistics (BTS), Freedom to Travel,

(www.bts.gov/publications/freedom_to_travel/), a report on the travel issues for people who have disabilities.

Institute of Transportation Engineers

- Alternative Treatments for At-Grade Pedestrian Crossings (an informational report which documents studies on crosswalks and warrants used by various entities).

- ITE's Web site, www.ite.org/accessible/, has information on accessible intersection design, *Electronic Toolbox for Making Intersections More Accessible for Pedestrians Who are Blind or Visually Impaired*

Informational Web sites

- Accessible Design for the Blind: information and research on making travel safer and accessible for pedestrians with disabilities, www.accessforblind.org.

- The Pedestrian/Bicycle Information Center (sponsored by FHWA):
  - www.walkinginfo.org
  - www.bicyclinginfo.org

Definitions

Accessible.

Describes a site, building, facility, or portion thereof that complies with the ADA Accessibility Guidelines. (ADAAG 3.5)

Accessible Route.

A continuous unobstructed path connecting all accessible elements and spaces of a building or facility. Interior accessible routes may include corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures. Exterior accessible routes may include parking access aisles, curb ramps, crosswalks at vehicular ways, walks, ramps, and lifts. (ADAAG 3.5)

Accessible Space.

Space that complies with the ADAAG. (ADAAG 3.5)

Alteration.

An alteration is a change to a building or facility that affects or could affect the usability of the building or facility or part thereof. Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, resurfacing of circulation paths or vehicular ways, changes or rearrangement of the structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. (ADAAG 3.5)

Further, each facility or part of a facility altered by, on behalf of, or for the use of, a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992. (28 CFR §35.151(b)

Circulation Path.

An exterior or interior way of passage from one place to another for pedestrians, including, but not limited to, walks, hallways, courtyards, stairways, and stair landings. (ADAAG 3.5)

Designated agency.

The Federal agency designated to oversee compliance activities for particular components of State and local governments. (28 CFR §35.104)

Detectable Warning.

A standardized surface feature built in or applied to walking surfaces or other elements to warn visually

impaired people of hazards on a circulation path. (ADAAG 3.5)

Discrimination.
Denying handicapped persons the opportunity to participate in or benefit from any program or activity. (28 CFR §35.149)

Facility.
All or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property located on a site. (28 CFR §35.104; ADAAG 3.5)

Maximum Extent Feasible.
In alteration projects, an ADA-required accessibility improvement must be installed to the maximum extent feasible; that is, to the maximum extent technically, or physically, feasible. (ADAAG 4.1.6(1)(j)

Public Entity.
(1) Any State or local government;
(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government. (42 U.S.C. §12131)

Public Facility.
A facility or portion of a facility constructed by, on behalf of, or for the use of a public entity subject to title II of the ADA and 28 CFR Part 35 or 49 CFR §§ 37.41, 37.43. (28 CFR §35.104)

Public Use.
Describes interior or exterior rooms or spaces that are made available to the general public. Public use may be provided at a building or facility that is privately or publicly owned. (ADAAG 3.5)

Undue Burden.
In determining whether financial and administrative burdens are undue in making decisions program-wide in the transition plan, a public agency must consider all of that public agency's resources available for use in the funding and operation of the service, program, or activity. (29 CFR Part 35, App. A, discussion of §35.150, ¶ 6)

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FHWA

United States Department of Transportation - **Federal Highway Administration**

Attachment B

2010 Specifications

SPECIAL PROVISION
Local Government / RMA / Non-Standard Contracts

Disadvantaged Business Enterprise in Federal-Aid Construction

Description. The purpose of this Special Provision is to carry out the U. S. Department of Transportation's (DOT) policy of ensuring nondiscrimination in the award and administration of DOT assisted contracts and creating a level playing field on which firms owned and controlled by individuals who are determined to be socially and economically disadvantaged can compete fairly for DOT assisted contracts. If the Disadvantaged Business Enterprise (DBE) goal is greater than zero, Article A, "Disadvantaged Business Enterprise in Federal-Aid Construction", of this Special Provision shall apply to this contract. If there is no DBE goal, Article B, "Race-Neutral DBE Participation", of this Special Provision shall apply to this contract. The percentage goal for DBE participation in the work to be performed under this contract will be shown on the proposal.

Article A. Disadvantaged Business Enterprise in Federal-Aid Construction.

1. **Policy.** It is the policy of the DOT and the Texas Department of Transportation (henceforth the "Department") that DBEs, as defined in 49 CFR Part 26, Subpart A and the Department's DBE Program, shall have the opportunity to participate in the performance of contracts financed in whole or in part with Federal funds. The DBE requirements of 49 CFR Part 26, and the Department's DBE Program, apply to this contract as follows:

   a. The prime contractor (Contractor) will solicit DBEs through reasonable and available means, as defined in 49 CFR Part 26, Appendix A and the approved DBE Program, or show a good faith effort to meet the DBE goal for this contract.

   b. 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 financially 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 Entity deems appropriate subject to review by the Department.

   c. The requirements of this Special Provision shall be physically included in any subcontract.

   d. By signing the contract proposal, the Bidder is certifying that the DBE goal as stated in the proposal will be met by obtaining commitments from eligible DBEs or that the Bidder will provide acceptable evidence of good

faith effort to meet the commitment. The Entity will determine the adequacy of a Contractor's efforts to meet the contract goal, within 10 business days, excluding national holidays, from receipt of the information outlined in this Special Provision under Article A.3, "Contractor's Responsibilities." If the requirements of Article A.3 are met, the conditional situation will be removed and the contract will be forwarded to the Contractor for execution.

2. Definitions.

a. "Department" means the Texas Department of Transportation.

b. "DOT" means the U.S. Department of Transportation, including the Office of the Secretary, and including the operating administrations, i.e. the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

c. "Federal-Aid Contract" is any contract between the Texas Department of Transportation and a Contractor at any tier, or Entity and a Contractor at any tier which is paid for in whole or in part with DOT financial assistance.

d. “Entity” means local government agency, MPO, RMA, etc.

e. "DBE Joint Venture" means an association of a DBE firm and 1 or more other firm(s) to carry out a single business enterprise for profit for which purpose they 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.

f. "Disadvantaged Business Enterprise" or "DBE" means a firm certified through the Texas Unified Certification Program in accordance with 49 CFR Part 26 Subparts D and E.

g. "Good Faith Effort" means efforts to achieve a DBE goal or other requirement of 49 CFR Part 26 Subpart C and this Special Provision which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

h. "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.

i. "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.

To be a Regular Dealer, the firm must be an established, regular business that engages in, as its principal business and under its own name, the purchase and sale or lease of the products in question.

A Regular Dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns and operates distribution equipment for the products. Any supplementing of 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. *Brokers, packagers, manufacturers' representatives, or other persons who arrange or expedite transactions shall not be regarded as a Regular Dealer.

***"Broker" is an intermediary or middleman that does not take possession of a commodity or act as a Regular Dealer selling to the public.

j. "Race-neutral DBE Participation" means any participation by a DBE through customary competitive procurement procedures.

k. "Race-conscious" means a measure or program that is focused specifically on assisting only DBEs, including women-owned DBEs.

l. "Texas Unified Certification Program" or "TUCP" provides one-stop shopping to applicants for certification in their region, such that applicants are required to apply only once for a DBE certification that will be honored by all recipients of federal funds in the state. The TUCP by Memorandum of Agreement established six member entities, including TxDOT, to serve as certifying agents for Texas in specified regions. Applicants for DBE certification may be directed to the TUCP internet site for more information at:

//www.txdot.gov/business/business_outreach/tucp.htm

3. Contractor's Responsibilities. These requirements must be satisfied by the Contractor.

a. After conditional award of the contract, the Contractor shall submit a completed Form No.SMS.4901, "DBE Commitment Agreement" for each DBE he/she intends to use to satisfy the DBE goal or a good faith effort to explain why the goal could not be reached, so as to arrive in the Entity's contracting office not later than 5:00 p.m. on the 10th business day, excluding national holidays, after the conditional award of the contract. When requested, additional time, not to exceed seven (7) business days, excluding national holidays, may be granted based on documentation submitted by the Contractor. The Entity shall submit the DBE Commitment Agreement package to the Department's Office of Civil Rights in Austin, Texas not later than 5:00 p.m. on the 30th business day, excluding national holidays, after the conditional award of the contract. The DBE Commitment Agreement package is subject to review, comment and approval by TxDOT prior to and as a condition of execution of the contract.

b. DBE prime contractors who subcontract with DBEs may receive credit toward the DBE goal for work performed by the DBE's own forces and work subcontracted to DBEs. A Contractor must make a good faith effort to meet the goals. In the event a DBE prime subcontracts to a non-DBE, that information must be reported on Form No. SMS.4902. The completed form is provided to the Entity with a copy to the TxDOT District Office responsible for overseeing the project.

c. A Contractor who cannot meet the contract goal, in whole or in part, shall make adequate good faith efforts to obtain DBE participation as so stated and defined in 49 CFR Part 26, Appendix A. The following is a list of the types of action that may be considered as good faith efforts. 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.

- 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 solicitation must be done within sufficient time to allow the DBEs to respond to it. Appropriate steps must be taken to follow up initial solicitations to determine, with certainty, if the DBEs are interested.
- 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 perform the work items with its own forces.
- 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.
- Negotiating in good faith with interested DBEs to make a portion of the work available to DBE subcontractors and suppliers and 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 negotiations 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.
- A Bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional cost involved in finding and using DBEs is not in itself sufficient reason for a Bidders failure to meet the Contract DBE goal as long as such cost are reasonable. Also, the ability or desire of the

Contractor to perform the work of the contract with its own organization does not relieve the Bidder of the responsibility to make good faith effort. Contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

- 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. nonunion employee status) are not legitimate cause for the rejection or non-solicitation of bids and the Contractors efforts to meet the project goal.
- Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Contractor.
- Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- 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.
- If the Entity determines that the Contractor has failed to meet the good faith effort requirements, the Contractor will be given an opportunity for reconsideration by the TxDOT District Office responsible for overseeing the project. Opportunity for further appeals will be addressed by the TxDOT Office of Civil Rights.

d. Should the Bidder to whom the contract is conditionally awarded refuse, neglect or fail to meet the DBE goal or comply with good faith effort requirements, the Entity can take remedial financial action as provided by the Entity's/Department's rules or practices or reference to 43 TAC §9.56, as a guideline when the Entity does not have uniform rules or practices for non-compliance with the terms of its contracts.

All contract and project information shall be submitted directly to the Entity and with a copy to the TxDOT District or Office responsible to oversee the project.

e. The Contractor shall not terminate for convenience a DBE subcontractor named in the commitment submitted under Article A.3.a. of this Special Provision. Prior to terminating or removing a DBE subcontractor named in the commitment, the Contractor shall make a good faith effort to replace a DBE subcontractor that is unable to perform successfully with another DBE to the extent needed to meet the contract goal. The Contractor shall submit a completed Form No.4901, "DBE Commitment Agreement," and Form No. 2228 "Disadvantaged Business Enterprise (DBE) Request for Substition for the substitute DBE firm(s). Any substitution of DBEs shall be subject to approval by the Entity. Prior to approving the substitution, the Entity will request a statement from the DBE about the circumstances

of its subcontract's termination. The contractor must have a written consent prior to substitution. A copy of all documentation shall be provided to the TxDOT District Office responsible to oversee the project.

f. The Contractor shall designate a DBE liaison officer who will administer the Contractor's DBE program and who will be responsible for maintenance of records, reports, efforts and contacts made to subcontract with DBEs.

g. Contractors are encouraged to investigate the services offered by banks owned and controlled by disadvantaged individuals and to make use of these banks where feasible.

4. Eligibility of DBEs.

a. The member entities of the TUCP certify the eligibility of DBEs and DBE joint ventures to perform DBE subcontract work on DOT financially assisted contracts.

b. The Department maintains the Texas Unified Certification Program DBE Directory containing the names of firms that have been certified to be eligible to participate as DBE's on DOT financially assisted contracts. This Directory is available from the Department's OCR. An update of the Directory can be found on the Internet at

http://www.dot.state.tx.us/business/tucpinfo.htm.

c. Only DBE firms certified at the time commitments are submitted are eligible to be used in the information furnished by the Contractor as required under Article A.3.a. and 3.g. above. For purposes of the DBE goal on this project. DBEs will only be allowed to perform work in the categories of work for which they are certified.

d. Only DBE firms certified at the time of execution of a contract, subcontract, or purchase order are eligible for DBE goal participation.

5. Determination of DBE Participation. When a DBE participates in a contract, only the values of the work actually performed by the DBE, as referenced below, shall be counted by the Contractor toward DBE goals:

a. The total amount paid to the DBE for work performed with the DBE's own forces is counted toward the DBE goal. 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 subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

b. A Contractor may count toward its DBE goal a portion of the total value of the contract amount paid to a DBE joint venture equal to the distinct, clearly defined portion of the work of the contract performed by the DBE.

(1) A Contractor may count toward its DBE goal only expenditures to DBEs that perform a commercially useful function (CUF) in the work of

a contract or purchase order. A DBE is considered to perform a CUF 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 CUF, 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.

A minimum of one CUF Project Site Review (CUFPSR) will be conducted by the Entity using Department Form 2182 on all DBE firms working on the project.

In accordance with 49 CFR Part 26. Appendix A. guidance concerning Good Faith Efforts, Contractors may make efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services. Contractors may not however, negotiate the price of materials or supplies used on the contract by the DBE, nor may they determine quality and quantity, order the materials themselves, nor install the materials (if applicable), or pay for the material themselves. Contractors however, may share the quotations they receive from the material supplier with the DBE firm, so that the DBE firm may negotiate a reasonable price with the material supplier.

In all cases, Contractor or other non-DBE subcontractor assistance will not be credited toward the DBE goal.

(2) A DBE does not perform a CUF 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.

Consistent with industry practices and the DOT/Department's DBE program, a DBE subcontractor may enter into second-tier subcontracts, amounting up to seventy percent (70%) of their contract. Work subcontracted to a non-DBE does not count towards DBE goals. If a DBE does not perform or exercise responsibility for at least thirty percent (30%) 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, it will be presumed that the DBE is not performing a CUF.

(3) A DBE trucking firm who is certified as a DBE is considered to be performing a CUF when the DBE is responsible for the management and supervision of the entire trucking operation on a particular contract and the DBE itself owns and operates at least one (1) fully licensed, insured, and operational truck used on the contract.

(a) The entity shall verify ownership of all trucks prior to commencement of work of the DBE trucking firm.

(b) The Contractor receives credit for the total value of the transportation services the DBE provides on a contract using trucks it owns, insures, and operates with drivers it employs.

(c) 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.

(d) 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 the DBE-owned trucks on its sub-contract. Additional participation by non-DBEs receive credit only for the fee or commission it receives as result of the lease arrangement.

(e) A lease must indicate that the DBE has exclusive use of and control over the trucks giving the DBE absolute priority for use of the leased trucks. Leased trucks must display the name and identification number of the DBE.

(f) The DBE Trucking Firm shall submit Form 2371, "Trucking Credit Worksheet", within 10 calendar days of the end of the month to the Prime Contractor. The prime shall submit a copy of Form 2371 with the DBE Monthly Progress Report.

(4) When a DBE is presumed not to be performing a CUF the TxDOT District Office responsible to oversee the project will be notified. The DBE may present evidence to rebut this presumption.

c. A Contractor may count toward its DBE goals expenditures for materials and supplies obtained from a DBE manufacturer, provided that the DBE assumes the actual and contractual responsibility for the materials and supplies. Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1) If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. (The definition of a DBE manufacturer is found at Article A.2.h. of this Special Provision.)

(2) If the materials or supplies are purchased from a DBE Regular Dealer, count 60% of the cost of the materials or supplies toward DBE goals. (The definition of a DBE Regular Dealer is found at Article A.2.i. of this Special Provision.)

(3) With respect to materials or supplies purchased from 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.

(4) 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 financially 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.

d. Should the DBE firm request assistance in the form of a joint check and the contractor chooses to assist the DBE firm, other than a manufacturing material supplier or Regular Dealer, the Contractor may act solely as a guarantor by use of a two-party check for payment of materials to be used on the project by the DBE. The material supplier must invoice the DBE who will present the invoice to the Contractor. The Contractor may issue a joint check to the DBE and the material supplier and the DBE firm must issue the remittance to the material supplier. No funds shall go directly from the Contractor to the material supplier. The DBE firm may accept or reject this joint checking arrangement.

The Contractor must obtain approval from the Entity, prior to implementing the use of joint check arrangements with the DBE. The Contractor shall submit to the Entity, Joint Check Approval Form 2178 and provide copies of cancelled joint checks to the Entity upon request if the joint check arrangement is approved. No DBE goal credit will be allowed for the cost of DBE materials that are paid by the Contractor directly to the material supplier. A copy of the completed form is to be provided to the TxDOT District Office responsible for overseeing the project.

e. No DBE goal credit will be allowed for supplies and equipment the DBE subcontractor leases from the contractor or its affiliates.

f. No DBE goal credit will be allowed for the period of time determined by the Entity that the DBE was not performing a CUF. The denial period of time may occur before or after a determination has been made by the Entity. In case of the denial of credit for non-performance of a CUF of a DBE, the Contractor will be required to provide a substitute DBE to meet the contract goal or provide an adequate good faith effort when applicable and as required under Article A.3.e.

6. Records and Reports.

a. The Contractor shall submit monthly reports, after work begins, on DBE payments to meet the DBE goal and for DBE race-neutral participation. Report payments made to non-DBE firms. The monthly report is to be

sent to the Entity with a copy to the TxDOT District Office responsible to oversee the project. These reports will be due within fifteen (15) days after the end of a calendar month. These reports will be required until all DBE subcontracting or material supply activity is completed. Form No. SMS.4903, DBE Progress Report, is to be used for monthly reporting. Form No. SMS.4904, DBE Final Report, is to be used as a final summary of DBE payments submitted upon completion of the project. The original final report must be submitted to the Entity with copies to the TxDOT District Office responsible for overseeing the project and to the TxDOT Office of Civil Rights. These forms may be obtained from the Department or may be reproduced by the Contractor. The Entity may verify the amounts being reported as paid to DBEs by requesting copies of cancelled checks paid to DBEs on a random basis. Cancelled checks and invoices should reference the Entity's or Department's project number, as applicable.

b. DBE subcontractors and/or material suppliers should be identified on the monthly report by Vendor Number, name, and the amount of actual payment made to each during the monthly period. Negative reports are required when no activity has occurred in a monthly period.

c. All such records must be retained by the Contractor and the Entity for a minimum of four (4) years following completion of the contract work, and shall be available at reasonable times and places for inspection by authorized representatives of the Department or the DOT operating administration.

d. Prior to receiving final payment, the Contractor shall submit Form No. SMS.4904. DBE Final Report. If the DBE goal requirement is not met, documentation supporting Good Faith Efforts, as outlined in Article A.3.c. of this Special Provision, must be submitted with the DBE Final Report. A copy of the completed form is provided to the TxDOT District Office responsible for overseeing the project.

7. Compliance of Contractor.

a. To ensure that DBE requirements of this DOT financially assisted contract are complied with, the Entity will monitor the Contractor's efforts to involve DBEs during the performance of this contract. This will be accomplished by a review by the Entity of monthly reports submitted to the Entity by the Contractor indicating his progress in achieving the DBE contract goal and by compliance reviews conducted on the project site by the Entity and by the Department, as needed.

b. The Contractor shall receive credit toward the DBE goal based on actual payments to the DBE subcontractor. The Contractor shall notify the Entity if it withholds or reduces payment to any DBE subcontractor. The Contractor shall submit an affidavit detailing the DBE subcontract payments prior to receiving final payment for the contract. Copies of these documents will be provided to the Entity and to the TxDOT District Office responsible for overseeing the project.

c. Contractors' requests for substitutions of DBE subcontractors shall be accompanied by a detailed explanation which should substantiate the need for a substitution. The Contractor may not be allowed to count work on those items being substituted toward the DBE goal prior to approval of the substitution from the Entity.

d. The Contractor is prohibited from providing work crews and equipment to DBEs. DBE Goal credit for the DBE subcontractors leasing of equipment or purchasing of supplies and/or materials from the Contractor or its affiliates is not allowed.

e. When a DBE subcontractor, named in the commitment under Article A.3.a. of this Special Provision, is terminated or fails to complete its work on the contract for any reason, the Contractor is required 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.

f. A Contractor's failure to comply with the requirements of this Special Provision shall constitute a material breach of the contract. In such a case, the Entity or the Department, as appropriate, reserves the right to terminate the contract; to deduct the amount of DBE goal not accomplished by DBEs from the money due or to become due the Contractor, or such other remedy or remedies as the Entity deems appropriate, subject to review by the Department.

Article B. Race-Neutral Disadvantaged Business Enterprise Participation.

1. Policy. It is the policy of the DOT that Disadvantaged Business Enterprises (DBE), as defined in 49 CFR Part 26 Subpart A, be given the opportunity to compete fairly for contracts and subcontracts financed in whole or in part with Federal funds and that a maximum feasible portion of the Department's overall DBE goal be met using race-neutral means.

a. If there is no DBE goal, the DBE requirements of 49 CFR Part 26, apply to this contract as follows:

The Contractor will offer DBEs as defined in 49 CFR Part 26, Subpart A, the opportunity to compete fairly for contracts and subcontractors financed in whole or in part with Federal funds.

b. 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 financially 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 Entity deems appropriate, subject to review by the Department.

2. **Reports.** Race-Neutral DBE participation on projects with no DBE goal shall be reported on Form No. SMS.4903, DBE Progress Report and submitted to the Entity each month and at project completion. Copies of payment documents should be sent to the TxDOT District Office responsible for project oversight. Payments to DBE firms are reported on Form No. SMS.4903 are subject to the requirements of Article A.5, "Determination of DBE Participation."

§ 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.

ATTACHMENT D

DBE Program Compliance Guidance for Local Government Agencies

OVERVIEW:

The DBE Program as authorized by 49 CFR, Part 26 ensures nondiscrimination in the award and administration of United States Department of Transportation contracts. The DBE Program applies to a Local Government Agency's highway contracts, funded in part or whole, from federal funds received through TxDOT and the Federal Highway Administration (FHWA). A Local Government Agency (LGA) may use TxDOT's DBE Program through a Memorandum Of Understanding (MOU). The MOU is the agreement that allows LGA's to use TxDOT's DBE Program and identifies the responsibility of each LGA as it pertains to DBE Program.

DBE annual goals are established by the Business Opportunity Programs Office (BOP) for the department's DBE Federal-Aid Highway Construction Programs. Individual contract goals are established by LGA with input from the BOP Office.

The BOP Office is responsible for administering the department's DBE Program. The BOP office, in conjunction with the LGA, will be responsible for monitoring the DBE Program and ensuring compliance. In an effort to effectively monitor the DBE Program, the DBE Program Compliance Guidance has been created and implemented. The LGAs will play a vital role in ensuring proper administration and compliance with the DBE Program.

GENERAL DBE PROGRAM PROCESS:

Annually, BOP will develop an overall goal for DBE participation in projects receiving federal funds. The objective is to achieve as much of the goal through "race-neutral" means as practical. This means that DBEs will participate in projects in the routine course of business and a specific project goal will not be assigned. If sufficient DBE participation is not anticipated through race-neutral means, "race-conscious" provisions are implemented and individual projects goals are assigned based on the availability of DBE firms to perform work within the scope of the project. In Fiscal Year 2005 and 2006, approximately one-half of the overall goal was achieved by race-neutral means.

The most current version of the DBE Special Provision is included in the bid documents of all federally funded projects. The Provision is divided into race-conscious and race-neutral sections. Race-neutral projects do not have a specific project goal while race-conscious projects will have a minimum goal to be achieved by the contractor to assure compliance with the terms of the

contract. The goal will be a percentage of the contract amount and is listed in the bid documents.

For projects with a goal, the contractor must submit a list of DBE firms the contractor commits to use to fulfill the goal as stated in the DBE Special Provisions. Once approved, this list forms the basis for project monitoring. The LGA monitors all federally funded projects that have DBE work to be counted toward meeting the annual goal. Monitoring is similar for race-neutral and race-conscious projects, but additional steps are required on race-conscious projects when the contractor does not meet the project goal or wants to substitute DBE firms for those listed in the contractor's commitment.

At the end of the project, actual DBE participation is totaled and credited to the annual goal for both race-neutral and race-conscious projects. Monitoring throughout the project gives assurance that credit is given for work accomplished in compliance with the specifications and statutes.

DBE PROGRAM COMPLIANCE GUIDANCE:

There are three key documents used in implementation and management of the DBE Program; the actual program as approved by FHWA, the current Special Provision to be included in all projects with federal funds, and a TxDOT Standard Operating Procedures Manual (SOP). This SOP contains the following Sections:

A. DBE Certification Program

B. Withdrawal, Denial, Surrender, Decertification and Appeal Program

C. Goal Setting, Counting DBE Participation, and Data Reporting

D. DBE Commitments, Good Faith Efforts, and Substitutions/Replacements

E. Joint Check Agreements

F. Prompt Payment and Retainage Monitoring and Enforcement

G. Commercially Useful Function Program Review

H. DBE Third Party Challenges

SECTION A: DBE CERTIFICATION PROGRAM
SECTION B: WITHDRAWAL, DENIAL, DECERTIFICATION, AND APPEAL PROGRAM PROCEDURES

General: In regards to Section A and B, the LGA does not have any responsibility regarding the DBE Certification Program as it relates to certification, withdrawal, denial, decertification and certification appeal procedures. As such, Section A and B are not part of the DBE Program Guidance for LGA.

Local Government Agency Procedures: The BOP Office and other TUCP Certifying Agencies have primary responsibility for all DBE certification actions. The LGA does not have any direct responsibility but may be requested to provide information or assistance to BOP or other TUCP Certifying Agencies regarding DBEs that are working on LGA federally-funded projects.

The LGA must be familiar with the TxDOT internet site www.dot.state.tx.us, TUCP Directory and use the information as appropriate for their monitoring activities.

SECTION C: GOAL SETTING, COUNTING DBE PARTICIPATION, AND DATA REPORTING

General: BOP is responsible for developing TxDOT's annual goal for DBE participation in projects funded by FHWA. The annual goal is comprised of race-neutral and race-conscious participation. For race-conscious participation, the LGA will assign a DBE goal for appropriate projects.

Work completed by a DBE will be counted toward the overall goal if the work is actually performed by the DBE (i.e. the DBE performs a "Commercially Useful Function" (CUF). CUF monitoring is discussed elsewhere in this document.

By special provision, the contractor must maintain certain records and submit certain reports. The contractor's records must be made available to LGA, TxDOT and FHWA on request. The following reports are submitted to LGA:

1. *DBE Program Commitment Agreement Form*
2. *DBE Monthly Project Report*
3. *DBE DBE/HUB Final Report*
4. *Prompt Payment Certification*

Local Government Agency Procedures:

- ☐ **Step 1** – Receive reports from the various sources and distribute as appropriate. The original of all reports should be kept with the official project records.
- ☐ **Step 2** – Verify the accuracy of DBE payments by comparing the *DBE Monthly Progress Report* to the *Prompt Payment Certification*.
- ☐ **Step 3** – Keep a running total of actual payments to DBE firms by entering information from *DBE Monthly Project Report* in subcontractors monitoring system.
- ☐ **Step 4** – Review the contractor's *DBE DBE/HUB Final Report* to ensure that DBE/SBE contract requirements have been satisfied.

SECTION D: DBE COMMITMENTS, GOOD FAITH EFFORTS, AND SUBSTITUTION REPLACEMENTS

General: This Section does not apply to race-neutral projects.

For projects with a specified percentage DBE goal, contractors make a commitment to meet the goal by signing the proposal and submitting a bid. Once the low bidder is determined and the contract is conditionally awarded, the contractor must submit a *DBE Commitment Agreement Form* or a *Pre-Good Faith Effort Review*. The *DBE Commitment Agreement Form* lists bid items and DBEs the contractor intends to use to fulfill the project DBE goal. The DBE Commitment Agreement Form is reviewed by the LGA to determine the appropriate DBE credit that will be allowed for each DBE. DBE Material Suppliers and Truckers have to provide the documentation at the time of commitment that supports the level of DBE credit that will be approved for each DBE. The contractor submits a *Pre-Good Faith Effort Review* if they believe they made every reasonable effort to do so but still cannot commit to meeting the goal. In either case, the form is submitted to the LGA for their action.

During the life of the project, LGA monitors the contractor's progress toward meeting the goal. If it appears that the goal may not be achieved, the contractor must show that they made a Good Faith Effort (GFE) to meet the goal. If justified, the GFE is approved. The contractor may also request that a different firm be substituted for one named in the *DBE Commitment Agreement Form*. The BOP Office will conduct periodic reviews of the LGA's projects to ensure compliance with the DBE Program requirements.

Local Government Agency Procedures:

Contract award

- ☐ **Step 1 –** LGA receives appropriate submission from the contractor and renders final compliance determination. LGA will keep informed of any adverse issues encountered during their review and approval process. After all issues are resolved, LGA approves contractor's commitment, enters information into their subcontractor monitoring system, and notifies the prime, and the DBE of their approval.

- ☐ **Step 2** – Contractor assures that a copy of *DBE Commitment Agreement Form* or *Notification of Compliance Letter* is transmitted to the project personnel for inclusion in the project records and for use in monitoring during construction.

Post GFE Review

- ☐ **Step 1 –** Determine actual goal achievements at the end of the project by reviewing their subcontractor monitoring programs, the

final estimate, and the Contractor's *DBE/HUB Final Report*. If the contractor did not meet the specified DBE goal, start Post GFE review by having the project personnel send the contractor a *Post Award GFE Information Request Letter*.

- ☐ **Step 2** – Assist the project personnel as requested in analyzing the contractor's documentation of GFE.
- ☐ **Step 3** – If the contractor's GFE is deficient, notify the contractor in writing, giving the contractor an opportunity to appeal the determination and/or provide additional information.
- ☐ **Step 4** – Complete a *Post-GFE Review Report* and prepare final disposition. Provide the BOP Office with a copy of the final disposition.

Substitutions/Replacements

- ☐ **Step 1** – Review documentation associated with the contractor's request.
  - o *DBE Commitment Agreement* for DBE to be substituted. Assure that the contractor provides all of the information requested.
  - o Written justification from the contractor listing reasons the DBE is being substituted.
- ☐ **Step 2** – Verify accuracy of the contractor's documentation by discussing circumstances with the project personnel as necessary.
- ☐ **Step 3** – Request a written statement from the DBE acknowledging they are being replaced. Consider any additional information the DBE may offer.
- ☐ **Step 4** – Determine whether the contractor is in compliance with the DBE special provision.
- ☐ **Step 5** – Prepare a *Substitution Form* and send to the project personnel for approval.

SECTION E: JOINT CHECK AGREEMENTS

General: The contractor may choose to assist a DBE firm by acting as a guarantor for payment of materials used by a DBE by the use of joint checks. To be eligible, the contractor must make joint checks available to all subcontractors and the DBE must agree to the arrangement. The contractor issues a joint check to the DBE and the material supplier and the DBE must issue the joint check to the material supplier. If approved by the LGA, this arrangement does not count against the DBE goal.

Local Government Agency Procedures:

- ☐ **Step 1** – Project personnel receives *DBE Joint Check Approval* from the contractor. Assist the project personnel in determining compliance with the Special Provision as requested. Project personnel sends signed *Approval* to the contractor by letter with copies to the DBE.
- ☐ **Step 2** – Compare the *DBE Monthly Progress Report* and *Prompt Payment Certification Form* for reasonable consistency**.**
- ☐ **Step 3** – Request a copy of cancelled joint checks for the months the contractor issued a joint check to each DBE with an approved *DBE Joint Check Approval*. Review the joint checks to ensure that payment was processed through the DBE.
- ☐ **Step 4** – If two consecutive reviews for the same DBE show no discrepancies, the LGA may reduce the frequency of requesting copies of cancelled joint checks.
- ☐ **Step 5** – Submit compliance questions to BOP for assistance as necessary.

SECTION F: PROMPT PAYMENT AND RETAINAGE MONITORING AND ENFORCEMENT

General: The contractor is paid for satisfactorily completed work every month through the monthly estimate process. This payment is for the work the contractor and all subcontractors perform. The contractor must pay subcontractors for the satisfactorily completed work within 10 days after the contractor receives payment for the subcontractors work from LGA.

Retainage is an amount of money withheld to ensure that the contractor fulfills all contract requirements, including submitting all documents at the end of the project. Retainage normally ranges from 3% – 5% of the amount paid and is not released until the final estimate is processed. It is common practice for the contractor to withhold retainage from their subcontractors. However, the contractor must release the total amount retained when the subcontractor satisfactorily completes all their work on the project. Depending on the scope of the subcontract, this may occur long before all work on the contract is finished.

Local Government Agency Procedures:

- ☐ **Step 1** – The project personnel receives a monthly *Prompt Payment Certification* from the contractor before the end of the month following receipt of payment from the LGA. This certification is kept in the project records and will be used only for dispute resolution.
- ☐ **Step 2** – Assist the project personnel as requested in the event a subcontractor alleges they did not receive prompt payment from the contractor. The project personnel must have the complaint in writing.
- ☐ **Step 3** – During visits to the project site, randomly spot check whether certifications are received in the time specified. Take appropriate action if non-compliance issues are discovered.

SECTION G: COMMERCIALLY USEFUL FUNCTION REVIEW PROGRAM

General: Commercially Useful Function (CUF), is the term used to describe a DBE's independence from the contractor. Over-reliance on a contractor brings a DBE's CUF into question. To perform a CUF, the DBE must be responsible for performing, managing, and supervising the work under its contract. The DBE must also be responsible for negotiating prices for, ordering, installing, and paying for material used in its work.

A contractor may only count the value of the work actually performed by a DBE toward the DBE goal. A DBE may enter into second-tier subcontracts, up to 70% of their contract. Work subcontracted to a non-DBE does not count towards the DBE goals. If the DBE does not perform or exercise responsibility for at least 30% of the total cost of their contract with their own work force, it will be presumed the DBE is not performing a CUF and none of the payments will be counted toward the contract goal.

The DBE Special Provision contains a discussion of when the contractor can count work by a DBE toward the goal.

Local Government Agency Procedures:

- **Step 1** – For projects with a specified DBE goal, contact the project personnel to ensure there is a copy of the *DBE Program Commitment Agreement Form* on the project.
- **Step 2** – For all projects, ask the project personnel to forward a copy of all completed *CUF On-Site Compliance Review Forms* to the LGA.
- **Step 3** – Project personnel will conduct at least one CUF review with each DBE on the project. Their review is documented using a *CUF On-Site Compliance Review Form* and should be performed as soon as practical after the DBE starts work on the project.
- **Step 4** – Periodically review the *DBE Monthly Progress Report* to assure that the the initial CUF review is conducted on the project in a timely manner. Contact the project personnel to discuss delays in receipt of CUF reviews. Provide assistance to the project personnel as requested and as work schedule allows.
- **Step 5** – Project personnel should observe DBE work as part of their normal inspection function. If the DBE's practices change after the initial CUF review, the project personnel should complete the *CUF Project Site Review*.
- **Step 6** – Periodically visit the project site after CUF monitoring starts. Discuss project personnel responsibilities and answer any questions the project personnel poses. As time allows, conduct a CUF review with project personnel and document using the *CUF Project Site Review* form. Explain "red flags" to project personnel to enhance their understanding of CUF.

- **Step 7** – Collect questions concerning CUF and submit to LGA with supporting documentation for their action. LGA will document their determination and will transmit the final determination to the contractor and the DBE. Forward to the project personnel for inclusion in the project records.

BOP will conduct periodic reviews of projects to monitor the LGA's compliance with CUF requirements.

SECTION H: DBE THIRD PARTY CHALLENGES

General: Anyone has the right to challenge the eligibility of a DBE firm. The challenge must be in writing and contain information to support the challenge. Responsibility for resolving the challenge lies with the TUCP certifying agency that initially certified the DBE's eligibility.

Local Government Agency Procedures:

- **Step 1** – Forward any third party challenges received by the LGA to BOP. BOP will be responsible for identifying the appropriate TUCP certifying agency that will handle the disposition of this challenge.

ATTACHMENT E

REQUIRED CONTRACT PROVISIONS
FEDERAL-AID CONSTRUCTION CONTRACTS

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ATTACHMENTS

A. Employment Preference for Appalachian Contracts (Included in Appalachian contracts only)

I. GENERAL

1. These contract provisions shall apply to all work performed on the contract by the contractor's own organization and with the assistance of workers under the contractor's immediate superintendence and to all work performed on the contract by piecework, station work, or by subcontract.

2. Except as otherwise provided for in each section, the contractor shall insert in each subcontract all of the stipulations contained in these Required Contract Provisions, and further require their inclusion in any lower tier subcontract or purchase order that may in turn be made. The Required Contract Provisions shall not be incorporated by reference in any case. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with these Required Contract Provisions.

3. A breach of any of the stipulations contained in these Required Contract Provisions shall be sufficient grounds for termination of the contract.

4. A breach of the following clauses of the Required Contract Provisions may also be grounds for debarment as provided in 29 CFR 5.12:

Section I, paragraph 2;
Section IV, paragraphs 1, 2, 3, 4, and 7;
Section V, paragraphs 1 and 2a through 2g.

5. Disputes arising out of the labor standards provisions of Section IV (except paragraph 5) and Section V of these Required Contract Provisions shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the U.S. Department of Labor (DOL) as set forth in 29 CFR 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the DOL, or the contractor's employees or their representatives.

6. **Selection of Labor:** During the performance of this contract, the contractor shall not:

a. discriminate against labor from any other State, possession, or territory of the United States (except for employment preference for Appalachian contracts, when applicable, as specified in Attachment A), or

b. employ convict labor for any purpose within the limits of the project unless it is labor performed by convicts who are on parole, supervised release, or probation.

II. NONDISCRIMINATION

(Applicable to all Federal-aid construction contracts and to all related subcontracts of $10,000 or more.)

1. **Equal Employment Opportunity:** Equal employment opportunity (EEO) requirements not to discriminate and to take affirmative action to assure equal opportunity as set forth under laws, executive orders, rules, regulations (28 CFR 35, 29 CFR 1630 and 41 CFR 60) and orders of the Secretary of Labor as modified by the provisions prescribed herein, and imposed pursuant to 23 U.S.C. 140 shall constitute the EEO and specific affirmative action standards for the contractor's project activities under this contract. The Equal Opportunity Construction Contract Specifications set forth under 41 CFR 60-4.3 and the provisions of the American Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) set forth under 28 CFR 35 and 29 CFR 1630 are incorporated by reference in this contract. In the execution of this contract, the contractor agrees to comply with the following minimum specific requirement activities of EEO:

a. The contractor will work with the State highway agency (SHA) and the Federal Government in carrying out EEO obligations and in their review of his/her activities under the contract.

b. The contractor will accept as his operating policy the following statement:

"It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, color, national origin, age or disability. Such action shall include: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, preapprenticeship, and/or on-the-job training."

2. **EEO Officer:** The contractor will designate and make known to the SHA contracting officers an EEO Officer who will have the responsibility for and must be capable of effectively administering and promoting an active contractor program of EEO and who must be assigned adequate authority and responsibility to do so.

3. **Dissemination of Policy:** All members of the contractor's staff who are authorized to hire, supervise, promote, and discharge employees, or who recommend such action, or who are substantially involved in such action, will be made fully cognizant of, and will implement, the contractor's EEO policy and contractual responsibilities to provide EEO in each grade and classification of employment. To ensure that the above agreement will be met, the following actions will be taken as a minimum:

a. Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less often than once every six months, at which time the contractor's EEO policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer.

b. All new supervisory or personnel office employees will be given a thorough indoctrination by the EEO Officer, covering all major aspects of the contractor's EEO obligations within thirty days following their reporting for duty with the contractor.

c. All personnel who are engaged in direct recruitment for the project will be instructed by the EEO Officer in the contractor's procedures for locating and hiring minority group employees.

d. Notices and posters setting forth the contractor's EEO policy will be placed in areas readily accessible to employees, applicants for employment and potential employees.

e. The contractor's EEO policy and the procedures to implement such policy will be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.

4. **Recruitment:** When advertising for employees, the contractor will include in all advertisements for employees the notation: "An Equal Opportunity Employer." All such advertisements will be placed

in publications having a large circulation among minority groups in the area from which the project work force would normally be derived.

a. The contractor will, unless precluded by a valid bargaining agreement, conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minority group applicants. To meet this requirement, the contractor will identify sources of potential minority group employees, and establish with such identified sources procedures whereby minority group applicants may be referred to the contractor for employment consideration.

b. In the event the contractor has a valid bargaining agreement providing for exclusive hiring hall referrals, he is expected to observe the provisions of that agreement to the extent that the system permits the contractor's compliance with EEO contract provisions. (The DOL has held that where implementation of such agreements have the effect of discriminating against minorities or women, or obligates the contractor to do the same, such implementation violates Executive Order 11246, as amended.)

c. The contractor will encourage his present employees to refer minority group applicants for employment. Information and procedures with regard to referring minority group applicants will be discussed with employees.

5. **Personnel Actions:** Wages, working conditions, and employee benefits shall be established and administered, and personnel actions of every type, including hiring, upgrading, promotion, transfer, demotion, layoff, and termination, shall be taken without regard to race, color, religion, sex, national origin, age or disability. The following procedures shall be followed:

a. The contractor will conduct periodic inspections of project sites to insure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.

b. The contractor will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices.

c. The contractor will periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the contractor will promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, such corrective action shall include all affected persons.

d. The contractor will promptly investigate all complaints of alleged discrimination made to the contractor in connection with his obligations under this contract, will attempt to resolve such complaints, and will take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, such corrective action shall include such other persons. Upon completion of each investigation, the contractor will inform every complainant of all of his avenues of appeal.

6. **Training and Promotion:**

a. The contractor will assist in locating, qualifying, and increasing the skills of minority group and women employees, and applicants for employment.

b. Consistent with the contractor's work force requirements and as permissible under Federal and State regulations, the contractor shall make full use of training programs, i.e., apprenticeship, and on-the-job training programs for the geographical area of contract performance. Where feasible, 25 percent of apprentices or trainees in each occupation shall be in their first year of apprenticeship or training. In the event a special provision for training is provided under this contract, this subparagraph will be superseded as indicated in the special provision.

c. The contractor will advise employees and applicants for employment of available training programs and entrance requirements for each.

d. The contractor will periodically review the training and promotion potential of minority group and women employees and will encourage eligible employees to apply for such training and promotion.

7. **Unions:** If the contractor relies in whole or in part upon unions as a source of employees, the contractor will use his/her best efforts to obtain the cooperation of such unions to increase opportunities for minority groups and women within the unions, and to effect referrals by such unions of minority and female employees. Actions by the contractor either directly or through a contractor's association acting as agent will include the procedures set forth below:

a. The contractor will use best efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minority group members and women for membership in the unions and increasing the skills of minority group employees and women so that they may qualify for higher paying employment.

b. The contractor will use best efforts to incorporate an EEO clause into each union agreement to the end that such union will be contractually bound to refer applicants without regard to their race, color, religion, sex, national origin, age or disability.

c. The contractor is to obtain information as to the referral practices and policies of the labor union except that to the extent such information is within the exclusive possession of the labor union and such labor union refuses to furnish such information to the contractor, the contractor shall so certify to the SHA and shall set forth what efforts have been made to obtain such information.

d. In the event the union is unable to provide the contractor with a reasonable flow of minority and women referrals within the time limit set forth in the collective bargaining agreement, the contractor will, through independent recruitment efforts, fill the employment vacancies without regard to race, color, religion, sex, national origin, age or disability; making full efforts to obtain qualified and/or qualifiable minority group persons and women. (The DOL has held that it shall be no excuse that the union with which the contractor has a collective bargaining agreement providing for exclusive referral failed to refer minority employees.) In the event the union referral practice prevents the contractor from meeting the obligations pursuant to Executive Order 11246, as amended, and these special provisions, such contractor shall immediately notify the SHA.

8. **Selection of Subcontractors, Procurement of Materials and Leasing of Equipment:** The contractor shall not discriminate on the grounds of race, color, religion, sex, national origin, age or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment.

a. The contractor shall notify all potential subcontractors and suppliers of his/her EEO obligations under this contract.

b. Disadvantaged business enterprises (DBE), as defined in 49 CFR 23, shall have equal opportunity to compete for and perform subcontracts which the contractor enters into pursuant to this contract. The contractor will use his best efforts to solicit bids from and to utilize DBE subcontractors or subcontractors with meaningful minority group and female representation among their employees. Contractors shall obtain lists of DBE construction firms from SHA personnel.

c. The contractor will use his best efforts to ensure subcontractor compliance with their EEO obligations.

9. **Records and Reports:** The contractor shall keep such records as necessary to document compliance with the EEO requirements. Such records shall be retained for a period of three years following completion of the contract work and shall be available at reasonable times and places for inspection by authorized representatives of the SHA and the FHWA.

a. The records kept by the contractor shall document the following:

(1) The number of minority and non-minority group members and women employed in each work classification on the project;

(2) The progress and efforts being made in cooperation with unions, when applicable, to increase employment opportunities for minorities and women;

(3) The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minority and female employees; and

(4) The progress and efforts being made in securing the services of DBE subcontractors or subcontractors with meaningful minority and female representation among their employees.

b. The contractors will submit an annual report to the SHA

each July for the duration of the project, indicating the number of minority, women, and non-minority group employees currently engaged in each work classification required by the contract work. This information is to be reported on Form FHWA-1391. If on-the job training is being required by special provision, the contractor will be required to collect and report training data.

III. NONSEGREGATED FACILITIES

(Applicable to all Federal-aid construction contracts and to all related subcontracts of $10,000 or more.)

a. By submission of this bid, the execution of this contract or subcontract, or the consummation of this material supply agreement or purchase order, as appropriate, the bidder, Federal-aid construction contractor, subcontractor, material supplier, or vendor, as appropriate, certifies that the firm does not maintain or provide for its employees any segregated facilities at any of its establishments, and that the firm does not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. The firm agrees that a breach of this certification is a violation of the EEO provisions of this contract. The firm further certifies that no employee will be denied access to adequate facilities on the basis of sex or disability.

b. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, restrooms and washrooms, restaurants and other eating areas, timeclocks, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive, or are, in fact, segregated on the basis of race, color, religion, national origin, age or disability, because of habit, local custom, or otherwise. The only exception will be for the disabled when the demands for accessibility override (e.g. disabled parking).

c. The contractor agrees that it has obtained or will obtain identical certification from proposed subcontractors or material suppliers prior to award of subcontracts or consummation of material supply agreements of $10,000 or more and that it will retain such certifications in its files.

IV. PAYMENT OF PREDETERMINED MINIMUM WAGE

(Applicable to all Federal-aid construction contracts exceeding $2,000 and to all related subcontracts, except for projects located on roadways classified as local roads or rural minor collectors, which are exempt.)

1. General:

a. All mechanics and laborers employed or working upon the site of the work will be paid unconditionally and not less often than once a week and without subsequent deduction or rebate on any account [except such payroll deductions as are permitted by regulations (29 CFR 3) issued by the Secretary of Labor under the Copeland Act (40 U.S.C. 276c)] the full amounts of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment. The payment shall be computed at wage rates not less than those contained in the wage determination of the Secretary of Labor (hereinafter "the wage determination") which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor or its subcontractors and such laborers and mechanics. The wage determination (including any additional classifications and wage rates conformed under paragraph 2 of this Section IV and the DOL poster (WH-1321) or Form FHWA-1495) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers. For the purpose of this Section, contributions made or costs reasonably anticipated for bona fide fringe benefits under Section 1(b)(2) of the Davis-Bacon Act (40 U.S.C. 276a) on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of Section IV, paragraph 3b, hereof. Also, for the purpose of this Section, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs, which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in paragraphs 4 and 5 of this Section IV.

b. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein, provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed.

c. All rulings and interpretations of the Davis-Bacon Act and related acts contained in 29 CFR 1, 3, and 5 are herein incorporated by reference in this contract.

2. Classification:

a. The SHA contracting officer shall require that any class of laborers or mechanics employed under the contract, which is not listed in the wage determination, shall be classified in conformance with the wage determination.

b. The contracting officer shall approve an additional classification, wage rate and fringe benefits only when the following criteria have been met:

(1) the work to be performed by the additional classification requested is not performed by a classification in the wage determination;

(2) the additional classification is utilized in the area by the construction industry;

(3) the proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and

(4) with respect to helpers, when such a classification prevails in the area in which the work is performed.

c. If the contractor or subcontractors, as appropriate, the laborers and mechanics (if known) to be employed in the additional classification or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the DOL, Administrator of the Wage and Hour Division, Employment Standards Administration, Washington, D.C. 20210. The Wage and Hour Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

d. In the event the contractor or subcontractors, as appropriate, the laborers or mechanics to be employed in the additional classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Wage and Hour Administrator for determination. Said Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary

e. The wage rate (including fringe benefits where appropriate) determined pursuant to paragraph 2c or 2d of this Section IV shall be paid to all workers performing work in the additional classification from the first day on which work is performed in the classification.

3. Payment of Fringe Benefits:

a. Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor or subcontractors, as appropriate, shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly case equivalent thereof.

b. If the contractor or subcontractor, as appropriate, does not make payments to a trustee or other third person, he/she may consider as a part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, provided, that the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

4. Apprentices and Trainees (Programs of the U.S. DOL) and Helpers:

a. Apprentices:

(1) Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the DOL, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State apprenticeship agency recognized by the Bureau, or if a person is employed in his/her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State apprenticeship agency (where appropriate) to be eligible for probationary employment as an apprentice.

(2) The allowable ratio of apprentices to journeyman-level employees on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate listed in the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor or subcontractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman-level hourly rate) specified in the contractor's or subcontractor's registered program shall be observed.

(3) Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman-level hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator for the Wage and Hour Division determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination.

(4) In the event the Bureau of Apprenticeship and Training, or a State apprenticeship agency recognized by the Bureau, withdraws approval of an apprenticeship program, the contractor or subcontractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the comparable work performed by regular employees until an acceptable program is approved.

b. Trainees:

(1) Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the DOL, Employment and Training Administration.

(2) The ratio of trainees to journeyman-level employees on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.

(3) Every trainee must be paid at not less than the rate specified in the approved program for his/her level of progress, expressed as a percentage of the journeyman-level hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman-level wage rate on the wage determination which provides for less than full fringe benefits for apprentices, in which case such trainees shall receive the same fringe benefits as apprentices.

(4) In the event the Employment and Training Administration withdraws approval of a training program, the contractor or subcontractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

c. Helpers:

Helpers will be permitted to work on a project if the helper classification is specified and defined on the applicable wage determination or is approved pursuant to the conformance procedure set forth in Section IV.2. Any worker listed on a payroll at a helper wage rate, who is not a helper under a approved definition, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed.

5. Apprentices and Trainees (Programs of the U.S. DOT):

Apprentices and trainees working under apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting EEO in connection with Federal-aid highway construction programs are not subject to the requirements of paragraph 4 of this Section IV. The straight time hourly wage rates for apprentices and trainees under such programs will be established by the particular programs. The ratio of apprentices and trainees to journeymen shall not be greater than permitted by the terms of the particular program.

6. Withholding:

The SHA shall upon its own action or upon written request of an authorized representative of the DOL withhold, or cause to be withheld, from the contractor or subcontractor under this contract or any other Federal contract with the same prime contractor, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements which is held by the same prime contractor, as much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the SHA contracting officer may, after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

7. Overtime Requirements:

No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers, mechanics, watchmen, or guards (including apprentices, trainees, and helpers described in paragraphs 4 and 5 above) shall require or permit any laborer, mechanic, watchman, or guard in any workweek in which he/she is employed on such work, to work in excess of 40 hours in such workweek unless such laborer, mechanic, watchman, or guard receives compensation at a rate not less than one-and-one-half times his/her basic rate of pay for all hours worked in excess of 40 hours in such workweek.

8. Violation:

Liability for Unpaid Wages; Liquidated Damages: In the event of any violation of the clause set forth in paragraph 7 above, the contractor and any subcontractor responsible thereof shall be liable to the affected employee for his/her unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer, mechanic, watchman, or guard employed in violation of the clause set forth in paragraph 7, in the sum of $10 for each calendar day on which such employee was required or permitted to work in excess of the standard work week of 40 hours without payment of the overtime wages required by the clause set forth in paragraph 7.

9. Withholding for Unpaid Wages and Liquidated Damages:

The SHA shall upon its own action or upon written request of any authorized representative of the DOL withhold, or cause to be withheld, from any monies payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph 8 above.

V. STATEMENTS AND PAYROLLS

(Applicable to all Federal-aid construction contracts exceeding $2,000 and to all related subcontracts, except for projects located on roadways classified as local roads or rural collectors, which are exempt.)

1. Compliance with Copeland Regulations (29 CFR 3):

The contractor shall comply with the Copeland Regulations of the Secretary of Labor which are herein incorporated by reference.

2. Payrolls and Payroll Records:

a. Payrolls and basic records relating thereto shall be maintained by the contractor and each subcontractor during the course of the work and preserved for a period of 3 years from the date of completion of the contract for all laborers, mechanics, apprentices, trainees, watchmen, helpers, and guards working at the site of the work.

b. The payroll records shall contain the name, social security number, and address of each such employee; his or her correct classification; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalent thereof the types described in Section 1(b)(2)(B) of the Davis Bacon Act); daily and weekly number of hours worked; deductions made; and actual wages paid. In addition, for Appalachian contracts, the payroll records shall contain a notation indicating whether the employee does, or does not, normally reside in the labor area as defined in Attachment A, paragraph 1. Whenever the Secretary of Labor, pursuant to Section IV, paragraph 3b, has found that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in Section 1(b)(2)(B) of the Davis Bacon Act, the contractor and each subcontractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, that the plan or program has been communicated in writing to the laborers or mechanics affected, and show the cost anticipated or the actual cost incurred in providing benefits. Contractors or subcontractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprentices and trainees, and ratios and wage rates prescribed in the applicable programs.

c. Each contractor and subcontractor shall furnish, each week in which any contract work is performed, to the SHA resident engineer a payroll of wages paid each of its employees (including apprentices, trainees, and helpers, described in Section IV, paragraphs 4 and 5, and watchmen and guards engaged on work during the preceding weekly payroll period). The payroll submitted shall set out accurately and completely all of the information required to be maintained under paragraph 2b of this Section V. This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal stock number 029-005-0014-1), U.S. Government Printing Office, Washington, D.C. 20402. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors.

d. Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his/her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) that the payroll for the payroll period contains the information required to be maintained under paragraph 2b of this Section V and that such information is correct and complete;

(2) that such laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in the Regulations, 29 CFR 3;

(3) that each laborer or mechanic has been paid not less that the applicable wage rate and fringe benefits or cash equivalent for the classification of worked performed, as specified in the applicable wage determination incorporated into the contract.

e. The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph 2d of this Section V.

f. The falsification of any of the above certifications may subject the contractor to civil or criminal prosecution under 18 U.S.C. 1001 and 31 U.S.C. 231.

g. The contractor or subcontractor shall make the records required under paragraph 2b of this Section V available for inspection, copying, or transcription by authorized representatives of the SHA, the FHWA, or the DOL, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the SHA, the FHWA, the DOL, or all may, after written notice to the contractor, sponsor, applicant, or owner, take such actions as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

VI. RECORD OF MATERIALS, SUPPLIES, AND LABOR

1. On all Federal-aid contracts on the National Highway System, except those which provide solely for the installation of protective devices at railroad grade crossings, those which are constructed on a force account or direct labor basis, highway beautification contracts, and contracts for which the total final construction cost for roadway and bridge is less than $1,000,000 (23 CFR 635) the contractor shall:

a. Become familiar with the list of specific materials and supplies contained in Form FHWA-47, "Statement of Materials and Labor Used by Contractor of Highway Construction Involving Federal Funds," prior to the commencement of work under this contract.

b. Maintain a record of the total cost of all materials and supplies purchased for and incorporated in the work, and also of the quantities of those specific materials and supplies listed on Form FHWA-47, and in the units shown on Form FHWA-47.

c. Furnish, upon the completion of the contract, to the SHA resident engineer on Form FHWA-47 together with the data required in paragraph 1b relative to materials and supplies, a final labor summary of all contract work indicating the total hours worked and the total amount earned.

2. At the prime contractor's option, either a single report covering all contract work or separate reports for the contractor and for each subcontract shall be submitted.

VII. SUBLETTING OR ASSIGNING THE CONTRACT

1. The contractor shall perform with its own organization contract work amounting to not less than 30 percent (or a greater percentage if specified elsewhere in the contract) of the total original contract price, excluding any specialty items designated by the State. Specialty items may be performed by subcontract and the amount of any such specialty items performed may be deducted from the total original contract price before computing the amount of work required to be performed by the contractor's own organization (23 CFR 635).

a. "Its own organization" shall be construed to include only workers employed and paid directly by the prime contractor and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of

a subcontractor, assignee, or agent of the prime contractor.

b. "Specialty Items" shall be construed to be limited to work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid on the contract as a whole and in general are to be limited to minor components of the overall contract.

2. The contract amount upon which the requirements set forth in paragraph 1 of Section VII is computed includes the cost of material and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

3. The contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) and (b) such other of its own organizational resources (supervision, management, and engineering services) as the SHA contracting officer determines is necessary to assure the performance of the contract.

4. No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the SHA contracting officer, or authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract. Written consent will be given only after the SHA has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract.

VIII. SAFETY: ACCIDENT PREVENTION

1. In the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the SHA contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR 1926) promulgated by the Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333).

3. Pursuant to 29 CFR 1926.3, it is a condition of this contract that the Secretary of Labor or authorized representative thereof, shall have right of entry to any site of contract performance to inspect or investigate the matter of compliance with the construction safety and health standards and to carry out the duties of the Secretary under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333).

IX. FALSE STATEMENTS CONCERNING HIGHWAY PROJECTS

In order to assure high quality and durable construction in conformity with approved plans and specifications and a high degree of reliability on statements and representations made by engineers, contractors, suppliers, and workers on Federal-aid highway projects, it is essential that all persons concerned with the project perform their functions as carefully, thoroughly, and honestly as possible. Willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of Federal law. To prevent any misunderstanding regarding the seriousness of these and similar acts, the following notice shall be posted on each Federal-aid highway project (23 CFR 635) in one or more places where it is readily available to all persons concerned with the project:

NOTICE TO ALL PERSONNEL ENGAGED ON FEDERAL-AID HIGHWAY PROJECTS

18 U.S.C. 1020 reads as follows:

"Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the cost thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction on any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever knowingly makes any false statement, false representation, false report or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or

Whoever knowingly makes any false statement or false representation as to material fact in any statement, certificate, or report submitted pursuant to provisions of the Federal-aid Roads Act approved July 1, 1916, (39 Stat. 355), as amended and supplemented;

Shall be fined not more that $10,000 or imprisoned not more than 5 years or both."

X. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT

(Applicable to all Federal-aid construction contracts and to all related subcontracts of $100,000 or more.)

By submission of this bid or the execution of this contract, or subcontract, as appropriate, the bidder, Federal-aid construction contractor, or subcontractor, as appropriate, will be deemed to have stipulated as follows:

1. That any facility that is or will be utilized in the performance of this contract, unless such contract is exempt under the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Pub.L. 91-604), and under the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq., as amended by Pub.L. 92-500), Executive Order 11738, and regulations in implementation thereof (40 CFR 15) is not listed, on the date of contract award, on the U.S. Environmental Protection Agency (EPA) List of Violating Facilities pursuant to 40 CFR 15.20.

2. That the firm agrees to comply and remain in compliance with all the requirements of Section 114 of the Clean Air Act and Section 308 of the Federal Water Pollution Control Act and all regulations and guidelines listed thereunder.

3. That the firm shall promptly notify the SHA of the receipt of any communication from the Director, Office of Federal Activities, EPA, indicating that a facility that is or will be utilized for the contract is under consideration to be listed on the EPA List of Violating Facilities.

4. That the firm agrees to include or cause to be included the requirements of paragraph 1 through 4 of this Section X in every nonexempt subcontract, and further agrees to take such action as the government may direct as a means of enforcing such requirements.

XI. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

1. **Instructions for Certification - Primary Covered Transactions:**

(Applicable to all Federal-aid contracts - 49 CFR 29)

a. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

b. The inability of a person to provide the certification set out below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such a person from participation in this transaction.

c. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this

transaction for cause of default.

d. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted if any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

e. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is submitted for assistance in obtaining a copy of those regulations.

f. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

g. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

h. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the nonprocurement portion of the "Lists of Parties Excluded From Federal Procurement or Nonprocurement Programs" (Nonprocurement List) which is compiled by the General Services Administration.

i. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

j. Except for transactions authorized under paragraph f of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

* * * * *

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Primary Covered Transactions

1. The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

a. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

b. Have not within a 3-year period preceding this proposal been convicted of or had a civil judgement rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

c. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph 1b of this certification; and

d. Have not within a 3-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

2. Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

* * * * *

2. Instructions for Certification - Lower Tier Covered Transactions:

(Applicable to all subcontracts, purchase orders and other lower tier transactions of $25,000 or more - 49 CFR 29)

a. By signing and submitting this proposal, the prospective lower tier is providing the certification set out below.

b. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department, or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

c. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous by reason of changed circumstances.

d. The terms "covered transaction," "debarred," "suspended," "ineligible," "primary covered transaction," "participant," "person," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

e. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

f. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

g. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and

frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

h. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

i. Except for transactions authorized under paragraph e of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

* * * * *

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Covered Transactions:

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

* * * * *

XII. CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

(Applicable to all Federal-aid construction contracts and to all related subcontracts which exceed $100,000 - 49 CFR 20)

1. The prospective participant certifies, by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:

a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

3. The prospective participant also agrees by submitting his or her bid or proposal that he or she shall require that the language of this certification be included in all lower tier subcontracts, which exceed $100,000 and that all such recipients shall certify and disclose accordingly.

ATTACHMENT A - EMPLOYMENT PREFERENCE FOR APPALACHIAN CONTRACTS
(Applicable to Appalachian contracts only.)

1. During the performance of this contract, the contractor undertaking to do work which is, or reasonably may be, done as on-site work, shall give preference to qualified persons who regularly reside in the labor area as designated by the DOL wherein the contract work is situated, or the subregion, or the Appalachian counties of the State wherein the contract work is situated, except:

a. To the extent that qualified persons regularly residing in the area are not available.

b. For the reasonable needs of the contractor to employ supervisory or specially experienced personnel necessary to assure an efficient execution of the contract work.

c. For the obligation of the contractor to offer employment to present or former employees as the result of a lawful collective bargaining contract, provided that the number of nonresident persons employed under this subparagraph 1c shall not exceed 20 percent of the total number of employees employed by the contractor on the contract work, except as provided in subparagraph 4 below.

2. The contractor shall place a job order with the State Employment Service indicating (a) the classifications of the laborers, mechanics and other employees required to perform the contract work, (b) the number of employees required in each classification, (c) the date on which he estimates such employees will be required, and (d) any other pertinent information required by the State Employment Service to complete the job order form. The job order may be placed with the State Employment Service in writing or by telephone. If during the course of the contract work, the information submitted by the contractor in the original job order is substantially modified, he shall promptly notify the State Employment Service.

3. The contractor shall give full consideration to all qualified job applicants referred to him by the State Employment Service. The contractor is not required to grant employment to any job applicants who, in his opinion, are not qualified to perform the classification of work required.

4. If, within 1 week following the placing of a job order by the contractor with the State Employment Service, the State Employment Service is unable to refer any qualified job applicants to the contractor, or less than the number requested, the State Employment Service will forward a certificate to the contractor indicating the unavailability of applicants. Such certificate shall be made a part of the contractor's permanent project records. Upon receipt of this certificate, the contractor may employ persons who do not normally reside in the labor area to fill positions covered by the certificate, notwithstanding the provisions of subparagraph 1c above.

5. The contractor shall include the provisions of Sections 1 through 4 of this Attachment A in every subcontract for work which is, or reasonably may be, done as on-site work.

ATTACHMENT F

Disadvantaged Business Enterprise (DBE) Program (49 CFR 26)

UPDATED JANUARY 2010
REVISED JUNE 2006
REVISED OCTOBER 1999

Policy Statement

The Texas Department of Transportation (TxDOT) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 CFR Part 26. TxDOT has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, TxDOT has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of TxDOT to ensure that DBEs, as defined in part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also our policy to:

- ensure nondiscrimination in the award and administration of DOT assisted contracts;
- create a level playing field on which DBEs can compete fairly for DOT assisted contracts;
- ensure that the DBE Program is narrowly tailored in accordance with applicable law; ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
- help remove barriers to the participation of DBEs in DOT assisted contracts; and
- assist in the development of firms that can compete successfully in the market place outside the DBE Program.

Nondiscrimination Policy

TxDOT will 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 49 CFR Part 26 on the basis of race, color, sex, national origin, age or disability.

In administering its DBE program, TxDOT will 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 DBE program with respect to individuals of a particular race, color, sex, national origin, age or disability.

TxDOT has disseminated this policy statement to the Texas Transportation Commission and all the components of our organization. Through the distribution of this DBE program, we have distributed this statement to DBE and non-DBE business communities that perform work for us on DOT-assisted contracts.

Appointment of DBE Liaison Officer (DBELO)

The Assistant Executive Director for Support Operations has been delegated as the DBE Liaison Officer. In that capacity, the Assistant Executive Director for Support Operations is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by TxDOT in its financial assistance agreements with the Department of Transportation.

Amadeo Saenz, P.E.
Executive Director
Texas Department of Transportation

11/30/01
Date

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM
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SUBPART A - GENERAL REQUIREMENTS Section

26.1 Objectives

The objectives are found in the policy statement on the first page of this program.

Section 26.3 Applicability

TxDOT is the recipient of federal airport funds authorized by 49 U.S.C. 47101, et seq;
TxDOT is the recipient of federal -aid highway funds authorized under Titles I and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L 102-240, 105 Stat. 1914, Titles I, III, and V of the Transportation Equity;
Act for the 21StCentury (TEA-21, Pub. L 105-178, 112 Stat. 107. SAFETEA-LU, P.L 109-59;
TxDOT is the recipient of 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, II, and V of the TEA-21, Pub. L 105-178. SAFETEA-LU, P.L. 109-59

Section 26.5 Definitions

TxDOT will adopt the definitions contained in Section 26.5 for this program.

Section 26.7 Non-discrimination Requirements

TxDOT will 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 49 CFR Part 26 -**Attachment 1** on the basis of race, color, sex, or national origin.

In administering its DBE program, TxDOT will 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 DBE program with respect to individuals of a particular race, color, sex, or national origin.

Section 26.11 Record Keeping Requirements

Reporting to DOT: 26.11(b)

We will report DBE participation to DOT as follows:

We will submit annually The Uniform Report of DBE Awards or Commitment and Payments as modified for use by FAA recipients [as amended 68 FR 35556, June 16, 2003].

We will report on a semi-annual basis The Uniform Report of DBE Awards or Commitment and Payments as modified for use by FHWA [as amended 68 FR 35556, June 16,2003].

We will report on a semi-annual basis The Uniform Report of DBE Awards or Commitment and Payments as modified for use by FTA recipients [as amended 68 FR 35556, June 16, 2003].

These reports will reflect payments actually made to DBEs on DOT assisted contracts.

Bidders List: 26.11(c)

TxDOT will create 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 calculating overall goals. The bidder list will include the name, address, DBE non-DBE status, age, and annual gross receipts of firms. We will collect this information in the following ways:

> The TxDOT Bidder's list consists of firms that include highway construction prime contractors, professional servic e prov iders and subcontrac tor and materi al suppliers. Subcontractor and material su pplier information is suppl ied by t he low bid Prime Contractor. T xDOT Bidder's List data was developed from contractors who have submitted bids on highway cons truction contracts. In the contract proposal, the low bidder, prio r to award of the contrac t, is required to submit bidders information they received for the pr oject. The Bidder's List also contain s data from DBEs that subm itted bids for construction and professional servic e contracts and from the DBE Commitments and Awards made.

Section 26.13 Federal Financial Assistance Agreement

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

Assurance: 26.13(a)

> TxDOT 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 recipients 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 TxDOT of its failure to carry out its approved program, the Department may impose sanction 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.).

This language will appear in financial assistance agreements with sub-recipients.

Contract Assurance: 26.13b

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

> 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. This information is included in the DBE Special Provision 000-1966 1.A.1.b. - **Attachment 2.**

SUBPART B - ADMINISTRATIVE REQUIREMENTS

Section 26.21 DBE Program Updates

The Department provides U.S. DOT with updates representing significant changes in the program as they occur. The department understands that all changes must be approved by FHWA, FTA, FAA prior to implementation.

Section 26.23 Policy Statement

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

Section 26.25 DBE Liaison Officer (DBELO)

The Assistant Executive Director for Support Operations has been delegated as the DBE Liaison Officer. In that capacity, the Assistant Executive Director for Support Operations is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is ac orded the same priority as compliance with all other legal obligations incurred by TxDOT in its financial assistance agreements with the Department of Transportation.

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that TxDOT complies with all provision of 49 CFR Part 26. The DBELO has direct, independent access to the Executive Director concerning DBE program matters. An organizational chart - **Attachment 3** displays the DBELO's position in the organization.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. The DBELO has a staff of 17 to assist in the administration of the program. The duties and responsibilities of the DBELO and staff include the following:

1 Gathers and reports statistical data and other information as required by DOT.
2 Works with all departments to set overall annual goals.
3 Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
4 Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals attainment and identifies ways to improve progress).
5 Participates with the Division Directors and District Officials to determine contractor compliance with good faith efforts.
6 Analyzes TxDOT's progress toward DBE goal attainment and identifies ways to improve progress.
7 Participates in pre-bid meetings.
8 Advises the Executive Director and the Texas Transportation Commission on DBE matters and achievement.
9 Chairs the DBE Liaison Committee.
10 Participates in pre-bid meetings.
11 Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
12 Plans and participates in DBE training seminars.
13 Certifies DBEs according to the criteria set by DOT and acts as liaison to the Uniform Certification Process in Texas.
14 Provides outreach to DBEs and community organizations to advise them of opportunities.
15 Maintains the Texas Unified Certification Program (TUCP) updated directory on certified DBEs.

Section 26.27 DBE Financial Institutions

It is the policy of TxDOT 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 on DOT-assisted contract to make use of these institutions. We have made a thorough search for financial institutions owned and controlled by socially and economically disadvantaged individuals in the State of Texas and were unable to identify financial institutions meeting the requirements of Section 26.27.

Section 26.29 Prompt Payment Mechanisms

TxDOT will require prime contractors to pay subcontractors for satisfactory performance of their contracts as specified in the Special Provision 009-007 Measurement and Payment - **Attachment 4,** which is included in all federal-aid contracts.

In regards to the prompt pay full payment of retainage, TxDOT has adopted option 2. TxDOT will decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage held by prime contractor to the subcontractor as specified in Special Provision 009-007 Measurement and Payment-**Attachment4.**

[68 FR 35553, June 16, 2003]

Section 26.31 Directory

TxDOT maintains a directory identifying all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as a DBE. We revise the Directory on a weekly basis.

The TUCP Certifying Partners agree that TxDOT will serve as the TUCP directory manager. The directory manager will be responsible for the following actions:

- Input all data and make any corrections, additions and/or deletions upon receipt of information from the Certifying TUCP Partners;
- Maintain and keep the DBE directory current;
- Make the DBE directory available to all TUCP Partners and other interested parties;

- Maintain the TUCP directory website at www.dot.state.tx.us see **Attachment 5** for sample.

Section 26.33 Over-concentration

TxDOT has not identified that over-concentration exists in the types of work that DBEs perform.

Section 26.35 Business Development Programs

TxDOT has established a business development program.

Section 26.37 Monitoring and Enforcement Mechanisms

TxDOT will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26:

> Monitoring Mechanisms-To ensure that DBE requirements of the DOT assisted contract are complied with, the Department will monitor the Contractor's efforts to involve DBEs during the performance of the contract. This will be accomplished by a review of monthly reports submitted to the Area Engineer by the Contractor indicating his progress in achieving the DBE contract goal, **and** by compliance reviews conducted on the project site by the Department. The DBE Special Provision 000-1966 - **Attachment 2** is included in all federal-aid projects and outlines the monitoring mechanism for compliance with 49CFR Part 26.
>
> Enforcement mechanisms- A Contractor's failure to comply with the requirements of the DBE Special Provision 000-1966 - **Attachment 2** shall constitute a material breach of the federal-aid contract. In such a case, the Department reserves the right to terminate the contract; to deduct the amount of DBE goal not accomplished by DBEs from the money due or to become due the Contractor, or to secure a refund, not as a penalty but as liquidated damages to the Department or such other remedy or remedies as the Department deems appropriate.

[As amended at 65 FR 68951, Nov 15, 2000, 68 FR 35554, June 16, 2003]

SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 26.43 Set-asides or Quotas

TxDOT does not use set-asides or quotas in any way in the administration of this DBE program.

Section 26.45 Overall Goals

In accordance with Section 26.45(f) TxDOT will submit its overall goal to DOT on August 1 of each year. Before establishing the overall goal each year, TxDOT will consult with 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 to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and TxDOTs efforts to establish a level playing field for the participation of DBEs.

Following this consultation, we will publish a notice of the proposed overall goals, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at our principal office for 30 days following the date of the notice, and informing the public that TxDOT will accept comments on the goals for 45 days from the date of the notice. The notice is published on TxDOT's website, newsletter, newspapers, available minority-focus media, and trade publications. Normally, we will issue this notice by June 25th of each year. The notice must include addresses to which comments may be sent and addresses (including offices and websites) where the proposal may be reviewed.

Our overall goal submission to DOT will include a summary of information and comments received during this public participation process and our responses.

We will begin using our overall goal on October 1 of each year, unless we have received other instructions from DOT. If we establish a goal on a project basis, we will begin using our goal by the time of the first solicitation for a DOT assisted contract.

A description of the methodology to calculate the overall goal and the goal calculations can be found in **Attachment 6** to this program. This section of the program will be updated annually.

Section 26.49 Transit Vehicle Manufacturers Goals

TxDOT will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, TxDOT may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

Section 26.51 (d-g) Contract Goals

TxDOT will use contract goals to meet any portion of the overall goal TxDOT does not project being able to meet using 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 our overall goal that is not projected to be met through the use of race-neutral means.

We will establish contract goals only on those DOT-assisted contracts that have subcontracting possibilities. We need not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work.)

We will express our contract goals as a percentage of the total amount of a DOT assisted contract.

TxDOT DBE Special Provision and Bidder's Certification

The purpose of the DBE Special Provision is to carry out the U. S. Department of Transportation's (DOT) policy of ensuring nondiscrimination in the award and administration of DOT assisted contracts and creating a level playing field on which firms owned and controlled by individuals who are determined to be socially and economically disadvantaged can compete fairly for DOT assisted contracts. If the Disadvantaged Business Enterprise (DBE) goal is greater than zero, Article A, "Disadvantaged Business Enterprise in Federal-Aid Construction", of this Special Provision shall apply to this contract. If there is no DBE goal, Article B, "Race-Neutral DBE Participation", of this Special Provision shall apply, to this contract. The percentage goal for DBE participation in the work to be performed under this contract will be shown on the proposal.

Certification of DBE Goal Attainment

The certification of DBE goal attainment is included in all proposals for federal-aid highway projects. By signing the proposal, the Bidder certifies that the DBE goal will be met by obtaining commitments equal to or exceeding the DBE percentage or that the Bidder will provide a good faith effort to substantiate the attempt to meet the goal. Failure to provide commitments to meet the stated goal or provide a satisfactory good faith effort will be considered a breach of the requirements of the proposal. As a result, the bid proposal guaranty of the bidder will become property of the Department and the Bidder will be excluded for re bidding on the project when it is re-advertised. See **Attachment 7.**

Tracking and monitoring of DBE goals throughout the life of the contract will be performed by the Department.

The Contractor shall submit monthly reports, after work begins, on DBE payments to meet the DBE goal and for DBE race-neutral participation. The monthly report is to be sent to the Area Engineer. These reports will be due within 15 days after the end of a calendar month. Office of Civil Rights reviews monthly progress reports through computer programs, i.e. SiteManager and Subcontractor Monitoring System (SMS). Upon continual monitoring of the DBE commitment and payments by the Area Engineer, the Area Engineer will notify the Office of Civil Rights of any issue that requires further review. The Office of Civil Rights will initiate a compliance review and take the appropriate contract remedies. See attached DBE Special Provisions 000-1966 - **Attachment 2.**

Section 26.53 Good Faith Efforts Procedures

Demonstration of good faith efforts (26.53(a) & **(c))**
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.

TxDOTs Office of Civil Rights is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive.

We will ensure that all information is complete and accurate and adequately documents the bidder/offer's good faith efforts before we commit to the performance of the contract by the bidder/offeror. This process for Good Faith Effort is included in the DBE Special Provision 000-1966 3.c. - **Attachment 2.**

Information to be submitted (26.53(b))
TxDOT treats bidder/offers' compliance with good faith efforts[1] requirements as a matter of responsiveness.

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 and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractors commitment and

6. If the contract goal is not met, evidence of good faith efforts.

Administrative reconsideration (26.53(d))

Within 15 days of being informed by TxDOT that it is not responsive 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 Office of Civil Rights, 125 E. 11th Street, Austin, Texas 78701, (512) 416-4700. The reconsideration official 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 or argument 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 our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do. We will 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. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

Good Faith Efforts when a DBE is replaced on a contract (26.53(f))

Contractors' requests for substitutions of DBE subcontractors shall be accompanied by a detailed explanation which should substantiate the need for a substitution. The Contractor may not be allowed to count work on those items being substituted toward the DBE goal prior to approval of the substitution from the Department.

The Districts will be responsible for coordinating and approving Prime's request for Substitution. Districts will notify Office of Civil Rights of the determination of a contractor's compliance and/or noncompliance of the DBE Special Provision and be responsible for coordinating appropriate sanctions with TxDOT's DBE Liaison Officer. If the contractor fails to comply according to federal regulations specified in 49 CFR §26.53 and according to TxDOT contract specifications the contractor will be sanctioned as outlined in TxDOT DBE Special Provision 000-1966-**Attachment 2.**

A Contractor's failure to comply with the requirements of the DBE Special Provision shall constitute a material breach of the contract. In such a case, the Department reserves the right to terminate the contract, deduct the amount of DBE goal not accomplished by DBEs from the money due or to become due to the Contractor, secure a refund, not as a penalty but as liquidated damages to the Department, or such other remedy or remedies as the Department deems appropriate.

Section 26.55 Counting DBE Participation

TxDOT will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55.

The district will perform CUF reviews on contracts that have a DBE goal. A CUF review will be performed on DBEs listed on the approved contract commitment using the *Commercially Useful Function (CUF) Project Site Review* checklist. If needed to verify a CUF, obtain a copy of the subcontract agreement for clarification regarding the DBEs contractual responsibilities. Office of Civil Rights will perform the CUF reviews on DBE suppliers. For non-supplier DBEs listed on the contract DBE commitment working on the project site and associated project specific locations, complete the checklist as follows:

1. Complete the initial checklist as soon as possible after the DBE's commencement of its work.
2. Monitor the DBEs performance and conduct additional reviews when the DBE's work performance brings into question whether the DBE meets CUF requirements.
3. If information obtained indicates possible noncompliance with the CUF requirements, contact Office of Civil Rights for a final determination.

In order to provide consistent interpretations statewide, Office of Civil Rights will make final negative CUF determinations and provide guidance and assistance for CUF reviews.

For trucking firms TxDOT will count DBE goal credit as follows:

A DBE trucking firm (including an owner operator who is certified as a DBE is considered to be performing a CUF when the DBE is responsible for the management and supervision of the entire trucking operation on a particular contract and the DBE itself owns and operates at least 1 fully licensed, insured, and operational truck used on the contract.

(a) The Contractor receives credit for the total value of the transportation services the DBE provides on a contract using trucks it owns, insures, and operates using drivers it employs.
(b) 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.
(c) 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 the DBE-owned trucks on the contract. Additional participation by non-DBE lessees receive credit only for the fee or commission it receives as result of the lease arrangement

(d) A lease must indicate that the DBE has exclusive use of and control over the trucks giving the DBE absolute priority for use of the leased trucks. Leased trucks must display the name and identification number of the DBE.

[68 FR 35554, June 16, 2003]

Use Of Joint Checks

With department approval, the use of joint checks between a prime contractor and a DBE subcontractor is allowed. The new DBE Special Provision Section 1.A.5.d. states the following regarding the use of joint checks:

> ***"If the Contractor chooses to assist a DBE firm, other than a manufacturing material supplier or regular dealer, and the DBE firm accepts the assistance, the Contractor may act solely as a guarantor by use of a two-party check for payment of materials to be used on the project by the DBE. The material supplier must invoice the DBE who will present the invoice to the Contractor. The Contractor may issue a Joint check to the DBE and the material supplier and the DBE firm must issue the remittance to the material supplier. No funds shall go directly from the Contractor to the material supplier. The DBE firm may accept or reject this joint checking arrangement***
>
> ***The Contractor must obtain approval from the Department prior to implementing the use of joint check arrangements with the DBE. Submit to the Department, Joint Check Approval Form 2178 for requesting approval. Provide copies of cancelled joint checks upon request No DBE goal credit will be allowed for the cost of DBE materials that are paid by the Contractor directly to the material supplier."***

Procedures- For all federal-aid contracts, review and approve the use of joint checks prior to their use. Districts should verify that the DBE subcontractor is responsible for ordering, scheduling delivery and issuing payment for the materials.

Prime contractor requests for joint check approval must be submitted to the Area Engineer on *Form 2178, DBE Joint Check Approval* - **Attachment 8**. The Department will expedite approval or denial of the use of DBE joint check agreements to ensure timely delivery of materials. Reasons for denial include, but are not limited to, the prime contractor's insistence on the joint check arrangement and failure of all parties to agree to the arrangement (only the DBE or the supplier may request the use of a joint check).

Obtain copies of cancelled joint checks as necessary to verify that the joint checks have passed through the DBE. Bank images are an acceptable method of review. Review the joint check agreements as necessary to ensure that a three party arrangement exists.

Material cost paid by the prime contractor directly to the material supplier is not allowed for DBE goal credit and may cause the denial of DBE goal credit for all work performed by the DBE subcontractor.

SUBPART D - CERTIFICATION STANDARDS

TxDOT will use the certification standards of Subpart D of Part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. We will make our certification decisions based on the facts as a whole. For information about the certification process or to apply for certification, firms should contact:

The Office of Civil Rights, 125 E. 11th Street, Austin, Texas 78701, Toll Free 1-866-480-2518

Our certification application forms and documentation requirements are found in the attached TUCP Standard Operating Procedures (SOP) at **Attachment 9.**

SUBPART E - CERTIFICATION PROCEDURES

TxDOT is a member of the Texas Unified Certification Program (TUCP)]. The TUPC will meet all of the requirements of this section. A description of the TUCP Memorandum of Agreement (MOA) is found at **Attachment 10.**

Withdrawal of DBE Application: TxDOT will follow the procedures under the TUCP for withdrawal DBE Application. A DBE may withdraw their application prior to a certification decision being rendered by TxDOT. TxDOT will acknowledge the DBE request for withdrawal of DBE Application by certified letter. The DBE may not reapply for certification for a period of 12 months from the date of receipt of TxDOT's letter, this withdrawal may not be appealed to US DOT.

Voluntary Surrender of Certification: TxDOT will follow the procedures under the TUCP for surrender of DBE Certification. A DBE may surrender their certification and TxDOT will acknowledge the DBE's request for surrender of their certification by certified letter. The DBE may not reapply for certification for a period of 12 months from the date of receipt of TxDOT's letter. This voluntary surrender may not be appealed to US DOT.

Section 26.83 Procedures for Certification Decisions

For procedures for the certification decisions see the attached TUCP Standard Operating Procedures (SOP) at **Attachment 9.**

TxDOT is one of six certifying agencies in Texas. The six certifying agencies have agreed by Memorandum of Agreement that TxDOT will be responsible for all highway construction industry DBE applications, Annual Affidavits, three-year on-site review, and decertification if applicable.

TxDOT will ensure that the decision in a proceeding to remove a firm's eligibility (decertification) is made by 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 personnel who did take part in these actions.

SUBPART F - COMPLIANCE AND ENFORCEMENT

Section 26.109 Information, Confidentiality, Cooperation and Intimidation or Retaliation

TxDOT will not release information that may be reasonably 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.

TxDOT will keep the identity of complainants confidential at their election, however complainants will be advised that in some circumstances, failure to waive the privilege will result in the closure of the investigation or proceeding or hearing. Federal Aviation Administration (FAA) follows the procedures of 14 CFR Part 16 with respect to confidentiality of information and complaints.

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, investigation and other request for information. Failure to do so shall be a ground for appropriate action against the party involved.

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. Records must be retained for a period of 3 years following completion of the contract work, and shall be available at reasonable times and places for inspection by authorized representatives of the Department or the DOT. Provide copies of subcontracts or agreements and other documentation upon request.

ATTACHMENTS

Attachment 1 DBE Regulations: 49 CFR Part 26
Attachment 2 DBE Special Provision 000-1966
Attachment 3 Organizational Chart
Attachment 4 Measurement and Payment Special Provision 009-007
Attachment 5 TUCP DBE directory example and website address to the directory
Attachment 6 DBE Goal Methodology
Attachment 7 DBE Bidder Certification
Attachment 8 DBE Joint Check Approval Form
Attachment 9 TUCP SOP
Attachment 10 TUCP MOA
Attachment 11 Forms List

ATTACHMENT 1

ATTACHMENT 1

§ 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.

§ 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.

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.

§ 25.605 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of 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 DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

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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 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.

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 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 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, Kirbati, 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

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.

(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

(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, 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 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. 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 unsure 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, willing 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 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.

[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]

§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 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 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) 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 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. 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 (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, policymaking, 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 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, 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 licenser 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 descendents 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 requirements 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 ineligibility 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 pendancy 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, 400 7th Street, SW, Room 5414, 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 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]

§ 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) 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 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—UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS FORM

INSTRUCTIONS FOR COMPLETING THE UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS

1. Indicate the DOT Operating Administration (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 more than six, 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. 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 this report is due to the FAA, data should cover the entire year.

6. Name of the recipient.

7. State your annual DBE goal(s) established for the Federal fiscal year of this report to be 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 Goals (both of which include gender-conscious/neutral goals). The Race Conscious Goal portion should be based on programs 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 Goal portion should include programs 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.

8-9. The amounts in items 8(A)-9(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.

8(A). Provide the total dollar amount for all prime contracts assisted with DOT funds that were awarded during this reporting period.

8(B). Provide the total number of all prime contracts assisted with DOT funds that were awarded during this reporting period.

8(C). From the total dollar amount awarded in item 8(A), provide the dollar amount awarded to certified DBEs during this reporting period.

8(D). From the total number of prime contracts awarded in item 8(B), specify the number awarded to certified DBEs during this reporting period.

8(E). From the total dollars awarded in 8(C), provide the dollar amount awarded to DBEs though the use of Race Conscious methods. See the definition of Race Conscious Goal in item 7 and the explanation of project types in item 8 to include in your calculation.

8(F). From the total number of prime contracts awarded in 8(D), specify the number awarded to DBEs through Race Conscious methods.

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 Goal in item 7 and the explanation of project types in item 8 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.

9(A)-9(I). 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.

10(A)-11(I). For all DBEs awarded prime contracts and awarded or committed subcontracts as indicated in 8(C)-(D) and 9(C)-(D), break the data down further by total dollar amount as well as the number of all contracts going to each ethnic group as well as to non-minority women. The "Other" category includes those DBEs who are not members of the presumptively disadvantaged groups already listed, but who are determined eligible for the DBE program on an individual basis (e.g. a Caucasian male with a disability). The TOTALS value in 10(H) should equal the sum of 8(C) plus 9(C), and similarly, the TOTALS value in 11(H) should equal the sum of 8(D) plus 9(D). Column I should only be filled out if this report is due on December 1, as indicated in item 5. The values for this column are derived by adding the values reported in column H in your first report with the values reported in this second report.

12(A). Provide the total number of prime contracts completed during this reporting period that had Race Conscious goals. Race Conscious contracts are those with contract goals or another Race Conscious measure.

12(B). Provide the total dollar value of prime contracts completed this reporting period that had Race Conscious goals.

12(C). Provide the total dollar amount of DBE participation on all Race Conscious prime contracts completed this reporting period that was necessary to meet the contract goals on them. This applies only to Race Conscious prime contracts.

12(D). Provide the actual total DBE participation in dollars on the race conscious prime contracts completed this reporting period.

12(E). Of all the prime contracts completed this reporting period, calculate the percentage of DBE participation. Divide the actual total dollar amount in 12(D) by the total dollar value provided in 12(B) to derive this percentage. Round to the nearest tenth.

13(A)-13(E). Items 13(A)-13(E) are derived in the same manner as items 12(A)-12(E), except these figures should be based on Race Neutral prime contacts (i.e. those with no race conscious measures).

14(A)-14(E). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above.

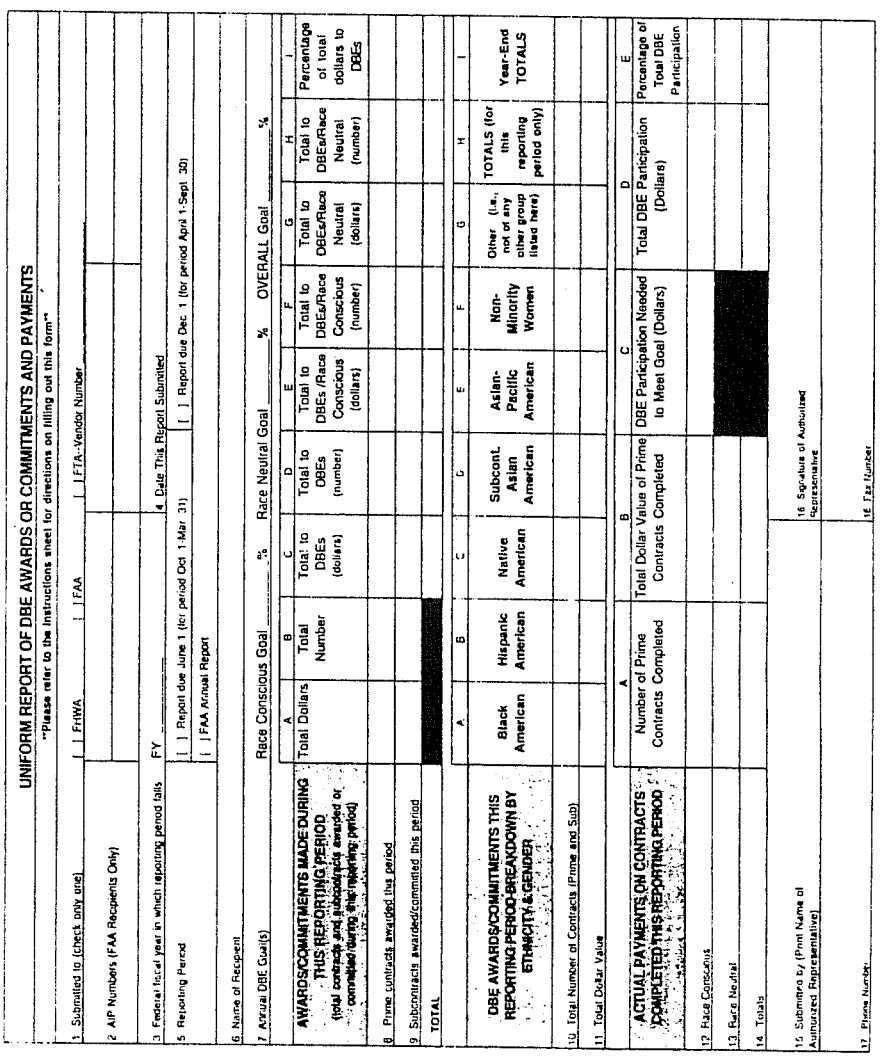
15. Name of the Authorized Representative preparing this form.

16. Signature of the Authorized Representative.

17. Phone number of the Authorized Representative.

18. Fax number of the Authorized Representative.

**Submit your completed report to your Regional or Division Office.



UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS

"Please refer to the instructions sheet for directions on filling out this form"

1. Submitted to (check only one) [ ] FHWA [ ] FAA [ ] FTA--Vendor Number

2. AIP Numbers (FAA Recipients Only)

3. Federal fiscal year in which reporting period falls FY _____ 4. Date This Report Submitted

5. Reporting Period [ ] Report due June 1 (for period Oct 1-Mar. 31) [ ] Report due Dec. 1 (for period April 1-Sept. 30)
[ ] FAA Annual Report

6. Name of Recipient

7. Annual DBE Goal(s) Race Conscious Goal _____ % Race Neutral Goal _____ % OVERALL Goal _____ %

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

DBE AWARDS/COMMITMENTS THIS REPORTING PERIOD BREAKDOWN BY ETHNICITY & GENDER	A Black American	B Hispanic American	C Native American	D Subcont. Asian American	E Asian-Pacific American	F Non-Minority Women	G Other (i.e., not of any other group listed here)	H TOTALS (for this reporting period only)	I Year-End TOTALS
10. Total Number of Contracts (Prime and Sub)									
11. Total Dollar Value									

ACTUAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD	A Number of Prime Contracts Completed	B Total Dollar Value of Prime Contracts Completed	C DBE Participation Needed to Meet Goal (Dollars)	D Total DBE Participation (Dollars)	E Percentage of Total DBE Participation
12. Race Conscious					
13. Race Neutral					
14. Totals					

15. Submitted by (Print Name of Authorized Representative) 16. Signature of Authorized Representative

17. Phone Number 18. Tax Number

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003]

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) [Reserved]

(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).

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35559, June 16, 2003]

APPENDIX F TO PART 26—UNIFORM CERTIFICATION APPLICATION FORM

INSTRUCTIONS FOR COMPLETING THE DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM UNIFORM CERTIFICATION APPLICATION

NOTE: 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. Prior/Other Certifications

Check the appropriate box indicating for which program your firm is currently certified. If you are already certified as a DBE, indicate in the appropriate box the name of the certifying agency that has previously certified your firm, and also indicate whether your firm has undergone an onsite visit. If your firm has already undergone an onsite visit/review, indicate the most recent date of that review and the state UCP that conducted the review.

NOTE: If your firm is currently certified under the SBA's 8(a) and/or SDB programs, you may not have to complete this application. You should contact your state UCP to find out about a streamlined application process for firms that are already certified under the 8(a) and SDB programs.

B. Prior/Other Applications and Privileges

Indicate whether your firm or any of the persons listed has ever withdrawn an application for a DBE program or an SBA 8(a) or SDB program, or whether any have ever been denied certification, decertified, debarred, suspended, or had bidding privileges denied or restricted by any state or local agency or Federal entity. If your answer is yes, indicate the date of such action, identify the name of the agency, and explain fully the nature of the action in the space provided.

Section 2: GENERAL INFORMATION

A. Contact Information

(1) State the name and title of the person who will serve as your firm's primary contact under this application.
(2) State the legal name of your firm, as indicated in your firm's Articles of Incorporation or charter.
(3) State the primary phone number of your firm.
(4) State a secondary phone number, if any.
(5) State your firm's fax number, if any.
(6) State your firm's or your contact person's email address.
(7) State your firm's website address, if any.
(8) State the street address of your firm (i.e., the physical location of its offices – not a post office box address).
(9) State the mailing address of your firm, if it is different from your firm's street address.

B. Business Profile

(1) In the box provided, briefly describe the primary business and professional activities in which your firm engages.
(2) State the Federal Tax ID number of your firm as provided on your firm's filed tax returns, if you have one. This could also be the Social Security number of the owner of your firm.
(3) State the date on which your firm was officially established, as stated in your firm's Articles of Incorporation or charter.
(4) State the date on which you and/or each other owner took ownership of the firm.
(5) Check the appropriate box that describes 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."

NOTE: If you checked "No," then you do NOT qualify for the DBE program and therefore do not need to complete the rest of this application. The DBE program requires all participating firms be for-profit enterprises.

(7) Check the appropriate box that describes the legal form of ownership of your firm, as indicated in your firm's Articles of Incorporation or charter. If you checked "Other," briefly explain in the space provided.
(8) Check the appropriate box that indicates whether your firm has ever existed under different ownership, a different type of ownership, or a different name. If you checked "Yes," specify which and briefly explain the circumstances in the space provided.
(9) Indicate in the spaces provided how many employees your firm has, specifying the number of employees who work on a full-time and part-time basis.
(10) Specify the total gross receipts of your firm for each of the past three years, as declared in your firm's filed tax returns.

C. Relationships 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, or any office staff with any other business, organization, or entity of any kind. If you answered "Yes," then specify the name of the other firm(s) and briefly explain the nature of the shared facilities or other items in the space provided.
(2) Check the appropriate box that indicates whether at present, or at any time in the past:
  (a) Your firm has been a subsidiary of any other firm;
  (b) Your firm consisted of a partnership in which one or more of the partners are other firms;
  (c) Your firm has owned any percentage of any other firm; and
  (d) Your firm has had any subsidiaries of its own.
(3) Check the appropriate box that indicates whether any other firm has ever had an ownership interest in your firm.

(4) If you answered "Yes" to any of the questions in (2)(a)-(d) or (3), identify the name, address and type of business for each.

D. **Immediate Family Member Businesses**

Check the appropriate box that indicates whether any of your immediate family members own or manage another company. An "immediate family member" is any person who is your father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law. If you answered "Yes," provide the name of each relative, your relationship to them, the name of the company they own or manage, the type of business, and whether they own or manage the company.

Section 3: OWNERSHIP

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 additional owner):

A. **Background Information**

(1) Give the name of the owner.
(2) State his/her title or position within your firm.
(3) Give his/her home phone number.
(4) State his/her home (street) address.
(5) Check the appropriate box that indicates this owner's gender.
(6) Check the appropriate box that indicates this owner's ethnicity (check all that apply). 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.
(8) If this owner is not a U.S. citizen, check the appropriate box that indicates whether this owner is 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. This, however, does not necessarily disqualify your firm altogether from the DBE program if another owner is a U.S. citizen or lawfully admitted permanent resident and meets the program's other qualifying requirements.

B. **Ownership Interest**

(1) State the number of years during which this owner has been an owner of your firm.
(2) 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.
(3) State the percentage of total ownership control of your firm that this owner possesses.
(4) State the familial relationship of this owner to each other owner of your firm.
(5) Indicate the number, percentage of the total, class, date acquired, and method by which this owner acquired his/her shares of stock in your firm.
(6) Check the appropriate box that indicates 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 or title held in that business.
(7) 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 and this owner's function or title held in that business. Briefly describe the nature of the business relationship in the space provided.

C. **Disadvantaged Status**

NOTE: You only need to complete this section for each owner that is applying for DBE qualification (i.e., for each owner who is claiming to be "socially and economically disadvantaged" and whose ownership interest is to be counted toward the control and 51% ownership requirements of the DBE program)

(1) Indicate in the space provided the total Personal Net Worth (PNW) of each owner who is applying for DBE qualification. Use the PNW calculator form at the end of this application to compute each owner's PNW.
(2) Check the appropriate box that indicates whether any trust has ever been created for the benefit of this disadvantaged owner. If you answered "Yes," briefly explain the nature, history, purpose, and current value of the trust(s).

Section 4: CONTROL

A. **Identify your 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 of your firm.
(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 that indicates whether any of your firm's officers and/or directors listed above perform 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. If you answered "Yes," identify the name of the firm, the officer or director, and the nature of his/her business relationship with that other firm.

B. **Identify your firm's management personnel (by name, title, ethnicity, and gender) who control your firm in the following areas:**

(1) Making financial decisions on your firm's behalf, including the acquisition of lines of credit, surety bonds, supplies, etc.;
(2) Estimating and bidding, including calculation of cost estimates, bid preparation and submission;
(3) Negotiating and contract execution, including participation in any of your firm's negotiations and executing contracts on your firm's behalf;
(4) Hiring and/or firing of management personnel, including interviewing and conducting performance evaluations;
(5) Field/Production operations supervision, including site supervision, scheduling, project management services, etc.;
(6) Office management;
(7) Marketing and sales;
(8) Purchasing of major equipment;
(9) Signing company checks (for any purpose); and
(10) Conducting any other financial transactions on your firm's behalf not otherwise listed.
(11) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above perform 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.
(12) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above own or work for any other firm(s) that has a relationship with your firm. If you answered "Yes," identify the name of the firm, the name of the person, and the nature of his/her business relationship with that other firm.

C. **Indicate your firm's inventory in the following categories:**
(1) **Equipment**
State the type, make and model, and current dollar value of each piece of equipment held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm.
(2) **Vehicles**
State the type, make and model, and current dollar value of each motor vehicle held and/or used by your firm. Indicate whether each vehicle is either owned or leased by your firm.
(3) **Office Space**
State the street address of each office space held and/or used by your firm. Indicate whether your firm owns or leases the office space and the current dollar value of that property or its lease.
(4) **Storage Space**
State the street address of each storage space held and/or used by your firm. Indicate whether your firm owns or leases the storage space and the current dollar value of that property or its lease.

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," briefly explain the nature of that reliance and the extent to which the other firm carries out such functions.

E. **Financial Information**
(1) Banking Information
(a) State the name of your firm's bank.
(b) State the main phone number of your firm's bank branch.
(c) State the address of your firm's bank branch.
(2) Bonding Information
(a) State your firm's Binder Number.
(b) State the name of your firm's bond agent and/or broker.
(c) State your agent's/broker's phone number.
(d) State your agent's/broker's address.
(e) State your firm's bonding limits (in dollars), specifying both the Aggregate and Project Limits.

F. **Identify all sources, amounts, and purposes of money loaned to your firm, including the names of persons or firms securing the loan, if other than the listed owner:**
State the name and address of each source, the name of the person securing the loan, the original dollar amount and the current balance of each loan, and the purpose for which each loan was made to your firm.

G. **List all contributions or transfers of assets to/from your firm and to/from any of its owners 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. **List 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 license or permit, the expiration date of the permit or license, and the license/permit number and issuing State of the license or permit.

I. **List the three 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. **List the three 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.

AFFIDAVIT & SIGNATURE
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.

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM
49 C.F.R. PART 26

UNIFORM CERTIFICATION APPLICATION

ROADMAP FOR APPLICANTS

① **Should I apply?**

- Is your firm at least 51%-owned by a socially and economically disadvantaged individual(s) who also controls the firm?
- Is the disadvantaged owner a U.S. citizen or lawfully admitted permanent resident of the U.S.?
- Is your firm a small business that meets the Small Business Administration's (SBA's) size standard and does not exceed $17.42 million in gross annual receipts?
- Is your firm organized as a for-profit business?

⇒ If you answered "Yes" to all of the questions above, you may be eligible to participate in the U.S. DOT DBE program.

② **Is there an easier way to apply?**
If you are currently certified by the SBA as an 8(a) and/or SDB firm, you may be eligible for a streamlined certification application process. Under this process, the certifying agency to which you are applying will accept your current SBA application package in lieu of requiring you to fill out and submit this form.
NOTE: You must still meet the requirements for the DBE program, including undergoing an on-site review.

③ **Be sure to attach all of the required documents listed in the Documents Check List at the end of this form with your completed application.**

④ **Where can I find more information?**

- U.S. DOT – http://osdbuweb.dot.gov/business/dbe/index.html (this site provides useful links to the rules and regulations governing the DBE program, questions and answers, and other pertinent information)
- SBA – http://www.ntis.gov/naics (provides a listing of NAICS codes) and http://www.sba.gov/size/indextableofsize.html (provides a listing of NAICS codes)
- 49 CFR Part 26 (the rules and regulations governing the DBE program)

Under Sec. 26.107 of 49 CFR Part 26, dated February 2, 1999, 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 49 CFR Part 29, Governmentwide Debarment and Suspension (nonprocurement) and Governmentwide Requirements for Drug-free Workplace (grants), take enforcement action under 49 CFR 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.

Section 1: CERTIFICATION INFORMATION

A. Prior/Other Certifications

Is your firm currently certified for any of the following programs? *(If Yes, check appropriate box(es))*	❑ DBE	Name of certifying agency:
		Has your firm's state UCP conducted an on-site visit? ❑ Yes, on / / State: ❑ No
	❑ 8(a)	⊗ **STOP!** If you checked either the 8(a) or SDB box, you may not have to complete this application. Ask your state UCP about the streamlined application process under the SBA-DOT MOU.
	❑ SDB	

B. Prior/Other Applications and Privileges

Has your firm (under any name) or any of its owners, Board of Directors, officers or management personnel, ever withdrawn an application for any of the programs listed above, or ever been denied certification, decertified, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or Federal entity?

❑ Yes, on ___/___/___ ❑ No

If Yes, identify State and name of state, local, or Federal agency and explain the nature of the action:

Section 2: GENERAL INFORMATION

A. Contact Information

(1) Contact person and Title:		(2) Legal name of firm:		
(3) Phone #:	(4) Other Phone #:		(5) Fax #:	
(6) E-mail:	(7) Website *(if have one)*:			
(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. Business Profile

(1) Describe the primary activities of your firm:	(2) Federal Tax ID *(if any)*:
(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 do NOT need to fill out this application.

(7) Type of firm *(check all that apply)*:
- ☐ Sole Proprietorship
- ☐ Partnership
- ☐ Corporation
- ☐ Limited Liability Partnership
- ☐ Limited Liability Corporation
- ☐ Joint Venture
- ☐ Other, Describe:

(8) Has your firm ever existed under different ownership, a different type of ownership, or a different name?
☐ Yes ☐ No
If Yes, explain:

(9) Number of employees: Full-time _____ Part-time _____ Total _____

(10) Specify the gross receipts of the firm for the last 3 years: Year _____ Total receipts $ _____
Year _____ Total receipts $ _____
Year _____ Total receipts $ _____

C. Relationships 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 space, yard, warehouse, facilities, equipment, or office staff, with any other business, organization, or entity?
☐ Yes ☐ No

If Yes, identify: Other Firm's name: _____
Explain nature of shared facilities:

(2) At present, or at any time in the past, has your firm:	(a) been a subsidiary of any other firm?	☐ Yes ☐ No
	(b) consisted of a partnership in which one or more of the partners are other firms?	☐ Yes ☐ No
	(c) owned any percentage of any other firm?	☐ Yes ☐ No
	(d) had any subsidiaries?	☐ Yes ☐ No
(3) Has any other firm had an ownership interest in your firm at present or at any time in the past?		☐ Yes ☐ No

(4) If you answered "Yes" to any of the questions in (2)(a)-(d) and/or (3), identify the following for each *(attach extra sheets, if needed)*:

	Name	Address	Type of Business
1.			
2.			
3.			

D. Immediate Family Member Businesses

Do any of your immediate family members own or manage another company? ☐ Yes ☐ No
If Yes, then list *(attach extra sheets, if needed)*:

	Name	Relationship	Company	Type of Business	Own or Manage?
1.					
2.					

Section 3: OWNERSHIP

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below *(If more than one owner, attach separate sheets for each additional owner)*:

A. Background Information

(1) 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 ❑ Native American ❑ Asian Pacific ❑ Subcontinent Asian ❑ Other (*specify*) _____
(7) U.S. Citizen: ❑ Yes ❑ No	
(8) Lawfully Admitted Permanent Resident: ❑ Yes ❑ No	

B. Ownership Interest

(1) Number of years as owner:	(2) Initial investment to acquire ownership interest in firm:	Type	Dollar Value
(3) Percentage owned:		Cash	$
(4) Familial relationship to other owners:		Real Estate	$
		Equipment	$
		Other	$

(5) Shares of Stock: Number Percentage Class Date acquired Method Acquired

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

(7) 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

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

C. Disadvantaged Status – NOTE: Complete this section only for each owner applying for DBE qualification (i.e., for each owner claiming to be socially and economically disadvantaged)

(1) What is the Personal Net Worth (PNW) of the owner(s) applying for DBE qualification? *(Use and attach the Personal Net Worth calculator form at the end of this application; attach additional sheets if more than one owner is applying)*

(2) Has any trust been created for the benefit of this disadvantaged owner(s)? ❑ Yes ❑ No
If Yes, explain (*attach additional sheets if needed*):

Section 4: CONTROL

A. **Identify your firm's Officers & 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)				
	(e)				
(2) Board of Directors	(a)				
	(b)				
	(c)				
	(d)				
	(e)				

(3) Do any of the persons listed in (1) and/or (2) above perform a management or supervisory function for any other business? ☐ Yes ☐ No
If Yes, identify for each: Person: _____ Title: _____
Business: Function:

(4) Do any of the persons listed (1) and/or (2) 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. **Identify your firm's management personnel who control your firm in the following areas** *(If more than two persons, attach a separate sheet)*:

	Name	Title	Ethnicity	Gender
(1) Financial Decisions (*responsibility for acquisition of lines of credit, surety bonding, supplies, etc.*)	a.			
	b.			
(2) Estimating and bidding	a.			
	b.			
(3) Negotiating and Contract Execution	a.			
	b.			
(4) Hiring/firing of management personnel	a.			
	b.			
(5) Field/Production Operations Supervisor	a.			
	b.			
(6) Office management	a.			
	b.			
(7) Marketing/Sales	a.			
	b.			
(8) Purchasing of major equipment	a.			
	b.			
(9) Authorized to Sign Company Checks (for any purpose)	a.			
	b.			
(10) Authorized to make Financial Transactions	a.			
	b.			

(11) Do any of the persons listed in (1) through (10) above perform a management or supervisory function for any other business? ☐ Yes ☐ No
If Yes, identify for each: Person: _____ Title: _____
Business: _____ Function: _____

(12) Do any of the persons listed in (1) through (10) 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:

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

(1) Equipment

Type of Equipment	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

(2) Vehicles

Type of Vehicle	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

(3) Office Space

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

(4) Storage Space

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

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

If Yes, explain:

E. Financial Information

(1) **Banking Information:**
(a) Name of bank: _____ (b) Phone No: ( ) _____
(c) Address of bank: _____ City: _____ State: _____ Zip: _____

(2) **Bonding Information:** If you have bonding capacity, identify: (a) Binder No: _____
(b) Name of agent/broker _____ (c) Phone No: ( ) _____
(d) Address of agent/broker: _____ City: _____ State: _____ Zip: _____
(e) Bonding limit: Aggregate limit $ _____ Project limit $ _____

F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of any persons or firms securing the loan, if other than the listed owner:

Name of Source	Address of Source	Name of Person Securing 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 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	License Number and 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.					

DBE UNIFORM CERTIFICATION APPLICATION SUPPORTING DOCUMENTS CHECKLIST

In order to complete your application for DBE certification, you must attach copies of all of the following documents as they apply to you and your firm.

All Applicants

- ☐ Work experience resumes (include places of ownership/employment with corresponding dates), for all owners and officers of your firm
- ☐ Personal Financial Statement (form available with this application)
- ☐ Personal tax returns for the past three years, if applicable, for each owner claiming disadvantaged status
- ☐ Your firm's tax returns (gross receipts) and all related schedules for the past three years
- ☐ Documented proof of contributions used to acquire ownership for each owner (*e.g., both sides of cancelled checks*)
- ☐ Your firm's signed loan agreements, security agreements, and bonding forms
- ☐ Descriptions of all real estate (including office/storage space, etc.) owned/leased by your firm and documented proof of ownership/signed leases
- ☐ List of equipment leased and signed lease agreements
- ☐ List of construction equipment and/or vehicles owned and titles/proof of ownership
- ☐ Documented proof of any transfers of assets to/from your firm and/or to/from any of its owners over the past two years
- ☐ Year-end balance sheets and income statements for the past three years (*or life of firm, if less than three years*); a new business must provide a current balance sheet
- ☐ All relevant licenses, license renewal forms, permits, and haul authority forms
- ☐ DBE and SBA 8(a) or SDB certifications, denials, and/or decertifications, if applicable
- ☐ Bank authorization and signatory cards
- ☐ Schedule of salaries (or other compensation or remuneration) paid to all officers, managers, owners, and/or directors of the firm
- ☐ Trust agreements held by any owner claiming disadvantaged status, if any

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
- ☐ 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)

Trucking Company

- ☐ Documented proof of ownership of the company
- ☐ Insurance agreements for each truck owned or operated by your firm
- ☐ Title(s) and registration certificate(s) for each truck owned or operated by your firm
- ☐ List of U.S. DOT numbers for each truck owned or operated by your firm

Regular Dealer

- ☐ Proof of warehouse ownership or lease
- ☐ List of product lines carried
- ☐ List of distribution equipment owned and/or leased

NOTE: The specific state UCP to which you are applying may have additional required documents that you must also supply with your application. Contact the appropriate certifying agency to which you are applying to find out if more is required.

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 applicant firm _____ (firm name) 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 place(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 or subcontract, 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 (UCP) of any material change in the information contained in the original application within 30 calendar days of such change (e.g., ownership, address, telephone number, 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 (DBE). 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) (circle 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 $750,000, 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.

Executed on _____ (Date)

Signature _____
(DBE Applicant)

NOTARY CERTIFICATE

2

[68 FR 35559, June 16, 2003]

ATTACHMENT 2

SPECIAL PROVISION

000--1966

Disadvantaged Business Enterprise in Federal Aid Contracts

1. Description. The purpose of this Special Provision is to carry out the U. S. Department of Transportation's (DOT) policy of ensuring nondiscrimination in the award and administration of DOT assisted contracts and creating a level playing field on which firms owned and controlled by individuals who are determined to be socially and economically disadvantaged can compete fairly for DOT assisted contracts. If the Disadvantaged Business Enterprise (DBE) goal is greater than zero, Article A, "Disadvantaged Business Enterprise in Federal Aid Contracts", of this Special Provision shall apply to this contract. If there is no DBE goal, Article B, "Race-Neutral DBE Participation", of this Special Provision shall apply to this contract. The percentage goal for DBE participation in the work to be performed under this contract will be shown on the proposal.

A. Article A. Disadvantaged Business Enterprise in Federal Aid Contracts.

1. Policy. It is the policy of the DOT and the Texas Department of Transportation (henceforth the "Department") that DBEs, as defined in 49 CFR Part 26, Subpart A and the Department's DBE Program, shall have the opportunity to participate in the performance of contracts financed in whole or in part with Federal funds. The DBE requirements of 49 CFR Part 26, and the Department's DBE Program, apply to this contract as follows:

a. The Contractor will solicit DBEs through reasonable and available means, as defined in 49 CFR Part 26, Appendix A and the Department's DBE Program, or show a good faith effort to meet the DBE goal for this contract.

b. 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.

c. The requirements of this Special Provision shall be physically included in any subcontract.

d. By signing the contract proposal, the Bidder is certifying that the DBE goal as stated in the proposal will be met by obtaining commitments from eligible DBEs or that the Bidder will provide acceptable evidence of good faith effort to meet the commitment. The Department will determine the adequacy of a Contractor's efforts to meet the contract goal, within 10 business days,

2. Definitions.

a. "Broker" is an intermediary or middleman that does not take possession of a commodity or act as a regular dealer selling to the public.

b. "Disadvantaged Business Enterprise" or "DBE" is defined in the standard specifications, Article 1, Definition of Terms.

c. "DBE Joint Venture" means an association of a DBE firm and 1 or more other firm(s) to carry out a single business enterprise for profit for which purpose they 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.

d. "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).

e. "Federal Aid Contract" is any contract between the Texas Department of Transportation and a Contractor which is paid for in whole or in part with DOT financial assistance.

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

g. "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."

h. "Race-conscious" means a measure or program that is focused specifically on assisting only DBEs, including women-owned businesses.

i. "Race-neutral DBE Participation" means any participation by a DBE through customary competitive procurement procedures.

j. "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. To be a regular dealer, the firm must be an established, regular business that engages in, as its principal business and under its own name, the purchase and sale or lease of the products in question.

A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it 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. Brokers, packagers, manufacturers' representatives, or other persons who arrange or expedite transactions shall not be regarded as a regular dealer.

k. "Texas Unified Certification Program" or "TUCP" provides one-stop shopping to applicants for certification, such that applicants are required to apply only once for a DBE certification that will be honored by all recipients of federal funds in the state. The TUCP by Memorandum of Agreement established six member entities to serve as certifying agents for Texas in specified regions.

3. Contractor's Responsibilities. These requirements must be satisfied by the Contractor.

a. After conditional award of the contract, the Contractor shall submit a completed Form SMS.4901 "DBE Commitment Agreement", From SMS 4901-T "DBE Trucking Commitment Agreement", or Form SMS.4901-MS "DBE Material & Supplier Commitment Agreement" for each DBE he/she intends to use to satisfy the DBE goal or a good faith effort to explain why the goal could not be reached, so as to arrive in the Department's Office of Civil Rights (OCR) in Austin, Texas not later than 5:00 p.m. on the 10th business day, excluding national holidays, after the conditional award of the contract. When requested, additional time, not to exceed 7 business days, excluding national holidays, may be granted based on documentation submitted by the Contractor.

b. DBE prime Contractors may receive credit toward the DBE goal for work performed by his/her own forces and work subcontracted to DBEs. A DBE prime must make a good faith effort to meet the goals. In the event a DBE prime subcontracts to a non-DBE, that information must be reported on Form SMS.4902.

c. A Contractor who cannot meet the contract goal, in whole or in part, shall make adequate good faith efforts to obtain DBE participation as so stated and defined in 49 CFR Part 26, Appendix A. The following is a list of the types of action that may be considered as good faith efforts. 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.

- Soliciting through all reasonable and available means (e.g. attendance at prebid meetings, advertising, and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The solicitation must be done within sufficient time to allow the DBEs to respond to it. Appropriate steps must be taken to follow up initial solicitations to determine, with certainty, if the DBEs are interested.

- 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 perform the work items with its own forces.
- 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.
- Negotiating in good faith with interested DBEs to make a portion of the work available to DBE subcontractors and suppliers and 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 negotiations 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.
- A Bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional cost involved in finding and using DBEs is not in itself sufficient reason for a bidders failure to meet the Contract DBE goal as long as such cost are reasonable. Also, the ability or desire of the Contractor to perform the work of the Contract with its own organization does not relieve the Bidder of the responsibility to make good faith effort. Contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- 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 cause for the rejection or non-solicitation of bids and the Contractors efforts to meet the project goal.
- Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Contractor.
- Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- 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.

- If the Program Manager of the OCR determines that the Contractor has failed to meet the good faith effort requirements, the Contractor will be given an opportunity for reconsideration by the Director of the OCR.

d. Should the bidder to whom the contract is conditionally awarded refuse, neglect or fail to meet the DBE goal or comply with good faith effort requirements, the proposal guaranty filed with the bid shall become the property of the state, not as a penalty, but as liquidated damages to the Department.

e. The preceding information shall be submitted directly to the Office of Civil Rights, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483.

f. The Contractor shall not terminate for convenience a DBE subcontractor named in the commitment submitted under Section 1.A.3.a, of this Special Provision. Prior to terminating or removing a DBE subcontractor named in the commitment, the Contractor must have a written consent of the Department.

g. The Contractor shall also make a good faith effort to replace a DBE subcontractor that is unable to perform successfully with another DBE, to the extent needed to meet the contract goal. The Contractor shall submit a completed Form 4901 "DBE Commitment Agreement", From SMS 4901-T "DBE Trucking Commitment Agreement", or Form SMS.4901-MS "DBE Material & Supplier Commitment Agreement" for the substitute DBE firm(s). Any substitution of DBEs shall be subject to approval by the Department. Prior to approving the substitution, the Department will request a statement from the DBE concerning it being replaced.

h. The Contractor shall designate a DBE liaison officer who will administer the Contractor's DBE program and who will be responsible for maintenance of records of efforts and contacts made to subcontract with DBEs.

i. Contractors are encouraged to investigate the services offered by banks owned and controlled by disadvantaged individuals and to make use of these banks where feasible.

4. Eligibility of DBEs.

a. The member entities of the TUCP certify the eligibility of DBEs and DBE joint ventures to perform DBE subcontract work on DOT financially assisted contracts.

b. The Department maintains the Texas Unified Certification Program DBE Directory containing the names of firms that have been certified to be eligible to participate as DBE's on DOT financially assisted contracts. This Directory is available from the Department's OCR. An update of the Directory can be found on the Internet at http://www.dot.state.tx.us/business/tucp/default.htm.

c. Only DBE firms certified at the time commitments are submitted are eligible to be used in the information furnished by the Contractor as required under Section 1.A.3.a. and 3.g. above. For purposes of the DBE goal on this project, DBEs will only be allowed to perform work in the categories of work for which they are certified.

d. Only DBE firms certified at the time of execution of a contract/subcontract/purchase order, are eligible for DBE goal participation.

5. Determination of DBE Participation. When a DBE participates in a contract, only the values of the work actually performed by the DBE, as referenced below, shall be counted by the prime contractor toward DBE goals:

a. The total amount paid to the DBE for work performed with his/her own forces is counted toward the DBE goal. 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 subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

b. A Contractor may count toward its DBE goal a portion of the total value of the contract amount paid to a DBE joint venture equal to the distinct, clearly defined portion of the work of the contract performed by the DBE.

(1) A Contractor may count toward its DBE goal only expenditures to DBEs that perform a commercially useful function (CUF) in the work of a contract or purchase order. A DBE is considered to perform a CUF 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 CUF, 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.

In accordance with 49 CFR Part 26, Appendix A, guidance concerning Good Faith Efforts, contractors may make efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services. Contractors may not however, negotiate the price of materials or supplies used on the contract by the DBE, nor may they determine quality and quantity, order the materials themselves, nor install the materials (where applicable), or pay for the material themselves. Contractors however, may share the quotations they receive from the material supplier with the DBE firm, so that the DBE firm may negotiate a reasonable price with the material supplier.

In all cases, prime or other non-DBE subcontractor assistance will not be credited toward the DBE goal.

(2) A DBE does not perform a CUF 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.

Consistent with industry practices and the DOT/Department's DBE program, a DBE subcontractor may enter into second-tier subcontracts, amounting up to 70% of their contract. Work subcontracted to a non-DBE does not count towards DBE goals. If a DBE does not perform or exercise responsibility for at least 30% 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, it will be presumed that the DBE is not performing a CUF

(3) A DBE trucking firm (including an owner operator who is certified as a DBE is considered to be performing a CUF when the DBE is responsible for the management and supervision of the entire trucking operation on a particular contract and the DBE itself owns and operates at least 1 fully licensed, insured, and operational truck used on the contract.

(a) The Contractor receives credit for the total value of the transportation services the DBE provides on a contract using trucks it owns, insures, and operates using drivers it employs.

(b) 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.

(c) 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 the DBE-owned trucks on the contract. Additional participation by non-DBE lessees receive credit only for the fee or commission it receives as result of the lease arrangement

(d) A lease must indicate that the DBE has exclusive use of and control over the trucks giving the DBE absolute priority for use of the leased trucks. Leased trucks must display the name and identification number of the DBE.

(4) When a DBE is presumed not to be performing a CUF the DBE may present evidence to rebut this presumption.

(5) Project materials or supplies acquired from an affiliate of the prime contractor can not directly or indirectly (2^{nd} or lower tier subcontractor) be used for DBE goal credit.

c. A Contractor may count toward its DBE goals expenditures for materials and supplies obtained from a DBE manufacturer, provided that the DBE assumes the actual and contractual responsibility for the materials and supplies. Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1) If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. (Definition of a DBE manufacturer found at 1A.c.(1) of this provision.)

For purposes of this Section (1.A.c.(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) If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE goals.

For purposes of this Section (1.A.5.c.(2)), 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 the first paragraph under Section 1.A.5.c.(2), 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 Section 1.A.5.c.(2).

(3) With respect to materials or supplies purchased from 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.

(4) 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.

d. If the Contractor chooses to assist a DBE firm, other than a manufacturing material supplier or regular dealer, and the DBE firm accepts the assistance, the Contractor may act solely as a guarantor by use of a two-party check for payment of materials to be used on the project by the DBE. The material supplier must invoice the DBE who will present the invoice to the Contractor. The Contractor may issue a joint check to the DBE and the material supplier and the DBE firm must issue the remittance to the material supplier. No funds shall go directly from the Contractor to the material supplier. The DBE firm may accept or reject this joint checking arrangement.

The Contractor must obtain approval from the Department prior to implementing the use of joint check arrangements with the DBE. Submit to the Department, Joint Check Approval Form 2178 for requesting approval. Provide copies of cancelled joint checks upon request. No DBE goal credit will be allowed for the cost of DBE materials that are paid by the Contractor directly to the material supplier.

e. No DBE goal credit will be allowed for supplies and equipment the DBE subcontractor leases from the contractor or its affiliates.

f. No DBE goal credit will be allowed for the period of time determined by the Department that the DBE was not performing a CUF. The denial period of time may occur before or after a determination has been made by the department. In case of the denial of credit for non-performance of a CUF of a DBE, the Contractor will be required to provide a substitute DBE to meet the contract goal or provide an adequate good faith effort when applicable.

6. Records and Reports.

a. The Contractor shall submit monthly reports, after work begins, on DBE payments to meet the DBE goal and for DBE or HUB race-neutral participation. Report payments made to non-DBE HUBs. The monthly report is to be sent to the Area Engineer. These reports will be due within 15 days after the end of a calendar month. These reports will be required until all DBE subcontracting or material supply activity is completed. Form SMS.4903, "DBE Progress Report," is to be used for monthly reporting. Form. SMS.4904, "DBE Final Report," is to be used as a final summary of DBE payments submitted upon completion of the project. The original final report

b. DBE subcontractors and/or material suppliers should be identified on the monthly report by Vendor Number, name, and the amount of actual payment made to each during the monthly period. Negative reports are required when no activity has occurred in a monthly period.

c. All such records must be retained for a period of 3 years following completion of the contract work, and shall be available at reasonable times and places for inspection by authorized representatives of the Department or the DOT. Provide copies of subcontracts or agreements and other documentation upon request.

d. Prior to receiving final payment, the Contractor shall submit Form SMS.4904, "DBE Final Report". If the DBE goal requirement is not met, documentation supporting Good Faith Efforts, as outlined in Section 1.A.3.c of this Special Provision, must be submitted with the "DBE Final Report."

e. Provide a certification of prompt payment, the Prompt Payment Certification Form 2177, to certify that all subcontractors and suppliers were paid from the previous months payments and retainage was released for those whose work is complete. Submit the completed form each month and the month following the month when final acceptance occurred at the end of the project.

7. Compliance of Contractor. To ensure that DBE requirements of this DOT assisted contract are complied with, the Department will monitor the Contractor's efforts to involve DBEs during the performance of this contract. This will be accomplished by a review of monthly reports submitted to the Area Engineer by the Contractor indicating his progress in achieving the DBE contract goal, and by compliance reviews conducted on the project site by the Department.

The Contractor shall receive credit toward the DBE goal based on actual payments to the DBE subcontractor. The Contractor shall notify the Area Engineer if he/she withholds or reduces payment to any DBE subcontractor. The Contractor shall submit an affidavit detailing the DBE subcontract payments prior to receiving final payment for the contract.

Contractors' requests for substitutions of DBE subcontractors shall be accompanied by a detailed explanation which should substantiate the need for a substitution. The Contractor may not be allowed to count work on those items being substituted toward the DBE goal prior to approval of the substitution from the Department.

The prime Contractor is prohibited from providing work crews and equipment to DBEs. DBE Goal credit for the DBE subcontractors leasing of equipment or purchasing of supplies from the prime contractor or its affiliates is not allowed.

When a DBE subcontractor named in the commitment under Section 1.A.3.a. of this Special Provision, is terminated or fails to complete its work on the contract for any reason, the prime contractor is required 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.

A Contractor's failure to comply with the requirements of this Special Provision shall constitute a material breach of this contract. In such a case, the Department reserves the right to terminate the contract; to deduct the amount of DBE goal not accomplished by DBEs from the money due or to become due the Contractor, or to secure a refund, not as a penalty but as liquidated damages to the Department or such other remedy or remedies as the Department deems appropriate.

Forward Form 2371, "DBE Trucking Credit Worksheet," completed by the DBE trucker every month DBE credit is used.

B. Article B. Race-Neutral Disadvantaged Business Enterprise Participation. It is the policy of the DOT that Disadvantaged Business Enterprises (DBE) as defined in 49 CFR Part 26 Subpart A, be given the opportunity to compete fairly for contracts and subcontracts financed in whole or in part with Federal funds and that a maximum feasible portion of the Department's overall DBE goal be met using race-neutral means. Consequently, if there is no DBE goal, the DBE requirements of 49 CFR Part 26, apply to this contract as follows:

The Contractor will offer DBEs as defined in 49 CFR Part 26, Subpart A, the opportunity to compete fairly for contracts and subcontractors financed in whole or in part with Federal funds. Race-Neutral DBE and non-DBE HUB participation on projects with no DBE goal shall be reported on Form SMS.4903, "DBE or HUB Progress Report" and submitted to the Area Engineer each month and at project completion. Payments to DBEs reported on Form SMS.4903 are subject to the requirements of Section 1.A.5, "Determination of DBE Participation."

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.

SPECIAL PROVISION

003—020

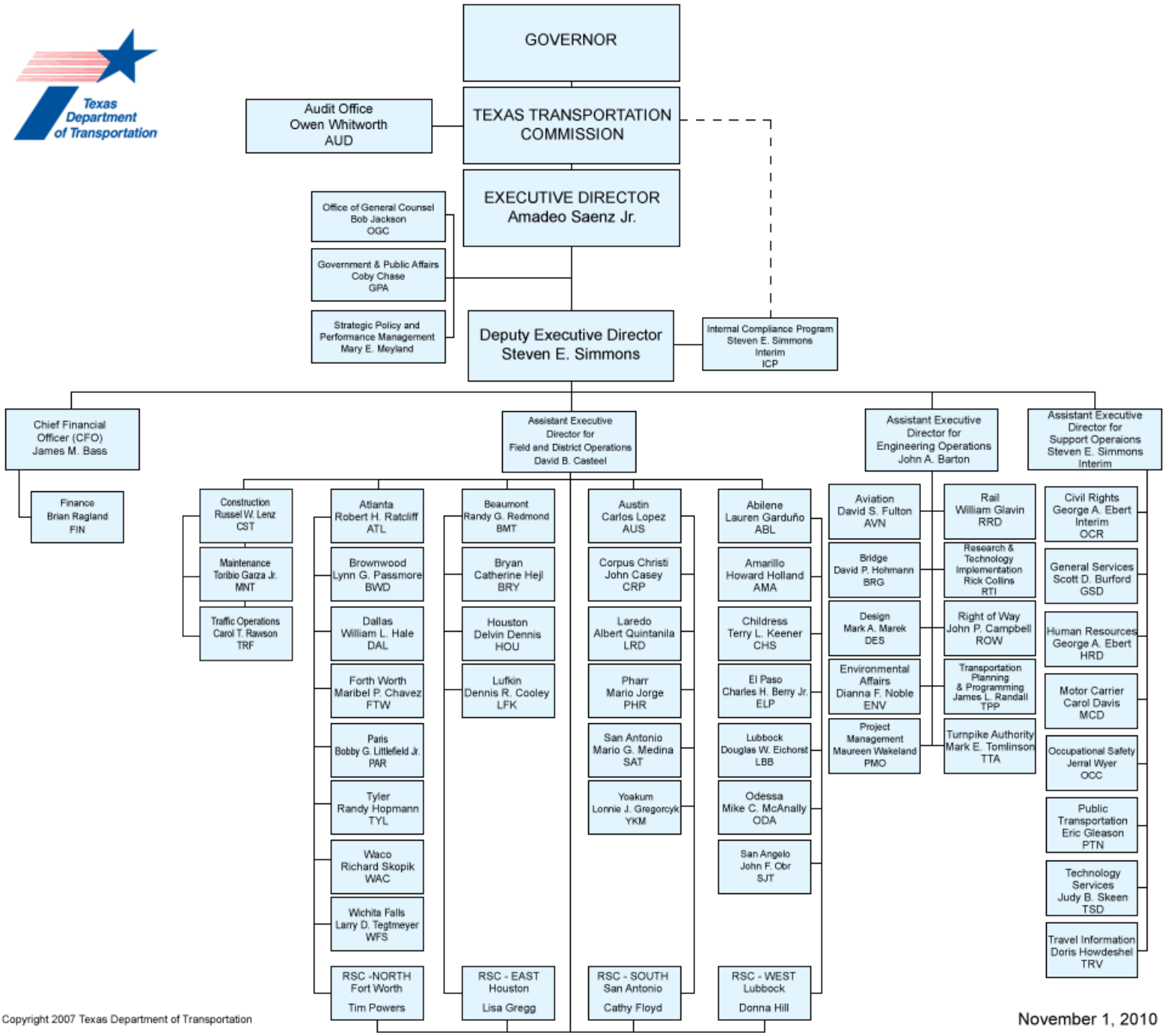
Award and Execution of Contract

For this project, Item 003, "Award and Execution of Contract," of the Standard Specifications, is hereby amended with respect to the clauses cited below, and no other clauses or requirements of this Item are waived or changed hereby.

Article 3.4, Execution of Contract, Section B, Bonds is supplemented by the following:

Provide a retainage bond in the amount of 10% of the total amount paid on the contract. The retainage bond is to be used as a guaranty for the protection of any claimants and the Department for overpayments, liquidated damages, and other deductions or damages owed by the Contractor in connection with the Contract.

ATTACHMENT 3



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November 1, 2010

ATTACHMENT 4

2004 Specifications

SPECIAL PROVISION
009---007
Measurement and Payment

For this project, Item 009, "Measurement and Payment," of the Standard Specifications, is hereby amended with respect to the clauses cited below, and no other clauses or requirements of this Item are waived or changed hereby.

Article 9.6. Progress Payments, Section A, Retainage is voided and replaced by the following:

A. Retainage. Retainage will not be withheld on this project.

Article 9.6. Progress Payments, Section B, Payment Provisions for Subcontractors is voided and replaced by the following:

B. Payment Provisions for Subcontractors. For the purposes of this Article only, the term subcontractor includes suppliers and the term work includes materials provided by suppliers at a location approved by the department. Pay the subcontractors for work performed within 10 days after receiving payment for the work performed by the subcontractor. Also, pay any retainage on a subcontractor's work within 10 days after satisfactory completion of all of the subcontractor's work. Completed subcontractor work includes vegetative establishment, test, maintenance, performance, and other similar periods that are the responsibility of the subcontractor.

For the purpose of this Section, satisfactory completion is accomplished when:

- the subcontractor has fulfilled the Contract requirements of both the Department and the subcontract for the subcontracted work, including the submittal of all information required by the specifications and the Department; and
- the work done by the subcontractor has been inspected and approved by the Department and the final quantities of the subcontractor's work have been determined and agreed upon.

The inspection and approval of a subcontractor's work does not eliminate the Contractor's responsibilities for all the work as defined in Article 7.14, "Contractor's Responsibility for Work."

The Department may pursue actions against the Contractor, including withholding of estimates and suspending the work, for noncompliance with the subcontract requirements of this Section upon receipt of written notice with sufficient details showing the subcontractor has complied with contractual obligations as described in this Article.

These requirements apply to all tiers of subcontractors. Incorporate the provisions of this Article into all subcontract or material purchase agreements.

ATTACHMENT 5

ATTACHMENT 5

TxDOT Expressway

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TUCP DBE Alphabetic Listing - A

Last Update: Monday, June 12, 2006

A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | Q | R | S | T | U | V | W | X | Y | Z | 0-9

A & A CONSTRUCTION COMPANY
P.O. BOX 202212
ARLINGTON, TX 760060000
Phone: 817-267-2757
Types of Work Performed: Highway, Street, and Bridge Construction(237310)
Other Construction Material Merchant Wholesalers(423390)
Site Preparation Contractors(238910)
District(s): STATEWIDE DISTRICTS

***Certified by:** NCTRCA
Region of: NCTRCA
Email: irene@aaconstructionco.com
Fax: 817-267-2887

A & A OFFICE PRODUCTS
P.O. BOX 20292
HOUSTON, TX 772250292
Phone: 713-664-4849
Types of Work Performed: Furniture Stores(442110)
District(s): STATEWIDE DISTRICTS

***Certified by:** HOUSTON
Region of: HOUSTON
Email: antoniochua@pdq.net
Fax: 713-554-4173

A & B COLLEGE EXPOSURE PROGRAM
P.O. BOX 260952
CORPUS CHRISTI, TX 784260000
Phone: 361-387-1702
Types of Work Performed: Educational Support Services(611710)
District(s): STATEWIDE DISTRICTS

***Certified by:** CCRTA
Region of: CCRTA
Email: r21650@aol.com
Fax: 361-767-6630

A & B DELIVERY SERVICES
5429 CHERRY GLEN LANE
DALLAS, TX 752320000
Phone: 214-371-1756
Types of Work Performed: General Freight Trucking, Local(484110)
District(s): STATEWIDE DISTRICTS

***Certified by:** NCTRCA
Region of: NCTRCA
Email:
Fax: 214-375-8938

A & B ENVIROMENTAL SERVICES, INC.
10100 EAST FREEWAY, SUITE 100
HOUSTON, TX 77029
Phone: 713-453-6060
Types of Work Performed: Testing Laboratories(541380)
District(s): STATEWIDE DISTRICTS

***Certified by:** HOUSTON
Region of: HOUSTON
Email: kittu2@hal-pc.org
Fax: 713-453-6091

A & D INSPECTIONS
P. O. BOX 11106
HOUSTON, TX 77293

***Certified by:** HOUSTON
Region of: HOUSTON
Email: leep_south@yahoo.com

ATTACHMENT 6

Texas Department of Transportation

Overall Annual DBE Goal for Highway Design and Construction

Fiscal Year 2011-2013

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SECTION 1: EXECUTIVE SUMMARY

The Texas Department or Transportation (TxDOT) submits the following Disadvantaged Business Enterprise (DBE) goal methodology to the United States Department of Transportation (DOT) Federal Highway Administration (FHWA) for review in accordance with 49 Code of Federal Regulations (CFR) Part 26.45.

Effective March 5, 2010, recipients of financial assistance from the DOT that are required to implement a DBE program will no longer submit DBE goal setting methodology and process for approval every year. The annual overall DBE goal based on approved submissions will be in place for three years. The goal will remain the same for each year of the approved three year period until the next review cycle. TxDOT will make a good faith effort to meet the goal every year. The substantive goal setting requirements are not changed. TxDOT will use the time between submissions to improve the overall quality of the goal setting process by developing systems to collect and analyze data needed to support the goal setting methodologies and will fully engage stakeholders and the public in meaningful ways to obtain relevant information. TxDOT will submit its first three-year DBE Goal Methodology for FY 2011-2013.

Some sub-recipients of TxDOT highway design and construction funds are electing to adopt the TxDOT Memorandum of Understanding (MOU) for DBE Program and our methodology to establish their overall DBE goal. Attachment A provides a list of entities that have signed an MOU with TxDOT. Attachment B provides an example of an MOU.

Process Summary

The goal methodology consists of two steps, the base figure for the relative availability of DBEs and any adjustments to the base figure based on available evidence. In Step 1, the base figure is established through the 2009 Texas Disparity Study and takes into account an estimated weight of expenditures based on contracts projected for the upcoming year. In Step 2, TxDOT reviews available information and new evidence presented in a public consultation meeting and takes it into account in determining an adjustment to the base figure. The base figure and the adjustments to the base figure are used to determine the overall goal. The overall goal is further defined as race-neutral and race-conscious based on the amount that TxDOT plans to meet through race-neutral means.

TxDOT provides for two types of opportunities for public participation. The first type of opportunities included a cluster of four public consultation meetings held throughout the State of Texas in June 2010. The public was invited to discuss evidence that would influence the relative availability of DBE or other issues that influence DBE participation. The public meetings and discussion did not reveal new evidence that could influence DBE participation. In the second type of opportunity,

the public can review the methodology until August 31, 2010 and submit comments by September 14, 2010. If there are any comments that impact the DBE Goal Methodology, TxDOT will forward USDOT an amendment with said changes.

Results Summary

The DBE goal methodology justifies an FY 2011-2013 overall DBE goal of 12.20%. TxDOT plans to meet the overall goal by 7.00% race-neutral means and the remainder of 5.20% through race-conscious measures. TxDOT will monitor DBE participation for federal-aid highway design and construction projects throughout the FY 2011-2013 period and will make annual evaluations to determine if market conditions warrant adjustments to the DBE goal. TxDOT will also monitor race-conscious and race-neutral achievements of the DBE goal and make necessary adjustments as needed based on the DBE program guidelines.

SECTION 2: PROCESS

The process for setting an overall goal is defined in § 26.45. The CFR identifies August 1st as the submittal date (see §26.45(f)(1)).

The methodology includes: a description of the methods used to establish the goal, the base figure and evidence used for its calculation, summary listing of available evidence and wherever necessary an explanation on why it was not used, proposed projections for the portions of the goal to be met through race-neutral and race-conscious means (see § 26.45(f)(3)). The methodology also expands on the TxDOT's effort to obtain public participation through public consultation for evidence that may influence adjustments to the base figure and by extending public comment on the proposed methodology (see § 26.45(g)).

TxDOT is not required to have the operating administration's concurrence to implement the DBE goal; however if the operating administration's review suggest there are concerns over the methodology, it may, after consulting with TxDOT, adjust the overall goal or require TxDOT to do so (see § 26.45(f)(4)).

TxDOT's overall goal provides for the participation of all certified DBEs. The overall goal is NOT subdivided into group-specific goals (see §26.45(h)).

SECTION 3: STEP 1 – ESTABLISH BASE FIGURE

For Step 1, TxDOT takes into account available evidence, such as the newly completed 2009 Texas Disparity Study and the estimated weight of expenditures, in determining the base figure for the relative availability of DBEs. In determining the base figure, TxDOT considered the type of contracts anticipated for the upcoming year. This calculation results in a base figure of 11.45%.

TxDOT begins the goal setting process by determining the base figure for the relative availability of DBEs (see §26.45(c)). TxDOT's best available data includes a 2009 Texas Disparity Study as described in §26.45(c)(3).

2009 Texas Disparity Study

In 2008 the State of Texas commissioned a disparity study to update its 1994 State of Texas Disparity Study. This disparity study was conducted in 2009 and completed in early 2010. The purpose of the study was to provide a comprehensive review of the state's utilization of historically underutilized businesses (HUB). The disparity study specifically targeted HUBs, however most of the heavy construction firms identified are also DBEs. Furthermore, the majority of the heavy construction data comes from TxDOT participation. The study included all state agencies, state medical institutions and institutions of higher learning. Some of the key objectives of the study were to examine if disparities exist between the ready, willing and able HUBs and the actual utilization of HUBs in state contracting; and to determine the extent to which any disparities in the utilization of available HUBs might be impacted by discrimination.

The disparity study included extensive data from sate prime contractor and subcontractor utilization for 210 state agencies and institutions of higher learning. It included availability data was based on bids, bidders, prequalified firms, vendors, census, business surveys, and Dunn & Bradstreet. It also contained anecdotal information which came from four public hearings and a survey of 1,032 firms, five focus groups, 102 individual firm interviews, 142 Web surveys, and policy interviews with 60 Texas procurement and HUB Program staff. It also included a review of private sector disparities base on data from the US Census Bureau, local building permits, survey responses, Reed Construction Data and the National Survey of Small Business Finance.

TxDOT uses the 2009 Texas Disparity Study as the approach for calculating the relative availability of DBE's in the State of Texas because it is the most current and comprehensive information available on the relative availability of minority and non-minority women-owned businesses.

Estimated Weight of Expenditures

In order to more accurately define relative availability of DBEs in DOT-assisted contracts, TxDOT takes into consideration the types of contracts anticipated in the upcoming year against the relative availability of DBEs.

TxDOT identifies two types of Federal-aid contracts; highway construction and engineering/architecture contracts. Further analysis indicates that the ratio of contract types, estimated weight of expenditures, indicates low projections for engineering/architecture work. The proportion of federal aid for highway

construction and engineering/architecture contracts remains the same for FY 2011-2013.

Table 3.1: Estimated Weight of Expenditures

Industry	Percent
Highway Construction	98%
Engineering/Architecture	2%

Base Figure Calculation

The base figure is calculated by combining the proportion of the relative availability of DBEs in highway construction and the proportion in engineering/architecture. The proportion of relative availability of DBEs in highway construction is the calculated ratio of DBEs in highway construction (DBE in highway construction divided by all firms in highway construction) against the anticipated portion of highway construction work. The same evaluation is performed on the relative availability of DBEs in engineering/architecture work. The calculation (see Figure 3.1) results in a base figure of 11.45%.

Figure 3.1: Base Figure Calculation

$$\text{Base Figure} = \left[0.98\left(HeavyConstructionRWA\right) + 0.02\left(EngineringRWA\right)\right]$$
$$= \left[0.98\left(11.20\%\right) + 0.02\left(23.6\%\right)\right]$$
$$= \left[10.976 + 0.472\right]$$
$$= 11.448$$

Base Figure

11.45%

SECTION 4: STEP 2 – ADJUSTMENTS TO BASE FIGURE

TxDOT examines all available evidence to determine any adjustments to the base figure. A summary of the evidence considered includes: DBE directory analysis, TxDOT modified bidders list, evidence made available through the Public Consultation Meetings, and past participation.

Adjustment 1: Modified Bidders List

There are various methods for determining the relative availability of DBEs. (see §26.45(c)). TxDOT's traditional method for calculating the relative availability is through the modified bidders list, however for FY 2010-2013 there new and better information available through the 2009 Texas Disparity Study. When using the bidders list approach TxDOT used a modified version of the bidders list described in §26.45(c)(2). TxDOT uses this modified bidders list as an "Alternative Method" as described in §26.45(c)(5). The justification for this modified bidders list is that TxDOT uses a Low-Bid method to procure highway design and construction contracts. This method does not gather subcontracting information from non-successful bidders, therefore there is no subcontract list for non-successful bidders.

When using the modified bidders list, the first step is to determine the number of DBEs that bid on, or were awarded, DOT-assisted prime contracts and subcontracts from October 2008 to July 2010. Since the bidders list indicates "active" status by fiscal year, TxDOT needs to use this time range to obtain at least one full year of participation. To maintain a consistent method of calculation, TxDOT uses the same time period of evaluation every time it calculates the bidders file for the year. The next step is to determine the number of businesses that bid on, or were awarded, DOT-assisted prime contracts and subcontracts for the same period. The base figure is calculated by dividing the DBE bidders by all bidders.

TxDOT's Modified Bidders List consists of all available data on primes and subcontractors that bid on or were awarded DOT-assisted contracts, including DBEs. The list is qualified further by including appropriate data from pre-qualified highway construction contractors, pre-certified professional service providers, and other subcontractors and material suppliers on highway construction projects. The bidders list determines firms that are ready, willing, and able to participate in TxDOT's. (See Table 4.1)

Table 4.1: TxDOT's Modified Bidders List

	All Firms	Certified DBE Firms
Highway Construction	1,949	241
Engineering/Architecture	322	89

Analysis of Available Bidders

There are concerns of TxDOT's Modified Bidders List under-representing subcontractors, because it does not have available information on subcontractors that bid to contractors on non-winning bids. Traditionally, TxDOT has indicated that the large volume of contracts and subcontracts available provides a statistically significant sample base that sustains the unavailable information.

In order to validate the modified bidders list for the 2010 DBE Goal Methodology, TxDOT conducted a survey in June 2010 which requested subcontract bid information from Prime bidders on successful and unsuccessful bids on federal aid projects. TxDOT compared the sample information from the survey against the subcontract bid information from low-bid contractors used to put together the modified bidders list and concluded that there was a statistically insignificant difference in DBE availability between the two groups.

TxDOT plans to actively coordinate with stakeholders involved to conduct bi-annual surveys; in the winter (December) and summer (July) construction seasons. The surveys will continue to sample subcontractor bids from both successful and unsuccessful Prime bidders. The results from these surveys will be compared to the

modified bidders list and current methodology to check for significant differences throughout the year.

Relative Availability Calculation

A base figure is calculated by combining the proportion of the relative availability of DBEs in highway construction and the proportion in engineering/architecture. The proportion of relative availability of DBEs in highway construction is the calculated ratio of DBEs in highway construction (DBE in highway construction divided by all firms in highway construction) against the anticipated portion of highway construction work. The same evaluation is performed on the relative availability of DBEs in engineering/architecture work. The calculation (see Figure 4.1) results in a relative availability of 12.67%.

Figure 4.1: Relative Availability Calculation

$$\text{Base Figure} = \left[0.98\left(\frac{\#\ HighwayConstructionDBE}{\#\ HighwayConstructionFirms} \right) + 0.02\left(\frac{\#\ EngineeringArchitectureDBE}{\#\ EngineeringArchitectureFirms} \right) \right] \times 100$$

$$= \left[0.98\left(\frac{241}{1{,}949} \right) + 0.02\left(\frac{89}{322} \right) \right] \times 100$$

$$= \left[0.121180 + 0.005527 \right] \times 100$$

$$= 0.126707 \times 100$$

$$= 12.67$$

A comparison of the DBE availability derived from the modified bidders list slightly larger from the availability derived from the Texas Disparity Study. The Modified Bidders List approach yields a DBE availability of 12.67% while the Texas Disparity Study an availability of 11.45%. We feel that part of this variance comes from the fact that the modified bidders list is exclusive to TxDOT's bidders. This modified bidders file approach is traditionally the preferred method of calculating DBE ready, willing and able for TxDOT funds, however it is used as adjustment evidence for the FY 2011-2013 Goal Methodology because the 2009 Texas Disparity Study is recent large scale study that is a very comprehensive on the availability in the State of Texas. We determined that this available information justifies a +0.75% adjustment to the DBE Goal.

Adjustment 2: DBE Directory

TxDOT preformed an analysis to determine the relative availability of DBEs by utilizing the TUCP DBE directory and the Census Bureau's 2007 County Business Patterns (CBP) data as suggested §26.45(c). The source for DBEs is the TUCP DBE Directory (www.dot.state.tx.us/business/tucpinfo.htm). The relevant highway construction North American Industry Classification System (NAICS) codes were identified and used to determine the availability of the business. The overall number

of all ready, willing and able businesses in TxDOT's market is determined by the 2007 Census Bureau's County Business Patterns data (see Table 4.2).

Table 4.2: Relative Availability Base on DBE Directory

NAICS Code*	Industry	All Firms	DBE Firms
237110	Underground utility	1,114	68
237130	Underground utility	539	10
237310	Asphalt, Fencing, Minor Structures	748	154
237990	Rest Areas	326	18
238110	Concrete, Major Structures	1,623	51
238210	Illumination, Traffic Control Devices	4,612	70
238320	Painting	1,569	27
238910	Earthwork	2,069	58
238990	Material Suppliers	2,164	101
484000	Hauling	8,406	285
541310	PS Architects	1,537	70
541330	PS Engineers	4,597	268
541370	PS Surveyors	777	22
561730	Landscaping	4,231	72
Total		**34,312**	**1,274**

***** The NAICS includes all 6-digit NAICS under this code.

The base figure is calculated by taking the identified availability of DBEs against the identified availability of identified businesses. The calculation (see Figure 4.2) results in a base figure of 5.36%.

Figure 4.2: Base Figure Calculation

$$\text{Base Figure} = \left(\frac{\#DBE}{\#AllFirms}\right)\times 100$$
$$= \left(\frac{1{,}274}{34{,}312}\right)\times 100$$
$$= 3.71\%$$

A comparison of the DBE availability derived from the DBE Directory/CBP is significantly smaller from the availability derived from the TxDOT's Bidders List. The Directory approach yields a DBE availability of 3.71% while the 2009 Disparity Study shows a relative availability of 11.20% and the TxDOT's modified bidders list yields a relative availability of 12.67%. We feel that this significant variance requires further

evaluation and may be due in part to the identified highway NAICS are to restrictive. Another factor that may be influencing this variance is the fact that many of the firms identified do business with other recipients of DOT funds, but do not do business with TxDOT. We determined that this available information justifies a -1.00% adjustment to the DBE Goal.

Adjustment 3: Past Participation

TxDOT determines that an adjustment for past participation is appropriate. TxDOT utilized goal setting guidelines ("Tips for Goal-Setting in the DBE Program") from the Office of Small and Disadvantaged Business Utilization (OSDBU) web site which includes a method for evaluating an adjustment based on past participation. This adjustment considers past participation as a relative gauge for the anticipated participation for FY 2011-2013.

The adjustment to the base figure is determined with the median of past participation. The median is used instead of the average or mean because it excludes outliners; abnormally high or low numbers. TxDOT uses six (6) completed years of past participation (see Table 4.3) in computing the median value; therefore the value is determined by averaging the two middle values. The resulting calculation yields a median value of 12.46% (see Figure 4.3).

Table 4.3: Recent Past DBE Participation

Fiscal Year	Federal Awards	DBE Awards	DBE % Achieved
2004	$2,735,127,722	$360,031,279	13.16%
2005	$3,154,157,201	$378,993,625	12.02%
2006	$2,690,752,367	$342,867,974	12.74%
2007	$2,656,532,841	$307,091,081	11.56%
2008	$1,984,081,620	$291,922,772	14.71%
2009	$2,389,290,441	$290,826,669	12.17%
2010*	$1,123,439,917	$121,077,620	10.78%

***** Note: FY 2010 is not complete. Available figures only include data for the first six-months.

Figure 4.3: Median Value

$= (12.17 + 12.74) \div 2$

$= 12.46\%$

We determined that past participation is a strong indicator on actual DBE participation and that this available information justifies a +1.00% adjustment to the DBE Goal.

Adjustment 4: Public Consultation Evidence

The purpose of the public consultation is to gather evidence and information that can assist in the development of the FY 2011-2013 DBE Goal Methodology. As part of this goal setting process, four public consultation meetings was held in San Antonio,

Houston, Fort Worth and Amarillo. The purpose of the meetings was to meet and consult with "minority, women and general contractor groups, community organizations and other officials or organizations which would be expected to have information concerning the availability of DBEs and non-DBEs, the effects of discrimination on opportunities for DBEs, and TxDOT's efforts to establish a level playing field for the participation of DBEs (see §26.45(g)(1))." (See Attachment C: Public Consultation Meeting Invitees). Business development organizations, chambers of commerce and professional associations were mailed an invitation and a detailed agenda to participate in a face-to-face exchange aimed at gathering information regarding establishing the overall DBE goal. To ensure their participation, telephone follow-ups were made to assess whether or not they have relevant information to the goal setting process.

No new evidence was made available, however participants made comments concerning the market availability and TxDOT efforts to attain race-neutral participation. The information and evidence received was not sufficient in justifying a DBE Goal adjustment.

SECTION 5: ADJUSTED GOAL

All available evidence is taken into consideration to determine the adjustments to the base figure. An adjustment for past participation is appropriate; therefore the base figure is adjusted consideration to all available evidence to reveal the recommended adjusted goal (see Figure 5.1). The recommended DBE Goal for FY 2011-2013 is 12.20%.

Figure 5.1: Adjustment to Base Figure Calculation

Adjusted Goal = Base Figure + Adjustment 1 + …+ Adjustment 4

= 11.45 + 0.75+ -1.00+ 1.00+ 0.00

= 12.20%

Proposed DBE Goal
12.20%

SECTION 6: RACE-NEUTRAL AND RACE CONSCIOUS PARTICIPATION

The goal methodology includes the methods used to compute the DBE goal and a determination of how TxDOT plans to meet the goals through race-neutral and race-conscious measures (see §26.45(f)(3) and §26.51(c)). TxDOT plans to meet the "maximum feasible portion of [the] overall goal by using race-neutral means. (see §26.51(a))."

TxDOT examined the race-neutral attainment for the past six (6) complete years (see Table 6.1) to determine the maximum race-neutral participation. On average,

TxDOT achieved 7.18% (see Figure 6.1) of the goal through race-neutral means. The proposed race-neutral goal for FY 2011-2013 is 7.00%.

Table 6.1: Race-Neutral and Race-Conscious Goal vs. Achievement

	Goals			Achievement		
Fiscal Year	Race-Neutral	Race-Conscious	Overall	Race-Neutral	Race-Conscious	Overall
2004	5.00%	7.44%	12.44%	5.89%	7.27%	13.16%
2005	5.00%	7.70%	12.70%	5.96%	6.06%	12.02%
2006	6.54%	6.00%	12.54%	8.14%	4.60%	12.74%
2007	6.12%	6.00%	12.12%	6.76%	4.80%	11.56%
2008	6.12%	6.00%	12.12%	10.52%	4.19%	14.71%
2009	6.00%	5.00%	11.00%	5.81%	6.36%	12.17%
2010*	4.12%	7.50%	12.62%	5.73%	5.05%	10.78%

***** Note: FY 2010 is not complete. Available figures only include data for the first six-months.

Figure 6.1: Average Race-Neutral

$$= \left(\frac{5.89 + 5.96 + 8.14 + 6.76 + 10.52 + 5.81}{6} \right)$$

$$= \left(\frac{43.08}{6} \right)$$

$$= 7.18$$

Proposed Race Neutral

= 7.00

TxDOT will establish race-conscious measures, contract goals, to meet the balance (see Figure 6.2) of the overall goal (see §26.51(d)). The proposed Race-Conscious Goal for FY 2011-2013 is 5.20%.

Figure 6.2: Race-Conscious Calculation

$$RaceConscious + RaceNeutral = OverallGoal$$

$$RaceConscious = OverallGoal - RaceNeutral$$

$$= 12.20 - 7.00$$

5.20%

SECTION 7: PUBLIC COMMENT

In accordance with § 26.45(g)(2), TxDOT published a Public Notice announcing the proposed overall goal and methodology in general circulations, Texas Register and minority and trade focus papers statewide (see Attachment D: Public Comment Notifications) on June 30, 2010, inviting public review for 30 days and to comment for 45 days. The public will be afforded the opportunity to review the methodology until August 30, 2010 and to submit comments by September 14, 2010.

Office of Civil Rights staff will be available at a public comment meeting on August 17, 2010, at the TxDOT office building at 200 East Riverside Drive in Austin. Staff will provide an overview of the goal-setting process and the FY 2011-2013 DBE Goal Methodology. The public is invited to present oral or written comments at the meeting.

Any comments that warrant a modification to the FY 2011-2013 DBE Goal Methodology will be implemented and forwarded to the appropriate US DOT division.

SECTION 8: ATTACHMENTS

Attachment A: List of Memorandums of Understanding
Attachment B: Sample Memorandum of Understanding
Attachment C: Public Consultation Meeting Invitees
Attachment D: Public Comment Notifications

Attachment A
List of Memorandums of Understanding

The following sub-recipients of TxDOT highway design and construction funds adopted the TxDOT Memorandum of Understanding (MOU) for DBE Programs. The agencies have attended training programs sponsored by TxDOT regarding the DBE Program.

Alamo Regional Mobility Authority
Bexar County
Camino Real Regional Mobility Authority
Central Texas Regional Mobility Authority
City of Abilene
City of Baytown
City of Cedar Park
City of Corpus Christi
City of Forney
City of Leander
City of Manor
City of Pearland
City of San Antonio
City of San Marcos
City of Taylor
Harris County
Hidalgo County
Montgomery County Pass-Through Toll Agreement
North Texas Tollway Authority
Texas Historical Commission
Town of Trophy Club
Travis County
Val Verde County
Webb County
Williamson County

Attachment B
Sample Memorandum of Understanding

MEMORANDUM OF UNDERSTANDING
REGARDING THE ADOPTION OF THE TEXAS DEPARTMENT OF TRANSPORTATION'S FEDERALLY-APPROVED DISADVANTAGED BUSINESS ENTERPRISE PROGRAM BY THE CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY

This Memorandum of Understanding is by and between the **TEXAS DEPARTMENT OF TRANSPORTATION ("TxDOT"),** an agency of the State of Texas; and the **CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY ("the CTRMA"),** a Texas regional tollway authority organized and existing pursuant to Chapter 26, Texas Transportation Code.

Whereas, from time to time from CTRMA receives federal funds from the Federal Highway Administration ("FHWA") through TxDOT to assist the CTRMA with the construction of turnpike projects; and

Whereas, the CTRMA, as a sub-recipient of federal funds, is required by 49 CFR 26, to implement a program for disadvantaged business enterprises ("DBEs"), as defined by 49 CFR 26 ("DBE Program"); and

Whereas, TxDOT has implemented a DBE Program that is approved by the Federal Highway Administration (FHWA) pursuant to 49 CFR part 26; and

Whereas, as a condition of receiving federal funds from FHWA through TxDOT, certain aspects of the CTRMA's procurement of construction services are subject to review and/or concurrence by TxDOT; and

Whereas, the CTRMA and TxDOT undertake substantially similar roadway construction projects and construct their respective projects using substantially the same pool of contractors; and

Whereas, the CTRMA desires to implement a federally compliant DBE Program by adopting the TxDOT approved program, as recommended by FHWA; and

Whereas, TxDOT and the CTRMA find it appropriate to enter into this Memorandum of Understanding to memorialize the obligations, expectations and rights each has as related to the CTRMA's adoption of the TxDOT DBE Program to meet the federal requirements;

Now, therefore, TxDOT and the CTRMA, in consideration of the mutual promises, covenants and conditions made herein, agree to and acknowledge the following:

(1) TxDOT has developed a DBE Program and annually establishes a DBE goal for Texas that is federally approved and compliant with 49 CFR 26 and other applicable laws and regulations.

(2) The CTRMA is a sub-recipient of federal assistance for roadway construction projects and, in accordance with 49 CFR § 26.21, must implement a federally approved DBE Program. The CTRMA receives its federal assistance through TxDOT. As a sub-recipient, the CTRMA has the option of developing its own program or adopting and operating under TxDOT's federally approved DBE Program. The FHWA recommends that sub-recipients, such as the CTRMA, adopt the DBE program, administered through TxDOT, and the CTRMA hereby chooses to adopt the TxDOT DBE Program.

(3) This Memorandum of Understanding evidences FHWA's and TxDOT's consent to the adoption of the TxDOT DBE Program by the CTRMA to achieve its DBE participation in CTRMA federally assisted roadway construction projects.

(j) The CTRMA will submit DBE semi-annual progress reports to TxDOT.

(k) The CTRMA will participate in TxDOT sponsored training classes to include topics on DBE Annual Goals, DBE Construction Project Goal Setting, DBE Contract Provisions, and DBE Contract Compliance, which may include issues such as DBE Commitments, DBE Substitution, and Final DBE Clearance. TxDOT will include DBE contractors performing work on the CTRMA projects in the DBE Education and Outreach Programs.

(6) In the event there is a disagreement between TxDOT and the CTRMA about the implementation of the TxDOT DBE Program by the CTRMA, the parties agree to meet within ten (10) days of receiving a written request from the other party of a desire to meet to resolve any disagreement. The parties will make good faith efforts to resolve any disagreement as efficiently as is reasonably possible. If the parties are not able to resolve any material disagreement to the satisfaction of all parties, either party may terminate this Memorandum of Understanding by written notice to the other party and FHWA.

(7) This Memorandum of Understanding becomes effective upon execution by all parties and automatically renews each year unless a party notifies the other parties of its intent to terminate the agreement.

(8) If this Memorandum of Understanding is terminated for any reason, the CTRMA will be allowed reasonable time in which to seek approval for a DBE Program without being deemed non-compliant with 46 CFR Part 26 or with an approved DBE Program.

(9) This Memorandum of Understanding applies only to projects for which the CTRMA is a sub-recipient of federal funds. The CTRMA may also implement a Minority and Women-Owned Small Business Enterprise (M/W/SBE) policy and program that applies to projects for which it is not a sub-recipient of federal funds and which are not subject to the TxDOT DBE Program, The CTRMA may, at its option, use some aspects of the TxDOT DBE Program and other similar programs in implementing its other policies and programs.

(10) The following attachments to this MOU are incorporated as if fully set out herein for all purposes: Attachment A - FHWA Memorandum HCR-1/HIF-1 (relating to access required by the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973); Attachment B - SPECIAL PROVISION 000-461; Attachment C - Comprehensive Development Agreement (CDA) DBE Provisions (with TxDOT's DBE Program and its 10 Attachments) and Attachment D - 49 CFR §26.13 (contractual assurances). In the case of any conflict between the SPECIAL PROVISION, the CDA DBE Provisions and TxDOT's DBE Program, the provisions of the first two documents shall prevail in regard to CDAs.

EXECUTED by TxDOT and the CTRMA, acting through each duly authorized official and effective on the latest date signed.

APPROVED AS TO FORM:

By: Bob Jackson Date: 1/18/07

Bob Jackson, General Counsel
Texas Department of Transportation

By: Tom Nielson Date: 1/23/07

Tom Nielson, General Counsel
Central Texas Regional Mobility Authority

The signatories below confirm that they have the authority to execute this MOU and bind their principles.

TEXAS DEPARTMENT OF TRANSPORTATION

By: M. W. Behrens
Michael W. Behrens, P.E.
Executive Director

Date: 1-19-07

CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY

By: Mike Heiligenstein
Mike Heiligenstein
Executive Director

Date: 2/1/07

Attachment C
Public Consultation Meetings Invitees

The following minority, women's and general contractor groups, community organizations and other official and organization which were invited to attend the Public Consultation Meetings.

Abilene Black Chamber of Commerce
Acres Home Center for Business and Economic Development
African American Chamber of Commerce of San Antonio
African American News & Issues
African Chamber of Commerce, D/FW
African-American Chamber of Commerce
AGC of Texas
American Indian Chamber of Commerce of Texas
Beaumont Chamber of Commerce
Bee County Area Hispanic Chamber of Commerce
Bridging the Gap
Bryan-College Station Chamber of Commerce
Business Assistance Center-Innercity Community Dev Center
Camara De Comercio Hispaña De Amarillo (Cacha)
Capital City African American Chamber of Commerce
Childress Chamber of Commerce
Construction Information Network (CIN)
Corpus Christi Bay Area Minority Business Opportunity Center
Corpus Christi Hispanic Chamber of Commerce
Corpus Christi Minority Business Development Center
Dallas Black Chamber of Commerce
Dallas Black Contractors Association
Dallas/ Ft. Worth – MBDC
Dallas/Ft. Worth/Arlington/ MBDC
DFW Native American Chamber of Commerce
Eagle Pass Hispanic Chamber of Commerce
East Texas Council on African-American Affairs
El Mensajero, Inc.
El Paso Black Chamber of Commerce
El Paso Hispanic Chamber of Commerce
El Paso MBDC
El Paso Minority Business Development Center
Fort Worth Hispanic Chamber of Commerce
Fort Worth Metropolitan Black Chamber of Commerce
Greater Austin Hispanic Chamber of Commerce
Greater Dallas Asian American Chamber of Commerce

Greater Dallas Hispanic Chamber of Commerce
Greater Killeen Chamber of Commerce
Greater Marshall Chamber of Commerce
Greater Orange Area Chamber of Commerce
Greater San Antonio Chamber of Commerce
Greater Waco Chamber of Commerce
Hispanic Chamber of Greater Baytown
Hispanic Contractors Association of Dallas/Ft Worth
Houston Citizens Chamber of Commerce
Houston Hispanic Chamber of Commerce
Houston MBDC
Jasper/Lake Sam Rayburn Area Chamber of Commerce
Kilgore Chamber of Commerce
Lamar County Chamber of Commerce
Laredo Chamber of Commerce
Longview Metro Black Chamber of Commerce
Lubbock Black Chamber of Entrepreneurs, Inc.
Lubbock Hispanic Chamber of Commerce
Lufkin/Angelina County Chamber of Commerce
McAllen Chamber of Commerce
McAllen Hispanic Chamber of Commerce
Mexican American Network of Odessa, Inc. (MANO)
Midland Black Chamber of Entrepreneurs, Inc.
Midland Hispanic Chamber of Commerce
NAACP (Austin Office)
NAACP (San Antonio Office)
National Association for the Advancement of Colored People
National Association of African American Chamber of Commerce
National Association of Women in Construction
Pampa Chamber of Commerce
Pharr Chamber of Commerce
Professional Women's Association
Rio Grande City Chamber of Commerce
Round Rock Chamber of Commerce
San Angelo Chamber of Commerce
San Antonio Hispanic Chamber of Commerce
San Antonio MBDC
San Antonio Women's Chamber of Commerce
San Marcos Hispanic Chamber of Commerce
San Saba County Chamber of Commerce
Seguin-Guadalupe County Hispanic Chamber of Commerce
Seminole Area Chamber of Commerce
Smithville Chamber of Commerce
South Texas MBDC

Texarkana Chamber of Commerce
Texas Asian Chamber of Commerce
Texas Association of African-American Chamber of Commerce
Texas Association of Mexican-American Chamber of Commerce
Texas State Conference of NAACP
Texas Tech University Small Business Development Center
Texas Workforce Center of El Paso
Tulia Chamber of Commerce
Tyler Area Chamber of Commerce
Tyler Metropolitan Chamber of Commerce
U. S. Dept of Commerce Minority Business Dev Agency
U. S. Pan Asian American Chamber of Commerce-Southwest
U. S. Small Business Administration
Victoria Hispanic Chamber of Commerce
Women's Business Council – Southwest
Women's Chamber of Commerce of Texas
Women's Enterprise
Yoakum Chamber of Commerce

Attachment D
Public Comment Notifications

The following is a list of the general circulation and minority-focused media that are contacted to post a public notice for the examination of the DBE Goal Methodology.

Abilene Reporter News
Austin American Statesman
Amarillo Globe News
Beaumont Enterprise
Brownwood Bulletin
Corpus Christi Caller Times
Childress Index
Dallas Morning News
El Paso Times
Fort Worth Star Telegram
Houston Chronicle
Laredo Morning News
Longview News Journal
Lubbock Avalanche Journal
McAllen Monitor
San Antonio Express News
African American News & Issues
La Prensa

ATTACHMENT 7

ATTACHMENT 7

Control _____

Project _____

Highway _____

County _____

DISADVANTAGED BUSINESS ENTERPRISES REQUIREMENTS

The following goal for disadvantaged business enterprises is established:

DBE
8.0%

Certification of DBE Goal Attainment

By *signing* the proposal, the Bidder certifies that the above DBE goal will be met by obtaining commitments equal to or exceeding the DBE percentage or that the Bidder will provide a good faith effort to substantiate the attempt to meet the goal.

Failure to provide commitments to meet the stated goal or provide a satisfactory good faith effort will be considered a breach of the requirements of the proposal. As a result, the bid proposal guaranty of the bidder will become property of the Department and the Bidder will be excluded for re-bidding on the project when it is re-advertised.

ATTACHMENT 8

DBE JOINT CHECK APPROVAL

CSJ: _____

Project Number: _____

Highway: _____

County: _____

To: _____ (Area/Project Engineer),

We have received the **attached request** for the use of joint check arrangements from our DBE Subcontractor _____ . This arrangement is at the DBE Subcontractor and Supplier's request and the parties involved agree that the DBE Subcontractor will place all orders to pertinent Suppliers. We further agree that the DBE Subcontractor retains all final decision-making responsibilities as stated in the Federal DBE Regulations 26.55 (c)(1).

We, as the Contractor for the project, agree to issue joint checks for payment of sums due, on the above referenced project, to pertinent Suppliers of the DBE Subcontractor. We further agree to notify you when the joint checks will be used and will provide the joint check agreement upon your request.

Contractor: _____

Signature: _____

Print Name: _____

Title: _____

Date: _____

Reserved for TxDOT Use Only		
TxDOT District Approval: ☐ Check for Approval		☐ Check for Denial
Signature:		**Reason for Denial:**
Print Name:		
Title:		
Date:		

District Procedures:

1. Provide a copy of the approval or denial for the contractor.
2. Maintain a copy for the files.
3. Conduct reviews of the Contractor and DBE procedures on the use of joint checks.

ATTACHMENT 9

ATTACHMENT 9

TEXAS
UNIFIED CERTIFICATION PROGRAM
STANDARD OPERATING PROCEDURE

I. INTRODUCTION

A Disadvantaged Business Enterprise (DBE) Unified Certification Program (UCP) has been established in the State of Texas in accordance with Title 49 Part 26 of the Code of Federal Regulations (49 CFR Part 26). Pursuant to a Memorandum of Agreement (MOA) signed by all recipients required to participate in the TUCP, the Texas Department of Transportation (TXDOT), City of Houston, City of Austin, Corpus Christi Regional Transportation Authority (CCRTA), North Central Texas Regional Certification Agency (NCTRCA), and South Central Texas Regional Certification Agency (SCTRCA) as Certifying Partners for the TUCP. The cost of creating and establishing the TUCP web site and the electronic DBE Directory will be the responsibility of TxDOT. The TUCP reserves the right to develop a methodology to ascertain maintenance and operational costs. Any changes to the web site or Directory that results in costs to the Certifying and Non-Certifying Partners will be reviewed and approved by the TUCP recipients before the changes are implemented.

Each of the Certifying Partners is required to administer a DBE certification program in accordance with 49 CFR Parts 26 and 23. As part of the TUCP, Certifying Partners will make certification decisions on behalf of all USDOT recipients, sub recipients and grantees in Texas with respect to participation in the USDOT DBE Program. Certification decisions by the TUCP shall be binding on all USDOT recipients, sub recipients and grantees within Texas.

1. The following actions have been taken by the TUCP Partners: All TUCP Partners electronically submitted the current DBE firms to the DBE Database Manager for inclusion in the TUCP DBE Directory.
2. Each DBE firm was confirmed by each TUCP Partner, that the DBE firm was certified under the provisions of 49 CFR Parts 26 and 23.
3. The TUCP Partners met to review each of the DBE firms, and concluded which TUCP Partner would have custody of the certification record.

A thorough certification process ensures that the DBE program benefits only bona fide disadvantaged businesses. In order to ensure consistent application and interpretation of the regulatory requirements for DBE certification and consistent certification determinations, a Standard Operating Procedure (SOP) will be used by all Certifying Partners.

The Standard Operating Procedure sets forth the process to be utilized by the Certifying Partners when making determinations of DBE certification eligibility.

The procedures outlined herein are consistent with the U.S. Department of Transportation regulations codified at 49 CFR Part 26.

II. DEFINITIONS

Burden of Proof
Measure of persuasion that is required to convince someone that an alleged fact is true.

DBE Certification
A finding, after a certification eligibility review by a Certifying TUCP Partner that a business meets the certification eligibility requirements and is a bona fide Disadvantaged Business Enterprise in accordance with 49 CFR Parts 26 and 23.

Certification Interview
Face-to-face meeting between the applicant firm's qualifying owner(s) for DBE certification and the Certifying Partner

Certifying TUCP Partner
A Texas State recipient of USDOT funds with a current DBE Program Plan approved by an appropriate USDOT oversight modal agency. A Certifying TUCP Partner can issue or revoke DBE certifications. This includes those entities, North Central Texas Regional Certification Agency and South Central Texas Regional Certification Agency, who are not recipients, but were formed as domestic non-profit organizations for the purposes of performing certifications on behalf of recipients.

Decertification
The removal of certification based on a determination that a currently certified DBE no longer meets the eligibility criteria and is given due process under 49 CFR Part 26.

Decision Memorandum
Written document prepared by Certifying TUCP Partner detailing certification determination rendered.

Denial of Certification
A finding that a business is not a bona fide Disadvantaged Business Enterprise. A business that has been denied DBE certification or declared ineligible cannot again reapply for DBE certification for one year from the date of denial.

Executive Committee
A group consisting of representatives from each of the TUCP Certifying Partner agencies, who shall be designated by the signatories to the Memorandum of Agreement for the Unified Certification Program.

Grantee
Any public entity that has received USDOT assistance.

Non-Certifying TUCP Partner
A State of Texas recipient, sub-recipient, or grantee with a current DBE Program Plan approved by an appropriate USDOT oversight modal agency. A Non-Certifying TUCP partner can neither issue nor revoke DBE certification.

TUCP Certifying Partner
A State of Texas federal aid recipient with a current DBE Program Plan approved by an appropriate USDOT oversight modal agency. This includes those entities, North Central Texas Regional Certification Agency and South Central Texas Regional Certification Agency, who are not recipents, but were formed as domestic non-profit organizations for the purposes of performing certifications on behalf of recipients. A Certifying Partner can issue or revoke DBE certification. The TUCP Certifying Partners are the Texas Department of Transportation (TXDOT), Corpus Christi Regional Transportation Authority (CCRTA), North Central Texas Regional Certification Agency (NCTRCA), South Central Texas Regional Certification Agency (SCTRCA), City of Austin, and the City of Houston.

TUCP Partner
All Texas State federal-aid recipients, both Certifying and Non-Certifying, participating in the TUCP.

Preponderance of Evidence
A standard of proof which is met when the evidence on a fact indicates that it is "more likely than not" true.

Recipient
Any public entity, which receives direct USDOT financial assistance.

Sub recipient
Any public entity that receives USDOT financial assistance through another recipient.

Withdrawal of Application
An applicant's written request to the Certifying TUCP Partner to cease the certification review process. An applicant that has withdrawn its application cannot again reapply for DBE certification for twelve (12) months from the date of the withdrawal.

III. CERTIFICATION PROCEDURES

A. Application for DBE Certification

1. All applicants requesting initial DBE certification must complete and submit a complete certification application package to one of the TUCP Certifying Partners. The TUCP will accept a copy of a firm's application package that was submitted to the SBA and a copy of their certification letter. SBA firms must undergo a site visit.

2. A complete package consists of the following:

   a) USDOT Uniform Certification Application and Affidavit

b) Personal Financial Statement for each qualifying socially and economically disadvantaged owner

c) Required basic and support documentation as determined by business structure and in accordance with 49 CFR Parts 26 and 23.

B. Intake

1. Immediately upon receipt of the application package it is reviewed for completeness of form. Specifically, the Affidavit of Certification and Personal Financial Statement are reviewed for original signatures and notarization, and to determine whether the basic required supporting documents have been submitted.

2. The application is reviewed to ascertain the firm's line of work and services provided. Type of business service is necessary in determining whether the Certifying Partner in receipt of the application will process the application or transfer it to another Certifying Partner.

3. Only firms organized for profit are eligible for DBE certification.

C. Desk Audit

1. The processing staff will organize and assemble the applicant information in a business file. The processing staff must be mindful that all applications are to be processed within 90 days of receipt of a complete application.

2. The processing staff will thoroughly review the application package to determine whether all required supporting documentation has been submitted, and to determine if additional information will be requested. Care should be taken to ensure that any requested documentation/information is actually pertinent to the certification review.

3. If additional information is required, the processing staff will prepare a letter to the applicant firm requesting additional information. The letter will include a due date for submission of the additional information and advise the applicant that failure to respond will administratively close the application. In establishing a due date, processing staff must allow sufficient time thirty (30) days for the applicant to provide the requested information.

4. The processing staff will monitor the timely receipt of the requested information. Upon receipt of the additional information, the processing staff will review it and make a determination as to the completeness of the certification file. Processing staff are required to obtain information from the Texas State Comptroller/Texas Secretary of State for "standing" of the applicant business and all known affiliates.

5. Familial- marital relationships (see page 9).

D. Threshold Requirements

1. The processing staff will make a determination on each of the threshold requirements.

a) **Size standard** - in making a determination of *size standard*, processing staff must reference and adhere to §26.65 and 23.33 of the regulations.

b) **Social disadvantage** - In making a determination of *social disadvantage*, processing staff must reference and adhere to § 26.63 and §26.67 of the regulations.

c) **Economic disadvantage** – in making a determination of economic disadvantage processing staff must reference and adhere to §26.67 and 23.35 of the regulations.

d) **Citizenship** - each individual qualifying the firm for DBE certification must demonstrate that he/she is a citizen of the United States or a lawfully admitted permanent resident. Each individual must submit acceptable documentation as proof of citizenship or permanent resident status.

e) **Irrevocable separation of property:** When marital assets 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. A copy of the document legally transferring and renouncing the other spouse's rights must have been filed in the proper court. The document must clearly show receipt by the court.

2. **FAILURE TO MEET REQUIREMENT** - If the applicant firm or its qualifying owners fail to meet any one of the threshold requirements for DBE certification, the firm is to be deemed ineligible for DBE certification. The firm may appeal the denial determination to the U.S. Department of Transportation in accordance with the procedures set forth in §26.89.

3. **REVIEW OF COMPLETED FILES** - If the firm meets the threshold requirements, the processing staff will, upon a thorough and careful review of the complete file, prepare a list of firm specific questions to be answered by the qualifying owners of the firm. These questions should be in addition to the standard questions asked of every firm and should address the particulars and unique facts of the applicant firm and its owners.

a) In preparing firm specific questions, processing staff should be sufficiently knowledgeable of the business area in which the firm is

seeking certification, anticipating issues, which will require close examination. The processing staff should have knowledge of the capitalization requirements, licensing, technical expertise, staffing and industry practices. In the event that processing staff is unfamiliar with the requirements for the applicant business, technical assistance should be obtained from technical personnel within the agency.

b) Once the applicant file is complete and the questions have been prepared, processing staff must schedule a face-to-face certification on-site review meeting with the qualifying owners at a time convenient for all participants.

E. **On-Site Review**

1. The purpose of the on-site review is to verify the firm's location, personnel and operations; to substantiate information/documentation contained in the applicant file and to review business and financial records. The on-site review is the second phase of the certification review process and will also be conducted on certified firms every three years. An on-site review of the applicant firm and an interview of the socially and economically disadvantaged principals of the firm must be made in accordance with §26.83(c) (1) of the regulations.

2. The following information, **if applicable**, should be received and reviewed no later than the on-site review:

a) **Cash Receipts and Disbursements**

(i) Check for entries in the cash receipts journal, which disclose initial capital contributions.

(ii) Verify operational expenditures in the cash disbursements journal. Note questionable/exceptional/unusual entries and the frequency or consistency of such expenditures.

(iii)Note payments to and from shareholders, directors, officers and key employees in the cash disbursements journal.

(iv)Note payments to similar businesses for possible broker activity or evidence of conduit activity.

(v) Cross reference cash disbursements with cancelled checks.

(b) **Bank Statements and Cancelled Checks**

(i) Verify initial capitalization of firm with the first bank statement, if available.

(ii) Verify and document signature authority and consistency in which DBE owner v. non-DBE owner(s)/offices sign checks.

(iii)Verify payments to shareholders, key employees and consultants.

(iv)Pay particular attention to the "memo" section of checks.

(v) Determine is there are any additional checking accounts not disclosed prior to the visit. If so, note the authorized signatories.

(vi) Cross reference payments to and from clients, suppliers, consultants, etc.

(c) Payroll

(i) Determine who is on the firm's payroll.

(ii) Determine if the owner is receiving compensation in accordance with his/her ownership interest.

(iii) Determine who receives bonus payments and amounts.

(iv) Compare W-2's and 1099's to payroll register, to extent possible, for key employees.

(v) Pay attention to any "memo" notations on any payroll checks.

(d) Invoices and Receipts

(i) Check telephone bills to determine if they are addressed to the DBE firm.

(ii) Review invoices to substantiate method and source of payment.

(iii) Check invoices for suggestion of brokering activity or reliance on non-DBE firms.

(iv) Examine invoices for resolution of regular dealer issues (freight charges).

(e) **Contract Files**

(i) Determine who executes contracts on behalf of the firm.

(ii) Verify the services provided by the applicant firm and the terms and conditions of the provision of their services.

(iii) Verify consistency in which firm does business with a particular firm and whether any issues of dependency.

(f) **Inventory and Equipment**

(i) Identify nature and use of equipment possessed by firm.

(ii) Verify ownership of equipment with invoices.

(iii) If equipment is leased, review equipment lease agreements.

(iv) Identify inventory maintained by firm.

(v) Determine whether lack of inventory suggests broker or conduit activity.

(vi) If regular dealer, verify inventory, warehouse facility, transportation equipment, etc.

(vii) Determine if firm's name on vehicles (trucks).

(g) **Bonding and Insurance**

(i) Determine who is guaranteeing/financing bonding.

(ii) Is bond commensurate with size of firm?

(iii) Are insurance documents in the name of the firm?

(iv) Verify types of insurance maintained by firm.

(v) Does firm carry Key Man Insurance (life insurance on key person in business, should be owner—business is beneficiary)? If so, for whom?

(h) **Corporate Kit or Business Organization Documents**

(i) Cross reference documents in corporate kit with original submission.
(ii) Review all minutes and entries for voting, control, attendance, etc.

(i) **Corporate Kit or Business Organization Documents**
(i) Review stock transfer ledger.
(ii) Review cancelled/voided stock certificates and note reasons for cancellations.
(iii) Review non-issued stock certificates to determine if there is numerical continuity.
(iv) Verify corporate seal.
(v) Review by-laws for revisions since original submission of documents

(j) **Employment Agreements**
(i) Determine the existence of any Employment Agreements for owner(s) or key personnel.
(ii) Review terms of Employment Agreements for possible conflict with qualifying owner's ability to control operations of firm.

(k) **Physical Characteristics of Office/Building Location**
(i) Determine if the firm has identifying signs outside or inside of the building/office.
(ii) Determine if DBE owner has own office.
(iii) Request a tour of facilities and observe equipment on premises.
(iv) Ask questions regarding operation of equipment.
(v) Determine if office space shared with other companies, and if so, the nature of the business of the other companies.
(vi) Determine if equipment, supplies, etc. is shared with other companies.
(vii) If shared facilities, equipment, verify arrangement for sharing.
(viii) Determine if owner(s) are operating other related or unrelated businesses from the location. If so, identify the business and its owners.

(l) **Familial-martial relationships-** Familial-martial relationships between owners and employees that is pertinent to ownership and control of the company.

3. Information obtained during the on-site review must be compiled in a separate comprehensive written report. The on-site review report is made a part of the certification file and incorporated accordingly.

4. Depending upon the location of the firm, a Certifying Partner may request another Certifying Partner to conduct the on-site review. In such instances, a written request must be made to the Certifying Partner conducting the review with issues of concern identified. The Certifying Partner conducting the on-site review will be responsible for preparing the on-site review report.

5. An on-site visit to the job-site must be conducted if at the time of the on-site, the applicant firm is working.

6. In lieu of conducting an on-site review for a firm outside of Texas, a Certifying Partner may utilize an on-site review report from the potential DBE's home state DOT that certified the firm in accordance with 49 CFR Parts 26 and 23.

7. An applicant's failure to permit an on-site review shall be grounds for denial of DBE certification for failure to cooperate. The firm will be denied certification and cannot reapply for 12 months. The firm may appeal the denial determination to U.S. DOT in accordance with the procedures set forth in §26.89.

F. Certification Determination and Recommendation

1. **DECISION MEMORANDUM** - The certification recommendation is the final product of all information, which has been reviewed, and is an evaluation of the firm's compliance with the certification eligibility standards set forth in the regulations. The written recommendation must be sufficiently comprehensive to persuade an objective party of the merits of the recommendation.

2. **MANAGEMENT REVIEW** - The certification recommendation must be submitted to the supervisor responsible for certification review. The complete file must accompany the submission of the certification recommendation. The supervisor responsible for the certification review must provide written concurrence with the recommendation for certification or denial of certification before a letter can be forwarded to the firm's owners.

G. DBE Certification and Annual Certification Renewal

1. **WRITTEN NOTIFICATION** - A firm will be notified in writing by the TUCP Certifying Partner that it has been granted DBE certification.

2. **LENGTH OF CERTIFICATION** - Once a firm is certified as a DBE by the TUCP, it shall remain certified, unless and until its certification has been removed in accordance with procedures set forth in 49 CFR §26.87.

3. **CHANGE OF CIRCUMSTANCE** - A certified DBE firm has an affirmative responsibility to notify the TUCP Certifying Partner in writing, of any change in circumstances affecting size, disadvantaged status, ownership, or control requirements of the regulation, or any material change in the information provided in its application for DBE certification. Such notice must be within thirty (30) days of the change-taking place.

4. **NO CHANGE AFFIDAVIT** - A certified DBE firm must submit annually, on the anniversary of DBE certification, a No Change Affidavit. A

No Change Affidavit is a sworn affidavit affirming that there have been no changes in the firm's circumstances affecting its size, disadvantaged status, ownership or the control requirements of the regulation, or any material change in the information provided in its application for DBE certification, including the support documentation.

a) Each firm will be notified by the TUCP Certifying Partner at least 30 days in advance of its anniversary date, of the annual submission requirement and will be provided with the necessary affidavits to complete and return.

b) A firm failing to comply with the annual submission requirement will be notified in writing 30 days from the date that the submission was due, of the TUCP's intent to decertify the DBE in accordance with §26.87 of the regulation.

c) A firm failing to comply with the annual submission requirement will be decertified under the procedures of §26.87.

H. Initial Denial of DBE Certification

1. A firm will be notified in writing by the Certifying Partner that it has been denied DBE certification by the TUCP.

2. The firm will be provided with a written explanation of the reasons for denial, specifically referencing the evidence in the record that supports each reason for the denial.

3. All documents and information used to render a determination of denial will be made available for inspection by the applicant, upon written request to the Certifying Partner.

4. A firm that is denied DBE certification may not again apply for certification with the TUCP for a period of one year.

5. A firm denied DBE certification may appeal the denial of DBE certification to the USDOT in accordance with §26.89 of the regulation.

I. Removal of DBE Eligibility (Decertification)

1. The TUCP Certifying Partners will follow procedures consistent with §26.87 when removing DBE certification eligibility.

2. A DBE firm whose eligibility has been removed (decertified) for any of the following reasons will be afforded an Appeal Process as stated in Section J(2):

a) The business has changed to the extent that it is no longer owned or controlled by socially and economically disadvantaged individual(s).

b) The DBE firm is no longer an ongoing business entity.

c) The socially and economically disadvantaged owners falsified a sworn statement. This action may also result in more punitive action such as debarment.

d) The DBE fails to notify the TUCP Certifying Partner, within 30 days, of changes in ownership, control, independence or status as an ongoing concern.

e) A determination by the TUCP Certifying Partner that the firm no longer meets certification eligibility standards.

f) The DBE exhibits a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirement of the regulations. This action may also result in more punitive action such as debarment.

3. Decertified firms shall be removed from the TUCP directory..

4. A decertified firm may not again apply for certification with the TUCP for a period of one year.

J. Appeal Process

1. Initial Denials

a) a firm denied DBE certification may appeal the denial of DBE certification to the United States Department of Transportation (USDOT) in accordance with §26.89 of the regulation. Such appeal must be filed within 90 days of the date of the determination letter.

b) Pending a determination by USDOT, the decision rendered by the Certifying Partner remains in effect for the TUCP. Upon notification by USDOT, the TUCP Certifying Partner will forward a copy of the complete administrative record for review.

c) All appeal decisions rendered by USDOT are administratively final and are not subject to petitions for reconsideration.

d) A firm that is denied DBE certification may not again apply for certification with the TUCP for a period of one year.

e) The Database Manager will receive written notification of the certification determination rendered by the TUCP Certifying Partner.

2. **Removal of Certification**

a) Any firm that was certified under 49 CFR Part 26 and has had their certification removed may file a written rebuttal or appear in person at an informal hearing.

b) All requests for an informal hearing must be filed with the TUCP Certifying Partner responsible for the removal of DBE certification. The firm will have the opportunity to present information in person or in writing.

c) The TUCP Certifying Partner must maintain a complete record of the hearing, by a means acceptable under State law for the retention of a verbatim record of an Administrative Hearing.

d) Separations of Functions: The TUCP Certifying Partner must ensure that the decision in a proceeding to remove a firm's eligibility (decertification) 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.

e) Any firm may appeal directly to the United States Department of Transportation (USDOT). Such appeal must be filed within 90 days of the date of the denial letter from the Certifying Partner.

f) Pending a determination by the USDOT, the decision rendered by the TUCP Certifying Partner remains in effect for the TUCP.

g) Upon notification by USDOT, the TUCP Certifying Partner will forward a copy of the complete administrative record for review. USDOT will make a determination based solely on the administrative record.

h) USDOT will provide written notice of its decision to the TUCP and the appellant.

i) It is the policy of USDOT to make its determination within 180 days of receiving the complete administrative record. If a determination is not made within this period, USDOT will provide written notice to the parties explaining the reason for the delay and a date by which the appeal decision will be made.

j) All appeal decisions rendered by the USDOT are administratively final and are not subject to petitions for reconsideration.

K. Third Party Challenge

1. In compliance with Section 26.87 the TUCP Certifying Partners shall accept written complaints from any person, including Non-Certifying Partners, USDOT, and or a TUCP Certifying Partner alleging that a currently certified DBE firm is ineligible.

2. The complainant must state the specific reasons for the challenge and submit documentation in support of the complaint. The complainant's identity shall be protected as provided for in §26.109 (b).

3. The challenged firm shall be notified, in writing, by the original TUCP Certifying Partner, of the challenge, the basis for the challenge and the relevant regulations.

4. The TUCP Certifying Partner responsible for the original certification shall thoroughly investigate the complaint within a reasonable time not to exceed 60 days.

5. The TUCP Certifying Partner shall notify the challenged firm in writing via certified mail of the preliminary findings of the complaint.

~~6.~~ If reasonable cause to remove DBE certification eligibility is found, the original Certifying Partner will notify the complainant and DBE firm of the specific grounds for removal and will inform the DBE firm of its right to an informal hearing to address the preliminary findings.

7. The challenged firm may request reconsideration in writing, of the intent to remove certification eligibility, within 15 days of the date of the notice.

8. The request for an informal hearing must be made to the investigating TUCP Certifying Partner and must indicate whether the firm wishes to file a written appeal or appear in person for a hearing.

9. USDOT may also notify the TUCP of reasonable cause to find a certified DBE firm to be ineligible. In such cases, the TUCP shall without delay begin a proceeding to determine whether the firm's eligibility should be removed, as provided in Section 26.87.

III. AGENCY COMPLIANCE

If any TUCP Certifying Partner has reason to believe that another TUCP Certifying Partner is not in compliance with the requirements of 49 CFR 26, Subpart E, they should bring the matter to the attention of the TUCP Executive Committee. The TUCP Executive Committee will be responsible for reviewing any compliance matters that pertain to the requirements of 49 CFR Part 26 Subpart E. If the TUCP Certifying Partner raising a compliance matter is not satisfied with the action taken by the TUCP Executive

Committee to resolve the matter, they may make a written complaint to the appropriate U.S. DOT Intermodal Agency, e.g., FTA, FAA, FHWA etc.

ATTACHMENT 10

ATTACHMENT 10

TEXAS

MEMORANDUM OF AGREEMENT

for a

DISADVANTAGED BUSINESS UNIFIED CERTIFICATION PROGRAM

U.S. DEPARTMENT OF TRANSPORTATION PARTNERS

♦

Texas Department of Transportation
City of Houston
City of Austin
Corpus Christi Regional Transportation Agency
North Central Texas Regional Certification Agency
South Central Texas Regional Certification Agency

Texas Unified Certification Program
Memorandum of Agreement and Standard Operating Procedures
Amendment One

From: R.D. Brown, Interim Director, Certification and Reporting
Office of Civil Rights, TxDOT

Effective Date: October 14, 2008

Purpose

The purpose is to revise Section II and Section III of the Texas Unified Certification Program Standard Operating Procedures

Changes:

Under Section II. Definitions – Withdrawal of Application - An applicant's written request to the Certifying TUCP Partner to cease the certification review process. An applicant that has withdrawn its application cannot again reapply for DBE certification for twelve (12) months from the date of the withdrawal changed to:

An applicant's written request to the Certifying TUCP Partner to cease the certification review process. A new applicant that has withdrawn its application, prior submitting a complete DBE application (Desk Audit Checklist) and prior to an On-site Eligibility Review, cannot again reapply for DBE certification for six (6) months from the date of the withdrawal.

Any application withdrawn after an On-site Eligibility Review is conducted must wait for a period of one year (12 months) from the date of withdrawal, to reapply.

Under Section III. H. 4. - A firm that is denied DBE certification may not again apply for certification with the TUCP for a period of one year changed to:

A firm decertified for cause may not apply again for DBE certification with the TUCP for a period of one year (12 months). A firm that is decertified for not submitting an Annual Affidavit (failure to cooperate clause) may reapply for DBE certification after a six (6) month waiting period from the date of decertification.

SIGNATURES AND ACKNOWLEDGEMENT OF CERTIFYING ENTITIES ON FOLLOWING PAGE

R. J. Brown — 4/3/09

Texas Department of Transportation — Date

Sheena Morgan — 4/3/09

North Central Texas Regional Certification — Date

R. Mitchell — 4/3/09

South Central Texas Regional Certification — Date

Elton R. Quick Deanna Perez Brown — 4/3/09

City of Austin — Date

4.3.09

Corpus Christi Regional Transportation Authority — Date

4/3/09

City of Houston — Date

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STATE OF TEXAS
MEMORANDUM OF AGREEMENT

UNIFIED CERTIFICATION PROGRAM

This Memorandum of Agreement (MOA) establishes a Disadvantaged Business Enterprise (DBE) Unified Certification Program (UCP) in the State of Texas in accordance with Title 49 Parts 26 and 23 of the Code of Federal Regulations (49 CFR Parts 26 and 23). The TUCP Certifying Partners are the Texas Department of Transportation (TxDOT), City of Houston, City of Austin, Corpus Christi Regional Transportation Authority (CCRTA), North Central Texas Regional Certification Agency (NCTRCA), and South Central Texas Regional Certification Agency (SCTRCA).

Introduction

Each Certifying Partner in Texas is required to administer a DBE Certification Program in accordance with 49 CFR Part 26, Part 26.81 of this regulation require each state to develop a UCP by March 4, 2002. Each TUCP Certifying Partner agrees to commit sufficient resources and expertise to carry out the requirements of 49 CFR Part 26.

Organization

The TUCP shall establish an Executive Committee consisting of representatives from each of the Certifying Partner agencies, who shall be designated by the signatories to this MOA Agreement. The Executive committee will also be responsible for resolving any conflicts between certification actions of its members. The Standard Operating Procedures of the TUCP Section III-Agency Compliance, outlines the process for dealing with matters regarding the compliance with certification requirements. Nothing in this agreement should be construed to contravene the sovereignty of each participant. The contact person for the TUCP is the Texas Department of Transportation, Business Opportunity Program Section.

A Certifying TUCP Partner may terminate its responsibilities under this Agreement and become a Non-Certifying TUCP Partner upon a six month notice to all TUCP Partners.

Purpose

The objectives of the Texas UCP are as follows:

- To follow the certification procedures and standards and the non-discrimination requirements of 49 CFR Parts 26 and 23.

- To cooperate fully with all oversight, review and monitoring activities of the United States Department of Transportation (USDOT) and its operating administrations.

- To implement USDOT directives and guidance on DBE certification matters.

- To make all certification and decertification decisions on behalf of all TUCP Partners with respect to participation in the USDOT DBE Program. Certification decisions by the TUCP shall be binding on all TUCP Partners. Certification decisions must be made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

- To provide a single DBE certification that will be honored by all TUCP Partners.

- To maintain a unified DBE directory containing at least the following information for each firm listed: address, phone number and approved NAICS codes. The TUCP shall make the directory available to the public electronically on the Internet as well as in print. TxDOT shall update the electronic version of the directory by including additions, deletions and other changes upon notification by the DBE and/or Certifying Partner.

- The TUCP Partners will commit adequate resources and expertise to carry out this agreement. The partners will continue to individually bear the costs of training staff, certifying firms and sharing DBE files, i.e. postage and copying costs. Travel to and from meetings will be the responsibility of individual partners.

The TUCP will be created and fully functional no later than 18 months from the date of approval by the Secretary of Transportation and in accordance with the Implementation Schedule as described herein.

Definitions

TUCP Certifying Partner

A State of Texas recipient with a current DBE Program Plan approved by an appropriate USDOT oversight modal agency. This includes those entities, North Central Texas Regional Certification Agency and South Central Texas Regional Certification Agency, who are not recipents, but were formed as domestic non-profit organizations for the purposes of performing certifications on behalf of recipients. A certifying partner can issue or revoke DBE certification.

TUCP Partner

All Texas State recipients participating in this Memorandum of Agreement, both Certifying and Non-certifying Partners.

Non-Certifying TUCP Partner

A State of Texas recipient, sub-recipient or grantee with a current DBE Program Plan approved by an appropriate USDOT oversight modal agency. A Non-Certifying Partner can neither issue nor revoke DBE certification.

Recipient

Any public entity which receives direct USDOT financial assistance.

Sub-recipient

Any public entity receiving USDOT financial assistance through another recipient.

Grantee

Any public entity that has received USDOT assistance.

TUCP PROGRAM DESCRIPTION

Partners' Roles, Responsibilities & Obligations

All TUCP Partners agree to maintain DBE certification application files, conduct site visits, make certification decisions and handle appeals and complaints. The Certifying TUCP Partners agree to utilize the USDOT Uniform Certification Application and Affidavit.

- All decisions related to eligibility and certification must agree with 49 CFR Parts 26 and 23.

- The TUCP Certifying Partners and Non-Certifying Partners must have an approved DBE Program. Additionally, each Certifying Partner must have clearly defined and written processes and procedures related to the administration of its DBE Program and certification decisions.

- Each TUCP Certifying Partner must adhere to the processes and procedures as set forth in the Standard Operating Procedures.

DBE Directory Management :

Upon approval of a firm for DBE certification by the UCP Certifying Partners, the originating Certifying Partner shall submit the firm's information for inclusion in the electronic database directly to the DBE Database Manager. This information shall include at a minimum:

- Name, Street Address, P.O. Box, City, County, State, Telephone and Fax Number, E-mail address and Federal Tax Identification Number/SSN;

- Name, Sex, Ethnicity, Race and Country of Origin of qualifying DBE owner(s);

- Type of work performed by the DBE using the North American Industry Classification System (NAICS) adopted by the SBA on October 1, 2000, as amended;

- Date Business was Established;

- Name of TUCP Certifying Partner;

- Certification and Annual Update Affidavit Dates;

The TUCP Certifying Partners agree that a UCP Database Manager will be designated. The DBE Database Manager shall assume the following responsibilities:

- Input all data and make any corrections, additions and/or deletions upon receipt of information from the Certifying TUCP Partners;

- Maintain and keep the electronic DBE database current;

- Make the electronic DBE database available to all TUCP Partners and other interested parties;

- Provide printed copies only of the list of firms that are DBE certified upon request and at a charge to be established; (Third parties should only be provided with a list of DBE certified firms. They should not be provided with information that a firm has been denied certification.)

- Maintain the TUCP Website.

DBE Directory & Internet Access

The DBE Directory will be located on the TUCP website. In accordance with 49 CFR Part 26.31 and 23.31(b), the DBE Directory will include the following minimum information for each firm:

- Name, address and telephone number of firm;

- Contact person

- Types of work performed by the firm with appropriate six (3) digit NAICS code and description.

The TUCP DBE Directory may contain additional information, including but not limited to the following:

- Geographic Location of the Firm (i.e., county)
- Website Address of the Firm
- Fax Number & E-Mail Address of the Firm
- Certification and Annual Update Affidavit Dates

TUCP PROGRAM COSTS AND FUNDING

The cost of creating and establishing the TUCP website and the electronic DBE Directory will be the responsibility of the Texas Department of Transportation.

Training and Resources

The TUCP Certifying Partners will conduct ongoing in-service training. The TUCP Certifying Partners will agree to rotate the duties of planning and conducting training sessions.

CERTIFICATION PROCEDURES AND PROCESS

In addition to the following procedures, the TUCP will follow all certification procedures and standards of 49 CFR Part 26, and will implement USDOT directives and guidance concerning DBE certification matters. A Standard Operating Procedure (SOP) has been developed and will be utilized by all Certifying TUCP Partners. They may be modified as needed and agreed upon by the Certifying TUCP Partners and approved by U.S. DOT.

- The TUCP will accept an application from the SBA, but will not automatically recognize the DBE certification of a firm certified by the Small Business Administration . (See attached SOP for process)
- The TUCP will utilize the USDOT approved Uniform Certification Application and other related certification documents to facilitate "one-stop shopping" for applicants.

Geographic & Industry Considerations

Six agencies have agreed to perform the certification process for DBE program applicants within the State of Texas by geographical location. If a DBE applicant/firm works only in the highway construction industry, TxDOT agrees to process the

application and/or have certification responsibility for the DBE firm. Therefore, the certifying TUCP partner to whom application is made will ascertain the geographical area of the applicant firm and/or its primary work type or industry, and take the appropriate action to either process the application or forward the application within three to five business days to the appropriate TUCP certifying partner.

City of Houston: Georgraphical: Counties of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller.

Corpus Christi Regional Transportation Authority: Geographical: Counties of Aransas, Bee, Goliad, Jim Wells, Karnes, Kleberg, Live Oak, Nueces, Refugio, and San Patricio

North Central Texas Regional Certification Agency: Geographical: Counties of Collin, Dallas, Denton, Ellis, Erath, Hood, Jack, Johnson, Kaufman, Navarro, Palo Pinto, Parker, Rockwall, Somervell, Tarrant, and Wise.

South Central Texas Regional Certification Agency: Geographical: Counties of Atascosa, Bandera, Bexar, Comal, Frio, Guadalupe, Kendall, Kerr, McMullen, Medina, Uvalde, Wilson, Bastrop, Caldwell, Hays, Travis, and Williamson.

Texas Department of Transportation: Geographical: All other remaining counties in Texas.

Quality Assurance (New Certifications)

The SOP has been created to ensure consistent application of UCP program requirements among the Certifying TUCP Partners. Uniform documents have been developed for use by the Certifying TUCP Partners so that consistent information is obtained and used in certification determinations. At a minimum, there will be annual training of certification staff in order to maintain consistency in determinations.

Annual Review Process

DBEs will update their certifications annually using the TUCP Annual Update "No Change" Affidavit as required in the SOP. Failure to submit the required documentation may result in certification removal as outlined in 49 CFR Part 26.87 and the SOP. The annual review will be conducted by the responsible certifying TUCP Partner. A DBE on-site review will be conducted by the TUCP Partner every three years in conjunction with the DBE firm's submittal of the Annual Update Affidavit per 49 CFR Part 26.83(h).

Third-Party Challenges

Provisions exist in the Standard Operating Procedure for the Certifying TUCP Partners to accept written complaints from a third party alleging the ineligibility of a currently certified firm.

Appeals Process and Procedures

An appeals procedure has been established as part of the TX SOP for appeals of denial of original certification, and decertification that provides due process to the affected firm in accordance with 49 CFR Part 26.

Denials of Original Certifications and Decertification: The DBE applicant has the opportunity to appeal to U.S. DOT in accordance with 49 CFR Part 26.89. Firms that are decertified will have due process in accordance with 49 CFR Part 26.87.

IMPLEMENTATION SCHEDULE

The Certifying TUCP Partners will inform the public about the TUCP by holding public meetings throughout the State immediately upon approval by the USDOT of this MOA Agreement. Notification of the public meetings as well as the TUCP will occur in a variety of ways, including but not limited to the following: press releases, a notice on the Certifying TUCP Partners' website, and direct mailings to individual DBE firms, professional associations and community based organizations.

This MOA was submitted to the non-Certifying TUCP Partners, USDOT modal agencies and the Certifying TUCP Partners' respective counsels for their review and comment. Changes and revisions were made based on the comments received. The MOA was then re-submitted to all TUCP Partners for signature.

The following actions will be taken and completed by the Certifying Partners or designees no later than 18 months from the date of USDOT approval of this MOA Agreement:

Staff Training

- Develop and finalize training modules for SOP Manual, eligibility criteria, forms and procedures, on-site review, personal net worth analysis, internet-based system (DBE on-line directory).
- Recruit instructors and determine locations for training workshops.
- Schedule Joint Training Sessions.
- Conduct Initial Training.

Unified DBE Directory

- Develop and complete parameters for Unified DBE Directory.
- Compare UCP Certifying Partners databases.
- Remove duplicate DBE firms.
- Develop common database.
- Develop procedures for electronic submission of DBE firms for inclusion in the Unified DBE Directory.
- Develop and issue press release on public access to online DBE Directory (information will be maintained on TXDOT Website).

Transition of Currently Certified DBEs

The following actions have been accomplished by the TUCP Partners:(1) Each TUCP Partner has ensured each DBE has been certified under 49 CFR Parts 26 and 23; (2) TUCP Partners have reviewed the DBE firms and determined which TUCP Partner will have responsibility for the DBE firm's continued participation in the DBE program in accordance with 49 CFR Parts 26 and 23, based upon the geographical location of the DBE's home office; (3) Each TUCP Partner has forwarded to the designated TUCP Partner, the DBE certification file for which it has assumed responsibility based upon the geographical location of the DBE's home office.

CHANGES TO THE MOA

Changes to this MOA Agreement shall require the approval of the TUCP Certifying Partners and U.S. DOT.

SUMMARY

As a result of the requirements set forth in 49 CFR Parts 26 and 23, we the undersigned, agree to participate in the STATE OF TEXAS'S Unified Certification Program in accordance with the provisions of this MOA and agree to abide by its contents

EXECUTED AND DELIVERED by and between the TUCP Partners as of the effective date of this MOA.

EXECUTED AND DELIVERED by and between the TUCP Partners as of the effective date of this MOA.

TUCP CERTIFYING PARTNERS

Jeffrey W. Hamilton, Sr. — Name

05/19/2005 — Date

DIRECTOR — Title

CITY OF AUSTIN — Agency

EXECUTED AND DELIVERED by and between the TUCP Partners as of the effective date of this MOA.

TUCP CERTIFYING PARTNERS

Name _____ Date 19 May 2005

EXECUTIVE DIRECTOR
Title

SCTRCA
Agency

NCTRCA

North Central Texas Regional Certification Agency

AND

RECEIVED
CONSTRUCTION DIVISION
2005 MAY 25 AM 10: 42

Texas Unified Certification Program
TUCP

Memorandum of Agreement Signature Page Executed and Delivered
by the
NCTRCA a TUCP Certifying Partner

John Kelly, Director
"jkelly@nctrca.org"

20, May 2005
Date

EXECUTED AND DELIVERED by and between the TUCP Partners as of the effective date of this MOA.

TUCP CERTIFYING PARTNERS

Name _____ Date 5/20/10

Director
Title

City of Houston
Agency

EXECUTED AND DELIVERED by and between the TUCP Partners as of the effective date of this MOA.

TUCP CERTIFYING PARTNERS

Name- [signature] Date- June 1, 2005

Title- Director

Agency- Texas Department of Transportation

EXECUTED AND DELIVERED by and between the TUCP Partners as of the effective date of this MOA.

TUCP CERTIFYING PARTNER

Lamont C. Taylor
DBE/EEO Officer
Regional Transportation Authority

6.05
Date

ATTACHMENT 11

Disadvantaged Business Enterprises Forms

You may download the software (Tools and Plug-Ins) needed to access forms or view frequently asked questions regarding forms (Online Forms FAQs).

No.	Title	Format
2099	TUCP DBE Uniform Certification Application	
2103	TUCP DBE Annual Update Affidavit	
2177	Prompt Payment Certification (Federal-Aid Projects)	
2178	DBE Joint Check Approval	
2182	Commercially Useful Function (CUF) Project Site Review	
2184	Prime Contractor : DBE Good Faith Effort	
2228	DBE Substitution Request	
2307	DBE Needs Assessment	
SMS.4901	DBE Commitment Agreement	
SMS.4901-MS	DBE Program Material and Supplier Commitment Agreement	
SMS.4901-T	DBE Trucking Commitment Agreement	
SMS.4902	DBE Prime Contractor Payments to Non-DBE Subcontractors	
SMS.4903	DBE Monthly Progress Report	
SMS.4904	DBE Final Report	

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- Disadvantaged Business Enterprise (DBE) Program

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EXHIBIT I

49 CFR Part 26

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Parts 23 and 26

[Docket No. DOT–OST–2022–0051]

RIN 2105–AE98

Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT or the Department).

ACTION: Final rule.

SUMMARY: The U.S. Department of Transportation (DOT or Department) is amending its Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) program regulations. The DBE and ACDBE programs are designed to allow small businesses owned and controlled by socially and economically disadvantaged individuals to compete fairly for DOT funded contracts let by State and local transportation agencies and in airport concession opportunities. The final rule improves program implementation in major areas, including by updating the personal net worth and program size thresholds for inflation; modernizing rules for counting of material suppliers; incorporating procedural flexibilities enacted during the coronavirus (COVID–19) pandemic; adding elements to foster greater usage of DBEs and ACDBEs with concurrent, proactive monitoring and oversight; updating certification provisions with less prescriptive rules that give certifiers flexibility when determining eligibility; revising the interstate certification process to provide for reciprocity among certifiers; and making technical corrections to commonly misinterpreted rules.

DATES: This rule is effective May 9, 2024.

FOR FURTHER INFORMATION CONTACT: For questions related to the final rule or general information about the DBE and ACDBE Program regulations, please contact Marc D. Pentino, Associate Director, Disadvantaged Business Enterprise Programs Division, Departmental Office of Civil Rights, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W78–302, Washington, DC 20590, at 202–366–6968/*marc.pentino@dot.gov* or Lakwame Anyane-Yeboa, ACDBE and DBE Compliance Lead, Disadvantaged Business Enterprise Programs Division, Departmental Office of Civil Rights, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W78–103, Washington, DC 20590, at 202–366–9361/*Lakwame.Anyane-Yeboa@dot.gov*. Questions concerning part 23 amendments should be directed to Marcus England, Office of Civil Rights, National Airport Civil Rights Policy and Compliance (ACR–4C), Federal Aviation Administration, 600 Independence Ave. SW, Washington, DC 20591, at 202–267–0487/*marcus.england@faa.gov* or Nicholas Giles, Office of Civil Rights, National Airport Civil Rights Policy and Compliance (ACR–4C), Federal Aviation Administration, 600 Independence Ave. SW, Washington, DC 20591, at 202–267–0201/*nicholas.giles@faa.gov*. Office hours are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

Electronic Access and Filing

This document, the Notice of Proposed Rulemaking (NPRM), all comments received, and all background material may be viewed online at *www.regulations.gov* using the docket number listed above. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *www.federalregister.gov* and the Government Publishing Office's website at *www.GovInfo.gov*.

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Executive Summary

This final rule modernizes the DBE and ACDBE program rules to provide greater clarity and flexibility to DOT recipients and enhance the ability of DBEs to compete on a level playing field for DOT-assisted [1] contract opportunities. Spanning over 40 years, the DBE and ACDBE programs are small business initiatives intended to prevent discrimination, and to remedy the effects of past discrimination, in DOT-assisted contracting markets and airport concession opportunities. Since 1983, Congress has authorized the DBE program for highway and transit projects, most recently in Section 11101(e) of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117–58) (November 15, 2021). Congress codified the ACDBE program in 1987. (See 49 U.S.C. 47107(e)). In reauthorizing the DBE program in the BIL, Congress received and reviewed testimony and documentation from numerous sources which show that discrimination, its effects, and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States. *See* BIL, section 11101(e)(1).

The current rules and the revisions contained herein leave intact the goal setting rules that have been in place over many decades. These rules, then and now, prohibit DBE contract quotas; and they do not impose any penalties for failing to meet DBE goals, unless a recipient fails to administer its program in good faith. Every court to have considered the constitutionality of the program, as implemented by these regulations, has held that these limitations and other flexibilities embedded in the DBE program—such as the ability of recipients to seek waivers of or exemptions from certain provisions, the requirement for recipients to reexamine their programs and program goals every three years, and the authority to decertify firms that do not continue to meet certification standards—ensure that DOT's DBE regulations, on their face, are narrowly tailored to achieve the compelling interest that has been identified by Congress, thus satisfying strict scrutiny.

[1] 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.

On July 21, 2022, the Department issued a notice of proposed rulemaking (NPRM) in the **Federal Register** (87 FR 43620) setting forth the major categories of revisions, the Department's rationale, and proposed rule text. In July and August 2022, the Department held seven virtual listening sessions to brief the public and stakeholders on the proposals and to solicit further input. Recordings of the sessions are posted on the Department's DBE web page *https://www.transportation.gov/dbe-rulemaking*, and a transcript of all comments received are available at *Regulations.gov* (DOT–OST–2022–0051). DOT extended the comment period deadline from September 19 until October 31, 2022, through a notice published in the **Federal Register** on September 1, 2022 (87 FR 53708).

The Department received approximately 400 written comments from State departments of transportation, transit authorities, airports, DBEs, non-DBEs, representatives of various stakeholder organizations, and individuals. Many of the comments were extensive and covered numerous proposed changes. Some commenters suggested changes beyond the scope of what the Department proposed in the NPRM. We fully considered all written comments we received.

Congress created the DBE and ACDBE programs by statute and has continued to reauthorize the program in successive transportation reauthorization laws. The purpose of this rulemaking is to make technical improvements to the Department's DBE and ACDBE programs, including modifications to the forms used by program and certification-related changes. While this rule has implications for program eligibility, it does not change the underlying programs and projects being carried out with DOT funds. However, the Department recognizes that certain provisions focus on discrete aspects of the DBE and ACDBE programs. Therefore, the Department finds that the various provisions of this final rule are severable and able to operate functionally if severed from each other. In the event a court were to invalidate one or more of this final rule's unique provisions, the remaining provisions should stand, thus allowing this congressionally mandated program to continue to operate.

Part 26

Subpart A—General

1. Bipartisan Infrastructure Law (BIL) and Fixing America's Surface Transportation Act (FAST Act) (§ 26.3)

The Department proposed adding citations to applicable surface authorization legislation. We received no comments, and the final rule adopts our proposal with minor technical corrections to the text.

2. Definitions (§ 26.5)

NPRM

In addition to minor technical and spelling changes, the NPRM proposed new or altered definitions of disadvantaged business enterprise, principal place of business, transit vehicle, transit vehicle dealer, transit vehicle manufacturer, and unsworn declaration. In addition, because "home state" is no longer being used as a term of art in the regulation, we are removing that definition from the current rule.

Comments

Disadvantaged Business Enterprise

The majority of the comments addressed the proposed addition of "be engaged in transportation-related industries" to the definition of "disadvantaged business enterprise." We proposed the addition because applicants that have no capability or interest in working on DOT-assisted contracts seek DBE certification for other, unrelated reasons, resulting in an unnecessary burden on certifiers' workloads.

Ten of the 40 commenters (mostly recipients and DBEs) supported the proposed definition, though most requested clarification because they found it confusing. They stated that an absence of clarification would cause difficulty in determining which firms were in transportation-related industries and which were not, and the results could easily be inconsistent and arbitrary. Some commenters noted that many DBEs do not have specific mentions of transportation in their North American Industry Classification System (NAICS) codes. A few recipients asked how they should handle DBEs that might not be performing work in transportation-related industries.

The majority of commenters who sought clarification, as well as several others who opposed the proposal altogether, opined that the limitation would constrain opportunities for small businesses, especially those in the goods and services sector or new or non-traditional types of work. One commenter cited the example of firms

supporting electric vehicles or related infrastructure.

Very few of the commenters who sought clarification proposed an approach that would better clarify the definition. One State DOT suggested there could be a "stop here" entry on the Uniform Certification Application, analogous to the current check entry box on which an applicant would check whether it was a for-profit firm, on which a company could affirm that it intended to work on transportation projects.

Principal Place of Business

All three commenters supported the proposal, though one asked for more guidance.

Transit Vehicles, Manufacturers, and Dealerships

For comments and the Department's response related to the definitions of transit vehicle, transit vehicle manufacturer, and transit vehicle dealership, please see the portion of the preamble below concerning TVMs.

Unsworn Declaration

With the exception of one State DOT, which thought DOT's proposal could enable fraud, all of the more than 20 commenters on the concept and definition of unsworn declaration, both recipients and DBEs, supported the proposal. The main reason was that it reduced the burden on both firms and certifiers. One State DOT suggested the idea be extended to information provided in on-site interviews as well as applications. One transit agency suggested having a witness sign the declaration, the use of which it thought should be limited to declarations of eligibility (DOEs) or interstate certification applications.

Miscellaneous Comments Received

Some commenters asked for the addition of such groups as LGBTQ individuals, disabled veterans, individuals with disabilities, and persons from North Africa and the Middle East to the definition of "socially and economically disadvantaged individual." One commenter found the definition of "affiliation" confusing but did not suggest a clarification.

As has been the case during past rulemakings, a few commenters disliked the use of the term "disadvantaged business enterprise," finding its connotation too negative. Those commenters suggested alternatives like "historically underutilized business," "business inclusion program," or making the "D" in DBE stand for diverse, dynamic, or distinguished. A commenter wished to exclude "micro purchases," as defined in Federal procurement rules, from the definition of "contract." One commenter asked to expand the definition of "DOT-assisted contract" to include all contracts relating to any phase of a DOT-assisted project (*e.g.*, State or locally funded pre-construction engineering or design of a project that would ultimately gain DOT funding).

DOT Response

Disadvantaged Business Enterprise

With respect to comments on the proviso in the definition of "disadvantaged business enterprise" that a DBE be one "engaged in transportation-related industries," we considered two program concerns. On one hand, some Unified Certification Programs (UCPs) may have been burdened by significant numbers of applications from firms that appear not to have interest in, or the ability to work on, the DOT-assisted contracts of recipients. For example, some firms may seek certification from a UCP in order to become eligible for State and local programs in areas unrelated to transportation. We believe it is useful to limit such burdens on certifiers, which themselves have limited resources.

On the other hand, it would be counterproductive to use language that could be interpreted as limiting DBE program participation given the diversity of the types of work that DOT-assisted projects entail. Thus, we exclude "engaged in transportation-related industries" from the definition of DBE.

Instead, the final rule requires applicants to describe in detail in the Uniform Certification Application (UCA)—with examples wherever possible—the type(s) of work they envision performing on DOT-assisted contracts. The UCA will not be considered complete if the applicant omits this information. During the onsite visit, for example, certifiers should ask applicants to describe the nature of their work and what they seek to achieve with certification. If the applicant's response reasonably suggests to the certifier that the firm would likely not have opportunities to participate in, or has no intention of pursuing participation in, DOT-assisted contracts, the certifier should encourage the applicant to withdraw its UCA in order to avoid unnecessary expenditures of time and effort by all parties. This mechanism fulfills the intended purpose of the now-deleted "transportation-related industries" language.

Unsworn Declaration

Given commenters' general support of our proposal, and the likelihood that permitting unsworn declarations will reduce burdens and maintain program integrity, the final rule adopts the proposal without substantive change.

Principal Place of Business

We believe that the NPRM's proposed definition of "principal place of business" is clear as written, and the final rule incorporates it without change.

Other Comments

The Department does not have legal authority to add groups (*e.g.*, LGBTQ persons or disabled veterans) to the current list of groups whose members are rebuttably presumed socially and economically disadvantaged. However, persons who are not members of a presumptive group may qualify as socially and economically disadvantaged through individual determination procedures as detailed in § 26.67(d).

We recognize that some commenters were uncomfortable with possibly negative connotations of the term "disadvantaged business enterprise." We leave the program name unchanged. It is well-recognized and cited as such in the statutes authorizing the program, and changing the name of the program may lead to confusion.

3. Reporting Requirements (§ 26.11 and Appendix B)

NPRM

The NPRM proposed adding and changing three reporting requirements. First, the NPRM proposed adding ten new data fields to the Uniform Report of Awards, Commitments and Payments (Uniform Report) that recipients submit annually, such as work category/trade a firm performed in a contract, federally assisted contract number, and terminations (for the complete list, see 87 FR 43624 (July 21, 2022)). We believed this additional information would help the Department evaluate whether the DBE program is making progress toward the objectives stated in § 26.1 of the regulation. Recipients would submit the Uniform Report in a manner acceptable to the relevant OA, but the form itself, while on the DOT website, would no longer be printed in the regulation.

The NPRM also proposed to require recipients to obtain and enter bidders list data into a centralized, searchable database that the Department would

specify. The data points for this bidders list would be expanded to include race and gender information for a firm's socially and economically disadvantaged owner (SEDO) and the NAICS code applicable to each scope of work the firm proposed to perform in its bid. The NPRM asked for comment on the estimated costs for developing and maintaining such a database. The Department said that since recipients already collect most of the information that would be reported on the bidders list, reporting this data would be beneficial to the Department in evaluating program success with anticipated minimal impact on stakeholders.

Third, the NPRM asked for comments on expanding the information collected through what is referred to as the MAP–21 data report. That report includes information taken from each State's UCP directory and reporting on the percentage and location of DBEs owned and controlled by women, by disadvantaged individuals who are not women, and individuals who are women and are also otherwise disadvantaged. The NPRM proposed collecting data on the following six additional items: the number and percentage of in-state and out-of-state SEDOs by gender and ethnicity; the number of applications received from in-state and out-of-state firms and the number of each found eligible or ineligible; the number of in-state and out-of-state firms decertified or summarily suspended; the number of in-state and out-of-state applications involving a request for an individual determination of social and economic disadvantage; the number of in-state and out-of-state firms certified based on such a determination; and the number of DBEs prequalified in their work type by the Department. The Department proposed creating a similar data requirement for ACDBEs.

Comments

This section was one of the most frequently commented upon of any subject in the NPRM, with some commenters expressing general support for the proposals, some expressing general opposition, and others delving into the details of one or more of the reports.

General Comments on Proposed Reports

Of the nearly 60 commenters who expressed a view (pro or con) about the Uniform Report and MAP–21 report proposals, a significant majority, predominantly recipients, opposed the proposals. Often, these comments did not distinguish closely between the MAP–21 report and the Uniform Report but talked about the NPRM's reporting requirements generally.

Opponents primarily expressed that the proposals were too detailed and created unnecessary burdens and costs, particularly for local agencies and subrecipients. The required information would be difficult to collect, and create a cumbersome, time-consuming process, sometimes involving manual reporting (*e.g.*, concerning listing replaced firms), keeping staff from doing more substantive work. One recipient said it would have to double its staff to handle the requirements, for example. Another said that handling the proposed Uniform Report requirements would double its staff time on that work by 16 hours per year. Programs are short-staffed as it is, others said, especially for small recipients and some saw the expanded Uniform Report items as a substantial change. Certification could be slowed down.

While some commenters in this category said the requested information could be helpful, they did not think that its potential use outweighed the burdens involved. One commenter questioned the use the Department would make of the additional data; something more specific than "program evaluation" in general was needed to justify new collections. Instead of making reporting requirements more complex, commenters said they should be reduced and simplified (*e.g.*, one contractor suggested limiting fields to firm name, disadvantaged group membership, contracts, and DBE commitment amount).

Some commenters also thought that certain fields in the report were duplicative or redundant. For example, one commenter said that information about decertifications had to be reported in three different places. A few commenters thought some fields, such as those addressing decertifications and terminations, did not fit well in the Uniform Report. Another said the proposed reports generally were not relevant to ACDBEs. Rather than sending one report to the OA and another to DOCR, there should be a single, streamlined form sent to only one office at DOT.

Some commenters recommended that DOT convene a recipients' group to do a feasibility study and figure out how to make the reports work efficiently prior to adopting the proposals. Commenters suggested time frames from one to five years to phase in the requirements. Other commenters suggested that the Department should also develop, test, and make available a uniform, centralized database before imposing requirements that all recipients, vendors, and subcontractors could use and delay implementation 3 to 5 years.

Commenters said that such a database would allow data from different sources to merge and that the database should be made available to users through an online portal. Other commenters said DOT should provide funding for recipients to comply with the expanded requirements and provide more guidance on the reporting forms and process.

Supporters of the proposals included some recipients but were predominantly DBEs. Generally, they favored obtaining the additional detailed data for program evaluation purposes. Some cited particular items they thought were useful, such as race/ethnic/gender data, explaining that those items could keep better track of the use of Black-owned firms. Some commenters suggested collection of additional data points such as dollar amount of contracts by NAICS codes, and some commenters recommended that recipients be required to maintain copies of all prime contracts and subcontracts.

Bidders Lists

A large majority of the over 40 comments concerning the NPRM's bidders list proposal opposed it. A few comments, all but one of which were from DBEs, supported the proposal for the reasons stated in the preamble. Some of these comments favored the idea of a centralized database for bidders list information. One asked for more data on the actual use of successful DBE bidders, to address the issue of prime contractors listing DBEs in their bid and then not using them.

Most of the comments opposing the proposal were from recipients. Some of these commenters said that the existing bidders list requirements were sufficient, and that there was no need to make any changes. They asserted that the proposed changes to the Uniform and MAP–21 reports would be unduly burdensome and create an unfunded mandate. One airport trade organization member noted it would take 25 hours to complete the MAP–21 report of ACDBEs in various categories rather than the 3.2 hours estimated.

Commenters said that the NPRM underestimated the costs and burdens of the proposal, particularly with recipients for small staffs. One commenter estimated that its staff would have to take an extra 20 minutes per project under the proposed system, adding up to 13 hours per month, in contrast to the eight hours forecast in the NPRM. Another said it could take weeks of staff time per year to comply.

Another estimated that it would take two hours of staff time to enter information into the system for each bidder.

A few commenters expressed concern that prime contractors would be disincentivized from hiring DBE subcontractors, especially if they had to input information at the time of submitting a bid or offer. They also stated that it would reduce the data available to recipients. One commenter explained that it would be better if a bidder on a prime contract could submit information within a short time after the time the bid or offer was submitted, such as five days. One recipient said it typically allows prime contractors until the end of the month in which a letting takes place to submit bidders list data. On the other hand, a comment said that bidders list items should be submitted at the time of bid or offer. Another commenter suggested that to reduce burdens on prime contractors, recipients should collect information directly from subcontractors. One commenter recommended that firms submit to the recipient the NAICS codes they have worked on in the past year.

In addition to the general concern about burdens, a number of commenters focused on the centralized database that the NPRM said the Department would specify. Some thought having to communicate with such a database would be a source of administrative burdens for their staff. Others, while sympathetic to the concept of a centralized database, pointed to the fact that the Department had not yet specified the database to be used. Without such a system being in place, including a standard format, they said, the proposed changes would not work. Two commenters said that rather than creating a centralized database, DOT should make software available to allow interface with UCP directories and create reports. Another was concerned that, in the absence of an actual centralized system, recipients would develop their own electronic formats, which were likely to be incompatible with each other.

Some commenters questioned the utility of bidders lists. One said that such a list is an imperfect tool to gauge DBE interest in the program, since some DBEs do not submit bids because, in their experience, prime contractors typically use the same DBE firms that they always use. Because of this, another commenter said, firms effectively drop out of the program because they are not getting any work, even if they maintain their certified status. Others said that bidders lists have proved not to be an accurate or reliable indicator of DBEs' availability or interest in seeking contracts.

One commenter suggested that DBEs should not have to submit confidential or proprietary business information, another suggested that race/ethnic/gender information should be part of bidders list entries; while another indicated that some firms may decline to submit this information. Another asked if there should be an exemption to some requirements for publicly traded firms. One commenter suggested working with American Association of State Highway and Transportation Official's Civil Rights and Labor Committee on how best to handle bidders list issues.

Detailed Comments on Reporting and Bidders List Contents

Commenters had a wide variety of comments on details of the documents discussed in this portion of the NPRM. A commenter wanted to clarify the meaning of "awards," "commitments, and "payments." It said the age of a firm should be entered only for DBEs. Another suggested that termination data should be submitted as "known DBE terminations during the reporting period" to capture a lag in information reaching the recipient from contractors.

One commenter suggested not using "dollar value of contract," preferring the use of ranges (*e.g.*, less than $100,000 or $100,000–500,000). On the other hand, another commenter thought that the dollar value of contracts and NAICS codes involved were very important information to capture. That same commenter also thought that information on firms that have exceeded size standards was important, to see if the program was creating sustainable growth.

Another commenter wanted to make sure that the reporting would include professional services, even in States that do not include professional services in their DBE goals. One commenter said it does not do prequalifications, and so did not know how to respond to that field. One commenter expressed uncertainty about how reporting could be uniform since different States have different prequalification requirements. The commenter was also unsure what "work type" meant, and how firms prequalified in some, but not all, of the areas in which they were certified could be counted.

With respect to terminations and replacements of DBEs, one commenter thought reports should include the date of contract award, the date of the prime's termination notice, the reasons for the action, and the DBE's response. Another commenter agreed that the reason should be reported, adding that any resulting revisions of the recipient's overall goal should be noted. One commenter said that termination data should be reported in the semi-annual reporting timeframe, using a Google or Excel spreadsheet, and that the reporting should include the number of terminations and NAICS codes of terminated firms. Another commenter also supported using Excel spreadsheets or XML files for reporting this and other information into the reports, rather than relying on manual inputs of information.

Two commenters addressed the "running tally" requirement, one saying it did not currently have a running tally provision and was unsure how to develop one. Another asked how the running tally provision differed from the "open" and "completed" reporting fields, suggesting that the information requested was duplicative. Another commenter suggested that information about DBE's that have been decertified or graduated only be included in the "open" and "completed" fields, while a different commenter suggested that, for re-entering firms, the reports include the date and basis of graduation, the date of reapplication, and the basis for re-entry.

Some commenters expressed concern about what data should be submitted and by whom. One commenter said that the DBE owner's contact information and the ZIP code of the firm's principal place of business need not be reported. Another suggested that if multiple contracts were awarded to a firm during a reporting period, there should not have to be multiple entries of the firm's information. Two others said that if recipients submitted basic information (*e.g.*, a firm's certification number and NAICS code), the Operating Administration (OA), rather than the recipient, should enter other information about the firm.

One commenter asked whether race and gender were intended to be entered for all firms or only DBEs, and how the recipient would handle situations in which a firm is certified in more than one NAICS code. Another commenter advocated expanding the information reported, adding such items as the number and percentage of in-state and out-of-state firms by race and ethnicity, looking at applications, decertifications, and prequalifications information.

With respect to the bidders list, one commenter raised several questions. Would the centralized database be available at all times to recipients, as opposed to only during certain reporting periods? Would the December 1 date for submitting information apply to the bid date or the contract award date, when

one was before and the other was after December 1? How would micro purchases and single bidder or sole source procurements be handled? How should a recipient handle incomplete forms submitted by bidders? Since the commenter had a race-neutral program, how would "subcontract approval" be reported? This commenter, as well as another, said that reporting a high volume of bids would be very burdensome and expensive.

A few commenters said that prime contractors should have to submit most or all of the data required for the bidders list, while another said that recipients should collect bidders list information directly from bidders for subcontracts or certification process records, rather than indirectly through prime contractors.

One commenter said that, with respect to engineering firms, the bidders list should include the number of such firms bidding on prime contracts or subcontracts, the number of such firms that were shortlisted or awarded, and the total number of engineering contracts with and without DBE goals.

DOT Response

As described in this preamble (see discussion of § 26.11 and Appendix B), the final rule adopts revisions to all three reporting requirements, including the creation of a centralized bidders list system.

A recipient must provide its bidders list collection information in a standardized and centralized form. Although recipients are already obligated to gather most of this data, the rule imposes the additional step of reporting this information. However, the burden of this reporting process is expected to be minimal since recipients are already required to collect most of the information. One commenter stated that it does not collect bidder information on a per project basis. That recipient maintained that the compliance burden would be more than minimal. We respond that the current rule requires collection for all projects. The bidders list data that needs to be reported to DOT includes specific details such as the race and gender information for the owners of all firms and the NAICS code that is applicable to each scope of work proposed by the firm in its bid.

To ensure usability and standardization of the bidders list data, the Department will build a comprehensive and searchable database to house this information, a feature recommended by a commenter. The final rule allows for a delay in the requirement to allow ample time for the Department to complete the development of the database and ensure its readiness before recipients are obligated to submit the necessary data. Once the database is fully operational, recipients will be able to seamlessly enter the required information with minimal additional burden. Recipients may use the information to set their overall goals.

With this data, the Department will analyze the representation of DBEs within the bidding process. This assessment will enable a closer examination of the specific types of work that DBEs actively pursue and competitively bid for. Ultimately, this analysis will serve as a vital tool in monitoring the effectiveness of the rule and guiding future policy decisions. It enables the Department to make informed assessments regarding the impact of the regulations and take appropriate actions to address any identified shortcomings, thereby ensuring that DBEs can compete fairly for DOT-assisted contracts.

For the Uniform Report, the Department is requiring recipients to submit names of DBEs, NAICS codes performed in a contract, federally assisted contract number(s), and the dollar value of the contract. We disagree with a commenter who stated entering this information constitutes a substantial expansion of what is collected, because these data points should already be tabulated by the recipient in order for them to properly upload the current report. We inadvertently listed prequalification in the uniform report draft rule and deleted it from the final rule. We agree with commenters' concerns regarding "work categories" and exclude the ambiguous category from the final rule. Also, after careful consideration, the Department believes that the proposed data collection on terminations would pose significant challenges for recipients. Given the complexities and challenges inherent in collecting and reporting termination data, the Department believes that it would be unreasonable to mandate recipients to undertake this task. We must strike a balance between gathering valuable information for analysis and avoiding excessive administrative burden for recipients. The Department will continue to explore alternative approaches and strategies that can provide meaningful insights into terminations without imposing disproportionate burdens on recipients.

The additional uniform report information will help the Department evaluate whether the DBE program is making progress toward the objectives stated in § 26.1 of the regulation. Recipients would submit the Uniform Report Form online in a manner acceptable to the relevant OA. The Department will post a copy of the form, which is no longer posted in the regulation, to the DOT website.

Finally, the Department expands the MAP–21 data report collection to cover six items mentioned in the NPRM: the number and percentage of in-state and out-of-state SEDOs by gender and ethnicity; the number of applications received from in-state and out-of-state firms and the number of each found eligible or ineligible; the number of in-state and out-of-state firms decertified or summarily suspended; the number of in-state and out-of-state applications involving a request for an individual determination of social and economic disadvantage; and the number of in-state and out-of-state firms certified based on such a determination. Decertified DBEs that exceed gross receipts and PNW caps must be reported using MAP–21 data instead of the uniform report proposed in the NPRM.

Subpart B—Administrative Requirements for DBE Programs for Federally Assisted Contracting

4. Tiered Program Requirements for FTA Recipients (§ 26.21)

NPRM

Under the current rule, FTA recipients who will award prime contracts exceeding $250,000 (cumulatively) in a fiscal year must have a DBE program meeting all requirements of part 26. Based on changes in the consumer price index (CPI) since 1983 (the year the $250,000 value was established), the NPRM proposed to increase this value to $670,000. FTA recipients receiving planning, capital, or operating assistance who will award prime contracts (other than transit vehicle purchases) that cumulatively exceed $670,000 in a fiscal year would be required to comply with every requirement of part 26 and have a full DBE program. Recipients awarding prime contracts totaling $670,000 or less would also have to maintain a program, but compliance with only certain provisions of part 26 would be required. Specifically, these recipients would be subject to the requirements for reporting and recordkeeping, contract assurances, a policy statement, fostering small business participation, and transit vehicle procurements.

The Department's records show that in most years there were about 80 FTA recipients awarding between $250,000 and $670,000 per year. The Department estimated that the change would provide cost savings for such recipients

from the reduction in administrative burdens. Based on attainment data from previous years, the Department found that if there were any reductions in total program-level DBE participation, the reduction would be minimal.

Comments

Commenters on this issue, predominately transit operators and DBEs, were almost evenly divided. Supporters were attracted to the reduction in administrative burdens for some small transit providers. One commenter suggested raising the value further, to $750,000, while another suggested that a similar threshold should be established for airports. One supporter of the proposal asked the Department to define "significant changes" to a DBE program that would require OA approval (this provision, in proposed § 26.21(b)(2), applies to all OAs).

Opponents pointed to the estimated 80 transit operators that would not have to maintain full DBE programs, saying that this would reduce opportunities for DBEs. All recipients should have DBE programs, some comments said. One commenter said a problem could arise for a recipient who had been below the threshold but then received a large grant that put it above the threshold. The recipient would have to quickly create a full program, the commenter said.

Most of the commenters not in favor of the proposals or who expressed negative opinions were concerned that DBEs seeking to work with smaller recipients would not be afforded a level playing field because the DBE programs of such recipients would not be subject to as stringent oversight by FTA. These commenters were concerned that less oversight would result in these recipients taking the program less seriously.

DOT Response

The final rule is adopting this proposal substantively unchanged from the NPRM. The Department recognizes that the proposed regulatory text used a structure and phrasing that may not have been clear to some readers. Though commenters did not address the clarity of the drafting specifically, the comments suggested there may be some confusion as to what requirements apply to which recipients. In response to these comments, the final rule includes definitions for FTA Tier I and FTA Tier II recipients. Further, the final rule adds paragraphs to § 26.21(a)(2) to list the applicable requirements for Tier II recipients more clearly. The Department notes that under the new requirement, all FTA recipients that receive planning, capital, or operating assistance and award FTA funded contracts must have a DBE program.

The Department takes seriously commenters' concerns that some affected recipients might operate their DBE programs less robustly under the new rules. The Department expects that the positive impacts of expanding DBE program requirements to almost all FTA recipients mitigates that risk. The intent of reducing administrative burdens on smaller recipients is to allow them to direct a greater share of their resources towards implementing the DBE program elements that expand opportunities for DBEs, and the Department expects that they will do so. Under the final rule, all FTA recipients with DBE programs will be subject to enhanced reporting requirements, which will allow FTA to conduct more effective oversight.

As explained in the Regulatory Impact Analysis of the NPRM, if every single contract awarded annually to DBEs by the approximately 80 recipients that award between $250,001 and $670,000 annually (in prime contracts) went instead to non-DBEs, 99.7 percent of Federal funds awarded to DBEs on FTA assisted contracts would still be awarded to DBEs. In response to the comments received, FTA reviewed Uniform Report data for fiscal year 2021 to better understand the potential impact of the proposed Tier II DBE program on contract awards to DBEs. The data shows that 195 recipients reported awarding between $0 and $250,000 in that fiscal year. Of those, 159 operated completely race-neutral DBE programs. Of the remaining 36 recipients with race conscious goals, five awarded race conscious contracts to DBEs, resulting in $170,913 of cumulative awards to DBEs through the use of race-conscious means (or 0.02 percent of total dollars to DBEs that year).

The Department expects that many Tier II recipients will operate entirely race-neutral programs, though they are not prohibited from employing race-conscious means as necessary. The Department does not anticipate any reduction in awards to DBEs by Tier II recipients under the new rules, especially in light of increased funds being awarded by FTA to transit agencies. Further, FTA will be conducting *more* oversight of recipients currently awarding $250,000 or less. FTA will remain responsible for ensuring that *all* FTA recipients subject to the DBE program are awarding and administering their contracts in a nondiscriminatory manner, and the reporting requirements under the new rules will provide FTA the information needed to ensure compliance.

Regarding the comment that discusses the impact of receiving a large grant, as compared to the current rule the final rule would reduce the risk and mitigate the negative impact of exceeding the threshold due to a single grant. First, and as a matter of clarification, whether a recipient is tier I or II is determined by the value of contracts it awards, not the value of funds it receives from FTA. Under the current rule, since the contract value threshold is low ($250,000), there is a greater risk than under the final rule that a recipient will be required to implement all DBE program requirements after receiving a large grant. Further, since FTA Tier II recipients will be operating DBE programs, the additional administrative burden of becoming an FTA Tier I recipient is comparatively less than under the current rule, since recipients below the current threshold do not have the experience and administrative infrastructure to operate an effective DBE program. Finally, the Department expects recipients to budget and plan accordingly, and if a large grant is awarded then appropriate and commensurate resources should be devoted to compliance.

Regarding the comment that suggested raising the contract value to $750,000, the Department notes that $670,000 represents an inflationary adjustment, and there is no evidence to support that $750,000 would be more effective. Regarding the comment asking the Department to define "significant changes" to program plans, the Department notes that the final rule does not change what qualifies as a significant change.

5. Unified Certification Program (UCP) DBE/ACDBE Directories (§§ 26.31 and 26.81(g))

NPRM

The NPRM proposed to expand existing DBE and ACDBE directories to allow certified firms to display information about the firms' ability, availability, and capacity to perform work. The Department thought that this would provide a one-stop tool that would enable DBEs to market their services and help prime contractors seek out potential DBE subcontractors. Directories would include a standard set of options for information that firms could choose to make public, such as a capability statement, State licenses held, prequalifications, personnel and firm qualifications, bonding coverage, recently completed projects, equipment capability, and a link to the firm's

website. UCPs would not have to vouch for the accuracy of the information provided.

The NPRM would also eliminate the option for a hard copy directory since online availability of the information is sufficient. The NPRM said that the Department anticipated that UCPs could implement the proposed requirements by January 1, 2024, or 180 days after the final rule. However, the Department sought comment on having a phase-in period to allow necessary changes to be made.

Comments

This subject was among the most heavily commented upon in the NPRM, attracting over 70 comments. Of the almost 50 comments that expressed an opinion about the overall wisdom of the proposal, a majority fully or partially supported it. Many other comments addressed details of the directory process or had other ideas of how the directory process could best work.

Comments from supporters said that an expanded directory would help DBEs market themselves to primes, especially if DBEs could update information in an efficient way. Such a directory would be useful to primes searching for DBEs for a contract and could help to avoid the "can't find qualified DBEs" excuse for failing to meet goals, one comment said. More detail in the directory would also save DBEs from being inundated with solicitations from primes for work in areas in which the DBEs are not interested. DBEs, several comments said, should be allowed to add data about their operations, since NAICS codes, by themselves, provide only limited information about what a firm does.

Some supporters of the proposal nevertheless noted concerns about it. For example, commenters believed that the information in the expanded directories would be helpful to DBEs but acknowledged that costs and administrative burdens could be a problem, throwing the cost-effectiveness of the expanded directories into question. One asked whether there would be any DOT funds to support the expansion. Another supported the proposed expansion only if DBEs were not allowed to be certified in all 50 States under the interstate certification proposal in the NPRM. Others were concerned that, despite disclaimers to the contrary, the public would think that information about firms in the directory had been vetted for accuracy by certifiers. If certifiers were expected to verify information submitted by DBEs, another asked, how would certifiers determine the accuracy and timeliness of the information?

One commenter wanted to make sure that capability information about a firm be specific; another, however, thought that information about bonding and equipment should not be included because some of this information could be proprietary and could change from project to project. Other commenters suggested that owners' race and gender information should be included or that additional information categories should be included.

One commenter expressed concern that there would be large burdens on certifiers if they, rather than DBEs themselves, had to input data about the firms. It estimated that it would take 30 minutes to two hours of staff time per procurement for this process. Another commenter wanted the rule to prohibit recipients from using data from the expanded directory to judge which firms are ready, able, and willing to work.

A small number of commenters suggested that the Department go beyond the proposed changes and create a centralized, nationwide database, to which DBEs could upload information and which would be user-friendly and readily searchable by such terms as State and type of work. A variation on this idea was that States' UCP directories should be merged together to avoid duplication and inconsistency. A comment said that such a directory should specify which states a firm is certified in and should be in an Excel format and include the DBE's email and the SEDO's presumptive group membership. It could also include information on a firm's ability to perform a commercially useful function (CUF).

The principal objection of commenters who opposed the proposal is that it would add costs, take additional staff time, and create unnecessary administrative burdens. New software and additional staff would be needed, and staff would be unable to keep up with the workload they claimed.

Two commenters said that adding too much detail about firms would be counterproductive, and making sure information was updated would be a slow and difficult process. Another said that most of the proposed fields were available in commercial software, but seldom used. Similarly, another commenter questioned the usefulness of the added fields.

Commenters were concerned that there could be confusion about what a prime contractor could get credit for, based on representations in material DBEs added, since self-reported capability statements could be misleading. For this reason, one commenter said, DBEs should not be able to upload information themselves. Another said that capacity, availability, and other detailed information should not be entered, as that could lead to inaccuracy, discrimination, and lost opportunities. Two commenters suggested that it would be simpler and less burdensome to limit additional information to a link to the DBEs' websites, making additional directory fields unnecessary.

There was a wide variety of other comments concerning directories and the NPRM's proposal. A commenter expressed concern that, with many firms potentially being added to a UCP's directory as the result of the interstate certification proposal, the availability numbers used for goal setting could be distorted, even though many of the newly added firms might not be available to work in projects in the State. On the other hand, another commenter was concerned that directories might undercount firms that were potentially ready, willing, and able to work in a State, affecting goals in the other direction.

Some commenters were concerned about computer security and privacy. Two mentioned a concern about the privacy implications of including home addresses for businesses operated out of the SEDO's home, particularly in the context of more widespread certification under the interstate certification proposal. Some commenters thought the proposed implementation time frame for the new requirements was too short, and should be extended a year, or until software development and vendors were in place.

A commenter asked that more detail about the specifics of directory format, including using a spreadsheet and having search functions based on such factors as NAICS and ZIP codes. Another commenter wanted more to ensure that the dates when details concerning such items as prequalification, licensing, or bonding would be displayed. A commenter asked that all UCP directories use a standard format. Another commenter said the Department should give a unique identifier for each DBE that would be consistent across all UCP directories. A commenter recommended that directory entries have a notation about whether a DBE firm was eligible for FAA projects but not FTA or FHWA projects, because of differences in applicable size standards.

DOT Response

The main purpose of the DBE directory is to show DBEs, prime contractors, and the public which firms are certified as a DBE to do the various kinds of work that take place in DOT-assisted contracts. The directory is not primarily about the resources, equipment, bonding, experience, or other qualifications of a firm to do particular sorts of work. In performing their due diligence in selecting DBE contractors, considering those factors is a task for prime contractors.

We understand that it is useful for prime contractors to have such information readily at hand. One important means of making this information available to prime contractors would be for DBEs to include such information on their websites, which would then be linked to their entries in UCP directories.

In the NPRM, we proposed including fields for many of these types of information in UCP directories. However, we recognize, as commenters pointed out, that mandating a large expansion of the content of directories could create additional administrative burdens for certifiers. We are also concerned about some pitfalls that we recognize about open data fields for firms to enter their own information (*e.g.*, accuracy, information that has not been updated, unintended exclusion of eligible firms, available information being inconsistent from one firm to another).

In light of these concerns, DOT has limited the elements that must be included. They are firm name, location, NAICS code(s), and websites. The directory, which we now clarify must be an online platform, must permit the public to search and/or filter for these items in addition to the types of work a firm is seeking to perform. We will also mandate that the directory must include a prominently displayed disclaimer (*e.g.*, large type, bold font) that states the information within the directory is not a guarantee of the DBE's capacity and ability to perform work.

Certifiers may, at their discretion, include optional additional fields in their directories, including those proposed for inclusion in the NPRM. UCPs with sufficient resources may include such fields in their electronic directories, while others may find it more feasible to simply tell firms to provide a link to their own company websites, which would include the information they wanted prime contractors to access. UCPs have the responsibility, under the final rule, to ensure that mandatory items about firms are and remain accurate. UCPs permitting permissive entry of other information about firms' capabilities should also take steps to ensure that what the firms enter is accurate and up to date, including removal of inaccurate or untimely information they learn of. But the disclaimer mentioned above must state, UCPs do not warrant the accuracy of information provided by firms, and users' reliance upon it is at their own risk. Prime contractors always need to fact-check the claims made by firms they are considering doing business with.

6. Monitoring Requirements (§ 26.37)

NPRM

The NPRM would make a number of changes concerning a recipient's monitoring responsibilities. Recipients must monitor race-neutral participation by DBEs as well as participation on contracts that have DBE goals. The recipient would have to verify that a DBE was performing work on a contract, the recipient would also have to verify that it was performing a commercially useful function (CUF). This dual verification would have to occur on every contract involving a DBE. The NPRM emphasized the need for recipients to keep a "running tally" of its overall DBE attainment as well as each prime contractor's payments to DBEs it is using to meet its goal, rather than waiting until the end of the contract.

Comments

Monitoring Proposal

Most of the over 30 commenters on the NPRM supported the idea of more intensive and consistent monitoring of work in the DBE program, some saying they were already effectively doing what the NPRM proposed. Design/build contracts were one place where more monitoring was needed, a commenter said. The focus should be on actual dollars that DBEs receive, and payments should be confirmed on a regular and frequent basis, particularly to ensure compliance with prompt payment requirements.

Monitoring should continue throughout the procurement process and involve all elements of the recipient's organization, not just the civil rights office. More resources for monitoring are necessary, another comment said, because often times monitoring is not happening as it should. A comment said that DOT should verify commitment and performance numbers as well as CUF matters. One comment suggested that recipients use independent, third-party monitors.

Some of the comments supported the "running tally" requirement, especially the point that this applies to progress throughout the contract, and not just at the end of the project. One comment said that there should be written verification or a signed checklist concerning progress. Similarly, another said that there should be payment reconciliation on all invoices issued by DBEs.

Two comments questioned how and whether the running tally provision would apply to race-neutral contracts. Two others said that for funding or software reasons, implementation of the running tally provision should be phased in as funding, or software, becomes available (which one of these comments said would take 3–5 years). Another commenter, a recipient, said that more monitoring procedures are not needed beyond what it was already doing and that the OAs should provide uniform forms for monitoring purposes. One comment asked how often monitoring would have to be done and what the effect would be on staff workload. Another asked whether "local public agencies" that are part of FHWA's local public agency program would have to follow the proposed requirements applying to principal recipients themselves.

Other Enforcement Comments

Several comments talked about enforcement matters generally in the DBE program, rather than the specifics of the NPRM's monitoring proposal. One detailed a complaint about the commenter's perceived failure of a major recipient to enforce the program effectively. Another asked for stricter enforcement by the Department, since the commenter did not believe recipients could be trusted. There should be stiffer sanctions for noncompliance, including debarment of contractors, and DBEs who violate the rules should be decertified, other comments said. Another suggested that the Department should set up a public list of prime contractors' performance in meeting goals and getting DBE "waivers." A commenter said that the Department should crack down on misuse of waivers and exemptions that evaded DBE requirements. A commenter asked for greater involvement by the Office of Inspector General (OIG) and the imposition of penalties for noncompliance. On the other hand, a commenter said that audits should focus more on customer service, rather than on negative matters.

DOT Response

Bidders on contracts with DBE contract goals can meet their obligations in one of two ways, which are equally acceptable under the regulation. First, they can enlist sufficient DBE participation to meet the goal. Second, they can document sufficient good faith efforts to meet the goal. Either route results in compliance with the requirements of the rule. The second route is not a "waiver" of the requirements of the regulation. This is simply an alternative method of compliance, one necessary to avoid the DBE program becoming a quota-based program that would not be narrowly tailored, as is legally required.

We believe that the running tally requirement is an important element of the compliance monitoring that all recipients are responsible for completing. It ensures that, throughout the course of a contract, the recipient will know whether a DBE is doing the work to which the prime contractor has committed, whether payments to DBEs are timely, and whether DBEs are performing a commercially useful function. If problems are found, then they can be corrected at a time before it becomes too late to do anything about them as a practical matter. We believe it is crucial to avoid situations where issues are revealed only when a contract is completed, and there are no available measures to achieve the meaningful DBE participation that was promised at contract award.

The optimal frequency of running tally inspections of a contract is likely to vary with the length and complexity of the contract. In a relatively simple, 60-day contract involving one DBE, for example, a running tally check 30 days after the beginning of the contract might suffice. In a more complex, multi-year contract, involving several DBEs, more frequent checks focusing on the times when the DBEs would be performing their tasks would be appropriate. While there is not a one-size-fits-all interval for running tally checks, it is essential that a recipient know at all times what is going on with DBE participation on its projects. "There was a problem we didn't know about until after the fact" is not an acceptable way for a recipient to oversee a project.

The Department chose to clarify that the "running tally" not only applies to monitoring contract goal attainment but also to monitoring the recipient's progress toward attaining its overall goal each year. Recipients must meet the maximum feasible portion of their overall goal by using race-neutral means (§ 26.51(a)), establishing contract goals to meet any portion of the overall goal that the recipient does not project being able to meet using race-neutral means (§ 26.51 (d)). Accordingly, recipients need a mechanism to keep a running tally of progress toward annual goal achievement that provides for a frequent comparison of current DBE awards/commitments to DOT-assisted prime contract awards to determine whether the use of contract goals is appropriate.

It is also important to emphasize who provides information that goes into the running tally. The DBE program is not the exclusive province of a recipient's civil rights or business diversity office, the staff of which are often small. The DBE program is the responsibility of all parts of the recipient's program and of all personnel who work with it.

On a highway construction project, for example, it is inconceivable that resident engineers, inspectors, procurement officials, and others would not be keeping track of the progress of the work, whether the work met schedules and specifications, whether the work was meeting budget projections, etc. The DBE program is an element of the contract no less than these routine matters that are regularly overseen, and needs to be given the same attention and, importantly, by the same people. The same individuals who inspect a project to see if, for example, materials meet specifications and that a project is on time and on budget can and should be trained, and required, to give the same attention to providing the information informing the recipient's running tally. It is part of their job. This is a point that the Department has emphasized over many years, and we wish to re-emphasize it here. When the Department reviews a recipient's compliance, we will be paying special attention to whether the recipient is doing what needs to be done in this respect.

Subpart C—Goals, Good Faith Efforts, and Counting

7. Prompt Payment and Retainage (§ 26.29)

NPRM

Responding to Congressional mandates and OIG recommendations, the Department in 2016 issued guidance concerning prompt payment and retainage. The guidance emphasized that recipients had responsibility for affirmatively monitoring contractors' compliance with prompt payment and retainage requirements, rather than relying on complaints from subcontractors. However, a 2020 FHWA review of recipients' practices showed that many were not fulfilling this responsibility adequately. Therefore, the NPRM proposed a specific provision concerning mandating affirmative monitoring and an enforcement mechanism, including appropriate penalties for noncompliance. Requirements would flow down to lower-tier subcontractors as well as prime contractors.

Comments

DBE and recipient commenters generally supported the NPRM proposal, emphasizing the need for affirmative monitoring and stressing the need for prompt payment to avoid cash flow problems for subcontractors. Commenters who mentioned the flow-down of requirements to lower-tier contractors also supported the proposal. Several commenters asked for a clarification of the rule that would specifically authorize enforcement of State laws mandating payment to subcontractors with a shorter period of the time than the 30 days provided for in § 26.29(b).

Many of these commenters and others emphasized the need for closer oversight and stricter enforcement; a few made suggestions about what this would look like. Monitoring should be conducted on a regular and frequent basis (*e.g.*, monthly). Other commenters suggested mandating a 10- or 15-day rather than 30-day payment period. Some commenters advocated those penalties (*e.g.*, 3 percent of the subcontractor's invoice, interest on late payments) be assessed against tardy contractors.

Several comments proposed alternative ideas to achieve the objective of prompt payment. One was to provide an incentive to prime contractors who paid subcontractors on time or early, such as a bonus or gaining points that could be used in future procurements. Another was to follow a model the commenter said was used in the Department of Defense and some SBA programs, involving an automated payment system and online certifications that payments have been made on time.

A comment suggested that recipients could set up an escrow-like account to pay subcontractors in the event prime contractors were late. Some commenters emphasized that primes should send invoices to recipients on time or that recipients could avoid problems by making partial payments to primes when a subcontractor's portion of the work was completed, as opposed to waiting until the entire project had been completed. A commenter suggested that DOT should develop software for

grantees to track payments by all parties at all stages of the process.

Comments from some recipients, especially in the transit industry, expressed concern about affirmative monitoring being burdensome, especially for smaller recipients that have limited staff. Other commenters thought that applying prompt payment requirements to all subcontractors, rather than just DBEs, exceeded the scope of the DBE program.

DOT Response

We believe as a basic, upper limit, standard for a national program, the proposed 30-day period for payment and for the return of retainage following the satisfactory completion of a DBE's work on its portion of the overall contract is appropriate. We agree with commenters that when State law or a recipient's program calls for a quicker turnaround time, that shorter requirement prevails. For example, if State M's law calls for payment to be made in 15 days, all recipients in that State would have to observe the 15-day rule. On the other hand, if State P's law allowed 45 days for payment or the return of retainage, the regulation would require the action to be taken in 30 days on a DOT-assisted contract.

We strongly encourage recipients to establish shorter time frames for lower tier subcontractors, because these smaller businesses have more acute cash flow needs than their larger counterparts. While we are not adopting, as generally applicable national requirements, the various ideas that commenters suggested to make prompt payment and retainage more effective, we encourage recipients to adopt measures that will work in their circumstances, and we will work with recipients to incorporate such measures in their DBE programs. The idea of providing special incentives for contractors, merely for doing what they are supposed to do, is not one that the Department supports, however.

In any case, adopting strong enforcement mechanisms is critical to making prompt payment and retainage return requirements work. For example, making failure to meet these requirements a material breach of contract, or an explicit cause for liquidated damages in the prime contract, are among many possible measures for this purpose. Letting failure to comply go unnoticed, or to be without consequences, is not an acceptable option. As part of their normal oversight of recipient operations, as well as in compliance reviews, the OAs will make prompt payment and return of retainage a point of emphasis.

8. Transit Vehicle Manufacturers (TVMs) (§§ 26.5 & 26.49)

NPRM

The Department proposed several changes to provisions in 49 CFR part 26 related to requirements for FTA assisted transit vehicle procurements. The NPRM included revisions in § 26.5 to the definition of TVM and proposed two new definitions, transit vehicle and transit vehicle dealership. Additionally, the Department proposed several revisions to § 26.49 to clarify reporting requirements for FTA recipients and TVMs.

The NPRM proposed terminology changes to make § 26.49 more reader-friendly and clear, such as using "TVM" consistently to refer to transit vehicle manufacturers and using the term "eligible" rather than "certified" when referring to a TVM's eligibility to bid. The Department also sought to clarify that a contract to procure vehicles from a transit vehicle dealership (TVD) does not qualify as a contract with a TVM, even if the vehicle was originally manufactured by a TVM.

Comments

Definitions

The proposed definitions of transit vehicles, manufacturers, and dealers drew only a small number of comments, most of which supported the changes, though a transit authority and a consultant sought more clarity. As noted above, a commenter said that a transit vehicle dealer (TVD) should be more simply defined as a firm that sells transit vehicles (including modified vehicles) made by a transit vehicle manufacturer (TVM), whether or not the dealer is "primarily engaged" in selling such vehicles.

Terminology

The few comments addressing the proposed change from "certified" to "eligible" in § 26.49(a)(1) and (2) supported it.

Procuring Transit Vehicles

Two commenters agreed that a vehicle purchased from a non-TVM should not be treated in the TVM category for goal and reporting purposes. Another suggested that paratransit vehicles like SUVs and vans be allowed to be purchased from dealers rather than manufacturers.

Two commenters expressed concerns about the proposal that vehicles purchased from TVDs are not treated under the TVM provisions of the rule. Both said they procure ADA paratransit vehicles from TVDs. One concern was that because a TVD is not a TVM under the proposal, FTA funding would not be available for the paratransit vehicle purchases. A related concern was that since most TVDs are non-DBE firms, there are no meaningful contacting opportunities for DBEs in that field and hence no point in setting contract goals for TVDs. Moreover, a commenter noted that the proposal could limit DBE opportunities related to paratransit vehicles that might exist through the TVM program.

A commenter recommended that neither modified nor unmodified transit vehicles purchased through TVDs should be included in a recipient's goals or uniform reports.

A State DOT said that it procured its paratransit vehicles from TVDs, which then would not count as TVMs under the proposed language. It was concerned that FTA therefore would not treat such purchases as eligible for Federal funds because, as TVDs rather than TVMs, they could not participate in the TVM program. The commenter was unsure how a recipient would comply with the rule under these definitions. Moreover, it said, most TVDs are owned by socially and economically disadvantaged individuals (SEDs) and have few if any DBE subcontracting opportunities. It suggested that recipients be able to report purchases of such vehicles from TVDs in the same manner as for TVMs.

TVM Goal Submissions

Four commenters recommended that TVMs only have to submit goals every three years, rather than annually. This would reduce burdens, they said.

Ferries

The NPRM did not address ferries specifically, but several commenters noted the difficulty in applying the TVM rules to ferry procurements. For example, commenters suggested that the proposed definition of transit vehicle would likely result in additional confusion as to how to treat procurements of ferries because they are vehicles that clearly should be regarded as transit vehicles yet are manufactured by entities that should not be considered TVMs.

TVM Other Details

A commenter said that since TVMs report directly to FTA, a TVM should not have to report the same data to recipients. Another commenter said that TVMs should not have to provide confidential bidders list information in their DBE goal submission; FTA can

audit their records for this information if needed.

A commenter suggested amending § 26.49(a)(4) to say, "becoming contractually required [as opposed to the proposed "obligated"] to procure a transit vehicle." Another commenter said that it thought that NAICS codes do not cover vehicle component manufacturers adequately.

Another commenter supported the proposed revision of § 26.49(c) that clarified that TVMs would have to submit reports only for years in which they were eligible. It also suggested that the "awards/commitments" line item in section A of the Uniform Report form be clarified to apply only to work performed in the U.S., to be consistent with the language in § 26.49(b) that limits TVM goals to work performed in the U.S. A transit advocacy organization added that since many TVMs may be small businesses with limited staff, TVMs should be required to submit their goal information in the same three-year interval as recipients, thus further reducing the paperwork burden. Overall, this organization commented that any additional administrative burdens could result in fewer DBE businesses participating, fewer bids, less competition, and longer lead time for new capital projects.

DOT Response

§ 26.5 Definitions

The final rule will adopt the proposed definition of TVM. In response to the comments expressing concern over applying the definition to ferry manufacturers, the final rule further clarifies how recipients may establish project goals to procure transit vehicles from entities that are not eligible TVMs. See the discussion of § 26.49(f) below.

After considering the comments received, the Department decided not to adopt the proposed definition of transit vehicle. As noted in the preamble to the 2022 NPRM, the Department recognizes that there is some ambiguity as to what qualifies as a "transit vehicle procurement" and is therefore subject to special rules. However, since these situations are relatively rare and the most appropriate course of action depends on the unique facts and circumstances, the Department expects that providing training, guidance, and technical assistance will be more effective than issuing a one-size-fits-all regulatory definition.

The final rule will not include a definition for transit vehicle dealer. Commenters explained that small transit agencies routinely use dealers to procure transit vehicles, and that paratransit vehicles are often procured through dealers. As discussed elsewhere in this notice, these comments persuaded the Department to maintain the status quo with respect to dealership transactions in § 26.49. Since the definition would only be relevant if the Department retained the proposal in § 26.49, there is no need for a definition.

§ 26.49 Procuring Transit Vehicles

As noted above, the proposed revisions to § 26.49 received mixed comments. Generally, commenters agreed that the proposals would clarify the requirements. The Department appreciates the comments in support of the proposed change from "certified" to "eligible" in § 26.49(a)(1) and (2). Accordingly, the final rule adopts this change as proposed. The Department agrees with the commenter who suggested that the word "required," instead of "obligated," better conveys the necessary action that triggers the 30-day reporting requirement in § 26.49 (a)(4). The final rule therefore uses the term "required." Several commenters opined that the proposed addition of paragraph (a)(5) addressing awards to dealerships could severely disrupt vehicle acquisition practices by small transit agencies and paratransit providers. In response to these comments, the final rule does not adopt proposed paragraph (a)(5) or otherwise address awards to dealerships. The final rule substantively adopts all other proposed changes in § 26.49 with only minor additional revisions to paragraph (a)(2) for clarity. Additionally, the final rule incorporates changes to paragraph (f) to address situations in which recipients establish project goals.

§ 26.49 TVM Goal Submissions

The Department recognizes that TVMs are required to set and submit goals more frequently than recipients. The timelines are different because TVMs and direct recipients (often transit agencies in the case of FTA funds) fundamentally differ in their ability to predict contracting opportunities. Generally, transit agencies are able to predict the projects they will undertake over the next three years with a relatively high degree of accuracy, which allows transit agencies to accurately predict the scale and scope of contracts they will award. TVMs, though, are often limited to the information their potential clients (often transit agencies) make available. Since most transit agencies do not provide extensive details on the vehicles that they intend to procure prior to issuing a public solicitation, which in many cases is within months (at most) of the deadline to submit bids, TVMs cannot accurately predict the federally funded subcontracting opportunities they will have available in several years. Thus, the Department will retain the requirement for TVMs to set DBE goals on an annual basis and submit goal methodologies annually. Without more information from commenters, we are unaware of how this administrative burden can result in fewer DBEs participating, fewer bids, etc.

Ferries

The Department understands that large ships are manufactured by shipyards, and that the shipyard industry is different from bus and rail manufacturing industries. Shipyards are contracted by entities from various other industries to build vessels specified to the customer's needs. Smaller vessels, though, are typically manufactured by well-known brands, and may be specialized by the manufacturer or third parties. Thus, there are aspects of ferry manufacturing that are unique to the shipbuilding industry. However, other aspects are similar to the rest of the transit vehicle manufacturing industry. Such factors mean that ferry procurements are often best addressed through project goals pursuant to § 26.49(f). As discussed below, the final rule clarifies how to apply project goals to transit vehicle procurements from specialized manufacturers when a TVM cannot be identified.

Use of Project Goals

The final rule revises § 26.49(f) to clarify how to use project goals to procure transit vehicles. The revisions codify and clarify current practices and are in response to comments expressing confusion over how to apply the TVM rules to ferry procurements (project goals may be used to acquire vehicles other than ferries).

The final rule adds new paragraphs (f)(1), (f)(2) and (f)(3) and simplifies paragraph (f) to clarify that project goals are used in cases when transit vehicles are procured from specialized manufacturers when a TVM cannot be identified. Pursuant to paragraph (f)(1), if a recipient establishes a project goal, it must use the process prescribed in § 26.45 to do so. This effectively requires recipients to use the same methodology for project goals as overall goals. Pursuant to paragraph (f)(2), FTA must approve the recipient's decision to use a project goal before the recipient issues a public solicitation for vehicles. Paragraph (f)(3) requires recipients to demonstrate that no TVMs are available to manufacture the transit vehicle it intends to procure.

The Department established the project goal option in paragraph (f) in 2014. This option has always been intended to maintain the spirit of the DBE program when compliance with the general rule would be impracticable or create more barriers for DBEs in the transit vehicle manufacturing industry. Often, this scenario occurs when a transit agency intends to procure a vehicle for transit purposes but the entities that manufacture the vehicle do not meet the TVM definition (and are not excluded from the definition).

It has been FTA's longstanding practice that if a recipient can show that it is procuring transit vehicles with FTA funds and there are no entities that qualify as TVMs that manufacture such vehicles, the recipient may use a project goal to procure the vehicles. If a recipient intends to use a project goal, the recipient must request FTA's approval of that decision, and must not issue a public solicitation until FTA has approved the decision. The request for approval must demonstrate that the recipient looked for and could not identify a TVM that manufactures the vehicles sought. To be clear, the project goal does not have to be approved by FTA prior to the recipient's issuance of a request for proposals. Generally, recipients will be required to submit the project goal methodology prior to issuing a public solicitation, though FTA may make case-by-case decisions depending on the facts and circumstances; only under extraordinary circumstances will FTA permit recipients to submit the goal methodology after contract award. This is similar to how FTA reviews and approves all project and overall goals.

TVM Other Details

Regarding the comments on duplicative reporting requirements imposed by part 26 and locally by recipients, the Department recognizes that recipients have legitimate reasons for collecting information from TVMs, some of which may also be reported to FTA. Thus, the Department does not believe it would be prudent at this time to limit recipients' ability to collect such information.

Regarding the comments on confidential bidders lists submitted with goal methodologies, part 26 only requires submission of such information if the TVM chooses to use a bidders list when calculating its overall goal. Otherwise, TVMs are merely required to retain their bidders lists on file. Since it would be impossible to verify the validity of a goal based on a bidders list without reviewing the bidders list, the Department intends to continue to require TVMs to submit their bidders lists when they choose to use a bidders list in their goal methodology.

The final rule adopts the proposed changes to § 26.49(c). Regarding the comment about changing the Uniform Report to clarify that only domestically performed work is to be included in the report, the Department does not believe that this specific change is necessary. We acknowledge that the final rule will result in several changes to the Uniform Report; FTA will issue guidance to TVMs on how to fulfill their reporting requirements under the new rules.

The Department appreciates the comment that discussed the inadequacy of NAICS codes to describe the sort of work available in the vehicle manufacturing industry. The Department intends to use the data it collects under the final rule to learn more about the opportunities available to small businesses and DBEs in the vehicle manufacturing industry.

Finally, the Department intends to use this notice to clarify longstanding policy on how to count DBEs performing on transit vehicle procurements. In recognition of the complex supply chain necessary to manufacture a transit vehicle, the Department has always permitted TVMs to count awards to any certified DBE if the DBE is certified in the State in which it performs the work, regardless of whether the TVM is present in the State. More recently, particularly in the context of ferry procurements, the Department has been asked to allow recipients to count awards to DBEs certified in States other than the recipient's home State if the recipient is using a project goal. The Department has found that such practices can be an effective means of ensuring DBEs are afforded opportunities to compete on transit vehicle procurements. Thus, the Department may approve such practices when sufficiently justified (here, the Department reminds recipients and TVMs that work performed outside of the United States or its territories must not be counted).

9. Procedures for Good Faith Efforts on Design-Build Contracts With DBE Goals (§ 26.53)

NPRM

The NPRM proposed that, in a negotiated procurement (*e.g.*, for professional services), the bidder or offeror may make a binding commitment to meet the goal at the time of bid submission or presentation of initial proposals but provide the detailed information about its DBE participation later, before selection. This provision would not apply to design/build contracts, however.

The NPRM proposed that for a design-build contract, the bidder or offeror would submit a DBE Performance Plan (DPP) with its proposal. The DPP would have to include a commitment to meet the goals and provide details—including dollar amounts and time frames—for the type of subcontracting work or services the proposer will solicit DBEs to perform. The recipient would monitor the design-builder's good faith efforts (GFE) to comply with the DPP and its schedule. The recipient and design-builder could agree to revisions of the DPP over the course of the project.

Comments

DBE Performance Plans

Nearly 50 commenters, from all the major interests, addressed the NPRM's DPP proposal. Of these, about 40 supported the proposed concept, though many had suggestions for modifying the proposal.

In addition to agreeing with the NPRM's rationale for DPPs, supporters said that the DPP would help small businesses seeking work on large projects and would update the regulation to be consistent with existing best practices. Several comments said that they already used something like a DPP in their procurements. Other advantages include, commenters said, giving greater flexibility to prime contractors while allowing for detailed planning and monitoring to provide better experiences for DBEs.

One suggestion made by numerous commenters for modifying the proposal was to have a "hybrid" or two-step process in design/build procurements. That is, for the design and pre-construction phases of a project, recipients could use this flexibility to set goals that the design-builder would have to meet up front, as traditionally done in the DBE program. For the longer construction phase, recipients would have a process like that described in the NPRM.

A few commenters suggested that if, as might happen in smaller design/build projects, a contractor meets the goal with sufficient DBE commitments before the project started, the DPP might not be required for the project. A comment requested that prime contractors be required to commit to DBEs as soon as possible in the process.

Other suggestions included setting specific time frames in which actual DBE contracts would have to be executed and making the DPP process available to a broader scope of projects than design/build projects *per se* (*e.g.*,

public-private partnerships). To make this point clearer, some comments said, the regulation should use a term like "alternative delivery" rather than "design/build" for projects involving a DPP.

Several commenters wanted to make sure that there was active and frequent monitoring of contractors' performance under the DPP. Commenters suggested that DOT could assist this process by providing monitoring software and additional funding to deal with the costs of additional resources for evaluating and monitoring DPPs, and that DOT should also provide more details about what an adequate DPP looks like. Other commenters suggested that DOT should also provide guidance on how to deal with issues that may arise in the course of a project (*e.g.*, change orders), several commenters said, as well as on proper use of DPPs to avoid bids nonresponsive bids.

A few commenters asked how, if at all, the DPP concept would apply to contracts that have race-neutral goals (*e.g.*, as is commonly the case in Florida). One comment suggested that since many design/build projects are large, DBE size standards should be increased for firms participating in them. Another commenter asked that the regulation prohibit prime contractors from making small, incremental additions to their contracts to avoid making firm commitments to subcontractors for DBE work. Another pointed to what it thought could be an inconsistency between the DPP proposal and present Appendix A, section VI, which says that a promise to use DBEs after contract award is not considered responsive to the contract solicitation or to constitute GFE.

If what a prime contractor promises in a DPP does not happen, then what is a recipient to do, some commenters asked. In addition to monitoring, these commenters said, the rule should take enforcement action and impose consequences on prime contractors who are in noncompliance with their DPP obligations. One commenter said, however, that enforcement can be difficult because contractors often do not understand what is involved in a DPP.

The smaller number of comments opposed to the DPP proposal said that moving away from the requirement to have prime contractors commit to specific DBEs in advance would diminish opportunities for DBEs. A comment suggested that a bidder on a prime contract should have to always meet a goal or show GFE before being awarded a contract, no matter what the structure of the contract may be. DBEs need time to get working capital, employees, and equipment in order; and advance notice at the start of a project is important to enabling them to do so, a commenter noted. Another commenter asserted that the premise of the proposal is mistaken, it is not that difficult to identify subcontractors at the start of a project, it said. In the absence of requiring compliance before contract award, DBE participation could become an afterthought for the prime contractor and recipient.

Others opposing the proposal said that implementing the DPP proposal could increase burdens and costs for recipients, delay projects, or lead to additional restrictions or conditions on RFPs, potentially deterring some bidders.

DOT Response

Commenters generally approved of the concept of a DBE performance plan in design/build contracts, and we continue to believe that this will be a useful tool in managing DBE participation in a type of contract in which award of the contract occurs before the design is complete and the details of the work, quantities, and scheduling are not yet known. We agree with commenters that there may well be circumstances in which DBE subcontractors can be selected for the design phase of a project at the outset, in which case the DBE Performance Plan would include commitments to those firms while listing the work types it plans to solicit DBEs to perform in the remainder of the plan. While we appreciate that many projects span over the course of several years, at this time, it is only those contract procurement and delivery methods that lack the details needed to make subcontracting commitments prior to contract award to which the Department approves of the use of a DBE Performance Plan.

Since the beginning of the DBE program in the 1980s, the Department has heard complaints from prime contractors that they cannot find sufficiently qualified, capable DBEs to meet goals on a project. This belief itself appears to be one of the effects of discrimination that the program is designed to combat, and it can act as a self-fulfilling prophecy preventing prime contractors from exerting optimal efforts to find DBEs to meet a goal, whether on a traditional contract or a design-build project. Making good faith efforts to find DBEs is essential to compliance with the regulation. Open communication among the recipients and prime contractors is essential to ensure that the work commitments in the performance plan result in actual subcontracts. With agreement of the parties, work types identified up front could be altered to account for actual work needed in real time; however as long as there are subcontracting opportunities, the recipient must enforce the prime contractor's requirement to make ongoing good faith efforts to meet the goal. We do appreciate the comment that Appendix A needs to be revised to provide an exception for design-build contracts. We are making that alteration. In addition, we are re-naming the DBE Performance Plan to DBE Open Ended Performance Plan (OEPP) to align with the FHWA's EDC–7 initiative.[2] Other than these changes, we are adopting the proposal as proposed in the NPRM without substantive change.

10. Terminations (§ 26.53(f))

NPRM

The NPRM restated the prohibition on terminating DBE subcontractors' work without the recipient's written consent (*e.g.*, because the prime contractor wanted to self-perform the work or use a different firm for the work that had been committed to the DBE). The NPRM further clarified that "terminations" need not be terminations in full, but that "partial terminations," *e.g.*, removing a work item or decreasing the amount of work committed to a DBE would still require prime contractors to follow the process by providing a "good cause" reason it proposes to terminate, provide the DBE with time to respond, and not terminating before receiving prior written consent from the recipient. The NPRM also proposed to clarify that termination, on the one hand, and replacement or substitution, on the other, are two separate and distinct processes.

Comments

The majority of the nearly 20 commenters supported the proposal. They agreed that a prime contractor may not terminate a DBE's contract without the recipient's written consent. Some of these comments said that it made sense

[2] In 2009, FHWA launched the Every Day Counts (EDC) initiative in cooperation with state, local, and industry partners to speed up the delivery of highway projects and create a broad culture of innovation within the highway community. Proven innovations and enhanced business processes promoted through EDC facilitate greater efficiency at the state and local levels, saving time, money, and resources that can be used to deliver more projects. The EDC initiative is a state-based model to identify and rapidly deploy proven, yet underutilized innovations to shorten the project delivery process, enhance roadway safety, reduce traffic congestion, and improve environmental sustainability. Rethinking DBE for design-build projects is one of the innovations being promoted in the seventh round of the EDC initiative.

to fold the notion "substitution" into the overall "termination" framework, since a substitution had the effect of terminating the original contractor. One commenter wanted to make sure that the five-day period for a recipient's consent had elapsed before the prime contractor actually terminated the DBE. Another said that, if there was additional work to be done in the scope of a DBE's work, and the goal had been met, the DBE should complete the additional work, rather than the prime contractor self-performing it.

Some commenters sought clarifications of the proposal. Three commenters said that a recipient's removal of work intended for a DBE to perform should not be treated as a termination by the prime contractor. There could be circumstances, another commenter said, in which a recipient would need to make a determination in less than five days; for example, there may be an urgent need to ensure that hauling supplies to the job site happens on time. In such a case, the commenter said, the recipient would have to respond to the contractor's written notice in 24 hours, and a formal termination process could follow.

The small number of opponents preferred retaining the former regulation's provisions. Some thought that the list of "good cause" reasons for termination is too restrictive.

DOT Response

In the NPRM, the Department underscored that any time a prime contractor seeks to terminate a DBE to which it had made a commitment in response to a contract goal or approved substitution, it must follow the process set out in § 26.53(f). The Department sought to clarify that this requirement applies not only to a complete termination but also to a "partial termination," *i.e.*, eliminating a *portion* of work committed to a DBE. For example, a "partial termination" in which a prime contractor wishes the DBE to do $100,000 worth of work as opposed to the originally committed $200,000, is just as much subject to the approval as an action to terminate the DBE firm entirely. This would not apply to change orders initiated by the recipient that had the effect of eliminating some or all of the work to which a DBE was committed to perform.

The Department continues to believe that it is important to separate the termination requirements from the substitution process. We have found that some recipients will not allow the prime contractor to terminate a DBE until it has submitted a substitution. Other recipients forgo the termination process and merely require the prime contractor to submit a request for substitution. The due process requirements in § 26.53(f) are essential to protect DBEs committed toward a contract goal, or approved replacement, from arbitrary elimination. This is true whether or not a substitution of another firm for the terminated DBE's work is intended. Again, after considering the comments, we are adopting the termination and substitution provisions as proposed in the NPRM.

11. DBE Supplier Credit (§ 26.55(e))

NPRM

As noted in the 2022 NPRM preamble (87 FR 43631–43632), the issue of how to count DBE credit for suppliers has long been a subject of debate and extensive stakeholder input. Changes over the years in the way that materials are delivered for projects and the importance of concepts like the "regular dealer" to DBE suppliers and prime contractors seeking to meet goals have been among the frequent topics of discussion.

Based on the Department's consideration of stakeholder input, the NPRM proposed several changes to the counting provisions of § 26.55(e). First, a prime contractor could meet no more than 50 percent of a goal on a given contract through use of DBE suppliers (including manufacturers, regular dealers, distributors, or transaction facilitators). A recipient could, with prior OA approval, make exceptions to this limit (*e.g.*, for material-intensive contracts). The purpose of this proposal was to prevent the use of DBE suppliers from crowding out opportunities for other types of DBE contractors on a project.

To avoid ad hoc, post-contract award determinations of whether the contributions of a supplier were those of a "regular dealer" eligible for 60 percent credit, the NPRM proposed that recipients establish a system to determine, before contract award, whether a DBE supplier meets the basic requirements for being a regular dealer. That is, does the firm generally engage in the sale or purchase of the items in question or items having the general character of those to be supplied under the contract? As part of this pre-award process, the recipient would look at such questions as whether the items would be provided from the supplier's inventory, whether the supplier would have physical possession of the items, or, in the case of bulk items, whether the supplier would deliver the items using its own distribution equipment. Goal credit would ultimately be decided on a contract-by-contract basis based on the recipient's final evaluation of whether the firm would provide a commercially useful function (CUF) deserving of 60 percent regular dealer credit.

The recipient's system for carrying out this proposal would also evaluate situations in which all or most of a regular dealer's supplies come from its inventory, but other sources, such as a manufacturer, would provide additional minor quantities of items related to those in the contract.

In addition, the recipient's system would consider situations in which a DBE supplies items/goods that are not typically stocked (*e.g.*, specialty items). A DBE that provides such items would be eligible for 60 percent regular dealer credit if, like a supplier of bulk items, it used its own distribution equipment.

One of the issues that stakeholders have discussed is the handling of "drop shipping," in which a DBE supplier arranges to have a product sent from its manufacturer to the job site, without passing physically through the hands of the DBE. On the one hand, this arrangement appears similar to that of a transaction facilitator, whose credit is limited to its fees or commissions. On the other, some stakeholders said that dealers in bulk items with distributorship agreements had a good deal of control of a transaction, take significant risks, and often use their own delivery equipment, meaning that their involvement went beyond being simply a transaction facilitator.

To address these concerns, the NPRM proposed that a "distributor" having a valid distributorship agreement receive 40 percent credit for the items it provides. Recipients would have to review distributorship agreements, prior to contract award, to determine their validity with respect to each purchase order/subcontract and the risk the DBE assumes. Where a distributor "drop ships" materials without assuming risk, or does not operate according to its distributorship agreement, its credit would be limited to fees or commissions.

The NPRM proposed to retain the existing requirement that to receive credit for supplying materials, a DBE must negotiate the price of supplies, determine quality and quantity, order the materials, and pay for the materials itself.

The NPRM would clarify the definition of "manufacturer" by proposing that manufacturing includes blending or modifying raw materials or assembling components to create the finished product to meet contract specifications. Minor modifications do

not count as manufacturing eligible for 100 percent credit.

Comments

The 50 Percent Limit on Credit Toward Goals for Use of Suppliers

This provision of the NPRM attracted over 60 comments, which, by roughly a 5–1 ratio, opposed the Department's proposal. DBEs, non-DBEs, and recipients found reasons for objecting to the proposed limit on the use of suppliers to meet goals. Commenters opposing the proposal did so on a variety of grounds.

Several comments challenged the factual basis for the proposal. A DBE supplier said that there were no statistics or other evidence supporting the proposal, making the limit arbitrary, a point other commenters made as well.

A non-DBE contractor said that there were no studies showing that DBE suppliers were favored over other kinds of DBEs, or showing what percentage of goals were being met by different categories of DBE firms. Nor was there evidence that suppliers or manufactures were being used at a greater rate in the DBE program than in the construction industry generally, or that the participation of non-supplier DBEs were unduly limited under the present rule. The comment added that the only evidence in the NPRM preamble for the proposal was a reference to a 2018 stakeholder meeting in which some DBE participants had said that, on some contracts, prime contractors were able to meet all or most of DBE goals through use of suppliers, especially of bulk items, making use of other types of DBEs unnecessary. It depends, one commenter said: in some contracts in which his company had been involved, goals had been met mostly or entirely with DBEs other than suppliers.

A State-level contractors' association said that it had been told by its State DOT that it does not keep numbers on the participation of DBE suppliers vs. other DBEs, resulting in a lack of evidence that could provide a basis for a supplier limit. A national-level contractors' association said, referencing the stakeholder meeting mentioned above, that use of comments constituted rulemaking by anecdote. Moreover, it said, it had not been given the opportunity to participate in the meeting, the results of which had never been published. Another commenter noted it did not appear that the views of prime contractors or recipients had been solicited in the stakeholder meeting cited in the NPRM preamble.

Commenters who are or who represented recipients expressed concern that the proposal did not take into account the realities of their contracting activities, such as the unique characteristics of contracts, the needs associated with each contract, and the availability of DBEs relevant to the work of each contract. Two such commenters said that in their jurisdictions, there was not an excess of suppliers, one of them noting that only 20 percent of the DBEs in its directory were suppliers. Others said that the provision would not work with respect to contracts heavily involving bulk and other materials (*e.g.*, asphalt), therefore harming businesses who focus on those materials. One recipient said that there were often few DBEs to work on contracts in rural areas, making reliance on suppliers more important there.

Recipients and contractors both said that the proposal would adversely affect the ability of prime contractors to meet contract goals and of recipients to meet overall goals. Recipients' goals might have to be lowered as a result, especially when a contract did not provide significant opportunities for non-supplier DBEs. For example, one State contractors' association said that materials made up 60–80 percent of typical highway contracts in its State. On a paving contract for example, a commenter said, there might be only two or three, usually small, scopes of work that a DBE subcontractor could perform. If a contractor could count only suppliers to meet half of its goal, it would make it impossible to meet goals in many cases, commenters asserted, given what they characterize as the frequent unavailability of other types of ready, willing and able non-supplier firms. The effects of the pandemic on small business could make this problem worse, a prime contractor suggested. All this would make more good faith efforts "waivers" necessary, commenters said.

A few recipients expressed the concern that the proposal could increase their workload and create confusion or delays in their administration of their contracting activities.

A frequent comment opposing the proposal is that it would unfairly create financial harm to DBE suppliers. These firms have configured their businesses to meet the requirements of the existing rule, commenters said, making considerable investments in facilities, inventory, and employees. They would have fewer opportunities to work under the proposal, as the rule favors one category of DBEs over another, with the result that suppliers would lose income and could even be forced out of business. One DBE stated that it would cut their business in half.

A few comments also asked how the exception process was supposed to work. When would recipients have to go to an OA to have an exception approved, and what would be the OAs' criteria for approving the request? A commenter suggested there should be a deadline for an OA's response to a request for an exception (*e.g.*, five days). One comment suggested that the matter of exceptions should be delegated to recipients, without needing approval from an OA.

Some commenters also had suggestions for modifying the proposal. One would allow suppliers to count 50 percent of their gross sales for credit. Another suggested giving recipients flexibility to decide what level of credit (*e.g.*, 50, 60, or some other percentage) applied to a particular contract. Another suggestion was to calibrate credit according to the percentage of supplies on a contract. If supplies account for 80 percent of a contract, then the recipient would allow DBE suppliers' contribution to count for 80 percent of the goal. Another variation would be to apply the 50 percent limit with respect to commitments in the pre-award process, but then count the entire amount of actual supplier participation toward actual attainment at the end of the project.

The smaller number of commenters who supported the proposal, or at least did not object to it, said they thought the proposal fair and useful to keep open opportunities for non-supplier DBEs. Some supporters said there should be exceptions for materials-heavy contracts (*e.g.*, guardrails). Another said it could support a 50 percent limit for large contracts but not smaller contracts. A few recipients said the issue did not much impact their operations. One comment asked how the provision would apply to situations where there was no contract goal. A few comments wanted stricter limits on supplier participation (*e.g.*, 25 percent).

Regular Dealer Issues

The largest number of comments on regular dealer issues focused on the proposal that recipients have a system to make contract-by-contract pre-award decisions about whether a supplier deserved 60 percent credit as a regular dealer.

More than 20 comments, mostly from recipients, opposed the idea. Their primary objection was that implementing the proposal would be confusing, difficult, and burdensome. For example, there would be additional work for contract administrators, which could delay contact awards. Prime contract bidders would face an undue

burden, as they would have to do additional due diligence to make sure that the credit they were claiming for DBE participation was consistent with the recipient's determination in each case. These determinations could be subjective and subject to challenge.

Most of the comments opposed to the proposal stated that if there was to be a determination about whether a supply firm was a regular dealer, it should be made by the UCP at the time of certification, not on a pre-award basis on each contract by the recipient. On the other hand, a commenter objected to UCPs performing this function, since it would result in a *de facto* certification of regular dealers.

A few comments supported the proposal. One comment suggested that the approval of a DBE as a regular dealer could be done as part of a recipient's good faith efforts review. Another suggested that firms could submit an affidavit attesting to its meeting regular requirements as part of the pre-award process. Another recommended that a CUF review for regular dealers consider such factors as the firm's ability to secure the items, do their own takeoffs and quantity planning, get quotes, and have distribution agreements.

On other regular dealer matters, a few commenters said that the credit awarded to regular dealers should remain at 60 percent. Some would increase the percentage (*e.g.*, to 75, 80, or 100 percent). One commenter said that regular dealers in specialized fields for items such as bridges should be able to count 100 percent. Another commenter favored 100 percent credit if the firm's workforce was predominately minority or female. One commenter said the entire regular dealer concept was outdated and should be taken out of the regulation. The commenter urged that the regulation talk about suppliers in general in a simpler way.

Other commenters requested clarification with respect to terms like keeping a "sufficient quantity" of materials in stock (which the commenter said could vary among different kinds of items), "drop shipper," or "specialty items." Another asked how a recipient could make regular decisions with respect to out-of-state firms that were certified via interstate certification. Another provided a detailed typology of regular dealers, bulk suppliers, and brokers/transaction expediters.

Commercially Useful Function

In addition to its role in determining whether a firm was a regular dealer, some comments addressed CUF decisions more generally. Two supported doing CUF reviews on all federally assisted contracts, while another thought doing so would too burdensome if applied to contracts without a DBE goal. One of these asked for more specific CUF criteria. One wanted to streamline the process by allowing a CUF review that would apply to all jobs within a year, while another commenter thought certifiers could verify CUF at the time of certification.

Recipients, not prime contractors, should make CUF determinations, one commenter said. Another added that recipients should not be able to request CUF data from prime contractors; the prime contractor should get DBE credit unless there is documented evidence of noncompliance. Another was concerned that CUF reviews and the "running tally" monitoring requirements could become confused with one another.

A commenter thought that prime contractors should be able to do several things to assist DBEs without running afoul of CUF requirements. These included providing specialized training through a shared superintendent or foreman, access to contract management software and back- office assistance, sharing of equipment and workers, and guarantees consistent with industry practice.

Bulk Suppliers and Supplies of Specialty Items

The 60 percent credit given to suppliers of bulk materials and specialty items is a subcategory of the treatment of regular dealers under the rule. There was a division of opinion among commenters about whether, as the NPRM proposed, these suppliers would need to have their own distribution equipment to count for 60 percent credit towards a DBE goal.

Several comments said that leasing equipment was a common industry practice among suppliers, and that suppliers should not be penalized for doing so. Being unable to lease distribution equipment would be burdensome and could make DBE suppliers uncompetitive, one comment said. A distinction based on physical delivery of products is unrealistic, a DBE supplier said, as suppliers have to do a lot of work that adds value no matter how products are delivered.

One recipient suggested that an equipment lease should be long term (*e.g.*, at least a year). Others would make allowance for a situation in which a supplier that had its own distribution equipment used a short- or long-term lease arrangement for items that are infrequently needed (*e.g.*, highway signs) or to supplement their own equipment, as needed (*e.g.*, through engaging owner-operators).

Among other comments on the subject, a few supported the proposal as written. Another raised a problem concerning what it said was a common practice of manufacturers (*e.g.*, of structural steel) shipping their products to the job site using their own trucking company. The commenter wondered whether there would be a CUF for a DBE in such a situation.

Drop Shipping and Distributors

All but a few of over 40 comments that addressed this issue opposed the NPRM's proposal, though not all for the same reasons. A mix of recipients, DBEs, and non-DBEs said that the proposal was unclear, confusing, overly complex, burdensome, and difficult to administer. Recipients do not have expertise in evaluating the validity of a distributorship agreement, some said, adding that the NPRM did not provide guidance or criteria to aid this task. It could be difficult for recipients to distinguish between those transactions counted at 40 and 60 percent, another comment asserted. One comment suggested that other factors aside, all drop-shipped goods should be counted at a fixed percentage (*e.g.*, 30 or 50 percent) to simplify matters.

Two commenters thought that, as comments had suggested about regular dealer evaluations, decisions about the validity of distributorship agreements should be made in advance, through the certification process. Monitoring would be very hard to accomplish, requiring intensive work. Recipients should have the flexibility to determine how much credit to permit for drop-shipped goods, depending on the circumstances of individual contracts, a comment said. Some commenters were concerned that the 40 percent number was arbitrary, lacking a basis in evidence.

Another theme expressed by some commenters was that drop shipping was a normal industry practice for building and construction materials, particularly in this day of just-in-time logistics. Firms that do business this way, assuming that they insure the goods and bear the risk of loss, should not be penalized by the lower 40 percent level for credit. If a firm delivers or insures the material, commenters of this view said, it should count at the 60 percent level, even if drop shipped. The proposal could make it difficult for small firms to make a profit, another said. This is particularly true, one commenter said, for made-to-order items that are not typically kept in warehouses (*e.g.*, rail ties and switches). The proposal could place DBE shippers

at a competitive disadvantage compared to non-DBEs.

On the other hand, a few comments opposed any credit for drop shipping distributors, beyond fees and commissions, saying that regular dealers add more value and have more overhead costs. Moreover, a comment said, the proposal opens opportunities for fraud. Others said that distributorship was not a valid business model. In a similar vein, a few commenters suggested that a lower percentage (*e.g.*, 20 or 30 percent) should count. Another said that drop shipping credit should be permitted only for large quantities or oversized items that are difficult to store in a warehouse.

A few comments did support the proposal, though with the caveats that more guidance from DOT would be needed about what a valid distributorship agreement should look like, and that close scrutiny of such agreements by recipients would be necessary to make the concept work.

Negotiating Price of Supplies

Relatively few comments addressed the proposal to continue in effect the current requirement that, to get credit, a DBE supplier must negotiate the price of supplies, determine quality and quantity, order the materials, and pay for the materials itself. Some said that there are situations (*e.g.*, airport lighting) when the price of items cannot be negotiated. An equal number of comments supported the proposal. One of them added that a DBE should have to perform, and not outsource, all of the four required functions; otherwise, there would be opportunities for fraud and abuse. In any case, another said, recipients had to enforce these requirements strictly.

Definition of Manufacturer

A majority of the 13 comments that addressed this proposal supported it, though some asked for clarification of what constituted a "minor" modification of materials. Commenters asked whether activities like adding logos to uniforms, cement mixing trucks, coating rebar, or cutting materials to a specific size would count as manufacturing or minor modifications. Some comments also suggested using SBA regulations in 13 CFR 121.406 to define what constitutes a manufacturer. One comment asked that manufacturers not be subject to the proposed 50 percent limit on DBE credit for supplies provided to a project.

Other Comments

One comment said that there should be a special rule for counting disposal of hazardous materials, such as a percentage of the disposal costs. Two others said that DBE credit should be allowed for at least some of the work that a DBE subcontracts to a non-DBE, at least as long as the non-DBE is not an affiliate. Another said that brokers had a legitimate role, asking that the rule define their proper role.

DOT Response

50 Percent Limit on Credit Toward Goals for Use of Suppliers

In proposing the 50 percent limit on the counting of DBE participation by suppliers toward goals, the Department was responding to the perception of many DBEs, as well the experience of DOT staff, that prime contractors find it easier to meet DBE contract goals through obtaining supplies and materials from DBE suppliers than through using DBE subcontractors who work on projects on the ground. For example, on a highway project it can be simpler for a prime contractor to buy paving materials through a DBE supplier than to engage a DBE to install the materials. This has given rise to the concern that DBE subcontractors can be frozen out of opportunities, since goals may be able to be met without them. By limiting the portion of the goal that could be met by using suppliers, the Department hoped to keep open a significant percentage of work that would then be available for DBE subcontractors.

Nevertheless, the Department has been persuaded by the comments that this provision should not be included in the final rule. Comment periods on proposed rules are not simply votes, and in making this decision the Department is not simply responding to the numbers of comments opposing the proposal. Rather, we believe that commenters made reasonable points about the basis and potential effects of the proposal.

We find plausible the concern that if suppliers could not comprise more than 50 percent of a goal, many contract goals might not be met, resulting in higher numbers of goal attainment through documented good faith efforts instead of sufficient DBE subcontracting; this may have possible implications for overall goal attainment. This concern appears particularly credible with respect to contracts that emphasize bulk supplies like asphalt or petroleum products, or projects that may be located in parts of States or work scopes in which few DBE subcontractors may be available.

The proposed exception mechanism, as well as some of the commenters' suggestions for modifications that could be added to a supplier limit regime to provide greater flexibility, are well intended, but could easily lead to greater complexity and inconsistency in program administration. In any event, because we are not adopting the 50 percent limit provision, they are unnecessary.

Our underlying concern about ensuring that the program does not have inadvertent adverse effects on DBE subcontractors is addressed through other changes to the present rule that are adopted in this final rule. The definition of regular dealer is being strengthened to emphasize the necessity of regular dealers having facilities, inventories, and/or distribution/delivery equipment in order for 60 percent of the value of their supplies to be counted toward goals.

The new distributor definition limits to 40 percent the credit that can be obtained for many drop-shipped goods, provided the DBE bears risk for loss or damage of such items. The credit for broker and expediter participation continues to be limited to fees or commissions. These provisions should reduce the incentives and opportunities for prime contractors to over-rely on suppliers to meet goals to the detriment of other DBEs. We expect recipients to enforce these provisions rigorously and to take care, at the pre-award stage, to ensure that bidders on prime contractors do not obtain credit beyond what the provisions permit.

The Department also understands commenters' point that creating a provision that would directly benefit one category of DBEs at the expense of another category does risk being arbitrary. It is likewise the case that DBE suppliers, particularly those that are regular dealers, have a reliance interest in retaining full access to the program, and may often have made considerable investments to establish their position in the program. To limit their business opportunities could well cause them economic harm, as comments asserted, based solely on the type of work they do.

The risk of arbitrariness increases absent quantitative information to support an impression—even one based on considerable anecdotal experience—that there is a problem that such a regulatory provision is needed to solve. The Department recognizes that it does not collect information from recipients about the type of work DBEs perform on contracts. The Department proposed in the NPRM the ability to collect that information as part of recipient's required submission of the Uniform Report of DBE Awards, Commitments, and Payments. It may be that reliable data showing that DBE subcontractors

are effectively shut out of opportunities to work on projects by prime contractors' over-reliance on suppliers to meet goals could make a "market failure" case for imposing a provision like that of the NPRM; however, without that information at the present time, the Department is declining to change the rule at this time.

Going forward, the Department will have recipient data from the updated Uniform Report of DBE Awards, Commitments and Payments regarding not only the number and dollar amount of DBEs that participated on federally assisted contracts that we currently collect, but information on the type of work performed by those DBEs as well. Depending on what such data shows, the Department may reconsider whether a limit on goal credit for DBE suppliers is appropriate.

Commercially Useful Function and Regular Dealer Issues

Finding a means of limiting potential over-crediting of suppliers, while not unreasonably limiting their participation, is an important step toward creating a well-balanced DBE program.

We believe that we can achieve this objective by having recipients pay close attention, at the pre-award stage, to how suppliers proposed to be used by a prime contract bidder can go far to avoiding over-crediting in a way well-suited to the circumstances of a particular contract.

Recipients are already required to carefully examine, before contract award, whether the bidder has committed to a sufficient number of DBEs in sufficient amounts to meet the contract goal or has submitted adequate documentation of good faith efforts. Often, however, recipients assume that DBEs committed as suppliers are entitled to 60 percent of the cost of supplies when evaluating pre-award goal attainment. The final rule requires recipients to look in detail at how a DBE supplier would provide supplies and materials to the contract to provide more certainty whether the contractor would be entitled to count 60 percent of the cost of supplies toward goal attainment during contract performance. The recipient would do so through asking a series of questions with respect to the role of a proposed DBE supplier. In so doing, it would not determine whether a DBE was, in some intrinsic sense, a "regular dealer." The inquiry would not focus on the nature of the firm, but on what the firm proposed to do on a particular contract and how it proposed to carry out its responsibilities.

The Department determined that the proposed change to § 26.55 with respect to requiring bidders submitting commitments to DBE suppliers to include is better placed in § 26.53(c)(1). Thus, § 26.53(c)(1) of the final rule describes the nature of the questions and affirmations a proposed DBE supplier will provide, and the prime bidder will include in the pre-award process for each contract. This information helps the recipient to determine if the firm should be awarded 60 or 40 percent credit for supplies. For example, the recipient would ask, whether on a particular contract, the DBE supplier will be using its own distribution equipment, whether it maintain a warehouse or other facility, whether it engages in the sale of the sort of goods involved in the contract to the public on a regular basis, etc. We will also make available a form tool on the Departmental Office of Civil Rights' website.

Drop Shipping and Distributorship Issues

In an effort to address the fact that drop-shipping is a common way of doing business, we proposed that drop-shipping by a DBE that has a distributorship agreement with a manufacturer would be able to count 40 percent of the value of materials toward goals. The distributorship agreement concept troubled many commenters, both from the viewpoint of how recipients would decide if an agreement was legitimate and the fact that many, especially smaller, DBE suppliers might not have the resources to enter such an agreement. Commenters said that if a DBE supplier took enough risk, it should be entitled to credit regardless of whether it was part of a formal relationship of this kind with a manufacturer.

The Department will respond to these comments by eliminating the distributorship agreement proposal. Instead, as part of the pre-award review for firms proposing to drop-ship items, the recipient would determine whether the proposed supplier demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the DBE distributor. Again, the Department's form tool will have questions to help recipients make this determination. If the proposed drop-shipper met these criteria, it would receive 40 percent credit for the cost of the items. We anticipate that many bulk material items may well fall into this category, if all the requirements are met.

The current rule's provisions for 100 percent credit for materials provided by a DBE manufacturer, and for credit limited to the fees or commissions for firms who did not meet the criteria for 60 or 40 percent credit, would remain the same. The Department believes that detailed enforcement of all the supplier provisions discussed above would be sufficient to prevent or limit over-crediting of suppliers, to the detriment of other kinds of DBEs, to make the proposed 50 percent cap on supplier credit toward goals unnecessary, while respecting the arrangements that may be appropriate to the wide variety of contracts in DOT-assisted programs. To make this approach work, recipients would have to ensure that bidders and proposed DBE suppliers specify and certify the details of the work that would be performed and how it will be performed, so that post-award monitoring could ensure that commitments were being met.

Other Matters

The Department adopts the NPRM provisions concerning the definition of manufacturers and the responsibility of DBEs for negotiations concerning price without change. In regard to a commenter's view that credit be allowed for work performed by a non-DBE subcontractor, such an approach is not aligned with the intent of the program. The comments regarding the disposal of hazardous materials and brokers were not proposed in the NPRM and are therefore outside the scope of this final rule. DOCR appreciates the commenters' input and will consider any information or recommendations the commenters may have on these issues.

Subpart D—Certification Standards

12. General Certification Rules (§ 26.63)

NPRM

Proposed § 26.63 of the NPRM was largely a redesignation of the material previously found in § 26.73. The one substantive change of note would be that, in place of current § 26.73(e), concerning DBEs owned by holding or parent companies, the NPRM would substitute a simpler provision saying that there could be one level of ownership above the company seeking certification. That is, there could be a subsidiary and its parent company, but there could not be a "grandparent" company above both of them. Eligibility in such a situation assumes cumulative 51 percent ownership of the subsidiary company and that other eligibility

requirements were met. The proposal includes several examples of arrangements that would or would not be eligible under the revised rule.

Comments

There were 10 comments on this proposal; all but one favored it. The unfavorable comment expressed concern that the proposal could compromise the independence of the subsidiary firm.

Several commenters addressed the regulation's approach to certification in general. For example, some commenters asked the Department to simplify the certification process, which they characterized as a lengthy, costly, and paperwork intensive process that was an obstacle and deterrent to firms seeking to enter the program.

Other comments said that the annual submissions of a DOE and financial data were unnecessarily burdensome on both DBEs and certifiers. It would be better to require this submission only every two or three years. Moreover, in the context of the interstate certification proposal, the burden on firms would be multiplied if they had to submit a DOE to every State in which they had become certified.

Two comments suggested having independent third-party administrators do certification reviews instead of recipient personnel. Another commenter suggested better education and training about Federal and State program rules (*e.g.*, requirements for continuing education). Another commenter recommended and that the Department develop a code of conduct for certifiers.

DOT Response

The final rule adopts NPRM's proposal to limit DBEs to having one level of ownership above an operating DBE company. That is, there could be a "parent" company but not a "grandparent" company. The rule does not specify the type of business entity involved in the level above the operating company, as long as it permitted the operating company's ownership to meet certification requirements.

The final rule also retains the requirement for the annual DOE for all companies. A firm that is certified in multiple States must submit DOEs to all States in which it was certified on the anniversary date of its certification by the jurisdiction of original certification (JOC).

Given the frequent turnover of certifier personnel, and the errors in the certification process that too often come to light in the certification appeal process, it is clear that training is key to smooth operation of the certification function. This is especially true when, following the issuance of this final rule, new and changed certification standards go into effect. While we are not mandating a specific number of "continuing certification hours" for staff, or setting forth a standard curriculum at this time, the Department intends to make comprehensive training opportunities available to certifiers, which we expect all certifiers to take advantage of.

13. Business Size (§§ 26.65, 23.33)

NPRM

Only small businesses may participate in the DBE program. The business size limit for applicant and certified DBEs seeking to participate in FHWA and FTA assisted contracts is adjusted for inflation per the BIL. As of this final rule, this statutory gross receipts cap is $30.40 million. A DBE firm must still meet the size standard(s) appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts. These standards vary by industry according to the NAICS code(s) defined by the Small Business Administration (SBA).

The adjusted gross receipts cap does not apply to determining a firm's eligibility for participation in FAA assisted projects. This is due to a recent statutory change that eliminated this requirement for FAA assisted contracts. This means that the Department does not have the discretion to change these size standards through administrative action. DBE firms working on FAA assisted projects must meet the size standard(s) appropriate to the type(s) of work based solely on the applicable NAICS code(s) size standard(s). UCP directories must clearly indicate which firms are only eligible for counting on FAA assisted work. (There are separate size standards for the part 23 ACDBE program that are not affected by recent changes in SBA regulations pursuant to the Small Business Runway Extension Act of 2018 (Pub. L. 115–324).)

The NPRM proposed to conform the Department's rule so that a firm's compliance with NAICS code size standards would be based on its average annual gross receipts over the firm's previous five fiscal years. However, under § 1101(e)(2)(A)(i) and (ii) of the Bipartisan Infrastructure Law (BIL), only the firm's gross receipts for the most recent three fiscal years may be submitted to determine whether it meets the small business statutory size cap.

The NPRM also addressed size provisions in the ACDBE program. There would be minor changes to part 23 and a reference to pay telephone operators would be removed. The NPRM would also remove a requirement for adjusting the ACDBE size standards every two years; the preamble asked whether any change was needed at this time and, if so, what measure of inflation the Department should use. The preamble expressed concern that raising the standards could harm the chances of smaller firms trying to enter the program. It also asked whether industry-specific standards, like that for car rentals, are still needed. Finally, the NPRM added a clarification that an ACDBE that is a party to a joint venture must include in its gross receipts its proportional share of receipts generated by the joint venture.

Comments

Part 26 Standards

A significant number of commenters, from both DBEs and recipients, supported the proposal to go to a five-year calculation for NAICS code size standard compliance, though a couple of commenters would have preferred a shorter (3-year) or longer (7-year) calculation. A number of commenters, however, said that the NAICS codes limits and/or statutory size cap were themselves too low, given inflation that has particularly affected commodity prices. Several commenters advocated raising the part 26 limits to the level of the part 23 standards, or to the $39.5 million level applicable to many types of business under SBA regulations.

A few commenters recommended regional variations in the size standards. For example, in high-cost construction areas, like New York or San Francisco, size standards could be adjusted along a scale tuned to the prevailing wage rates in those areas. One commenter suggested that proceeds from COVID–19 pandemic relief legislation, like the Paycheck Protection Program, should not be counted toward a firm's gross receipts calculation. A few comments also suggested using net, rather than gross, receipts to calculate whether a firm meets size standards. One commenter said pass-through payments to subcontractors in particular should not be part of the calculation.

A smaller number of commenters stated that the regulation should eliminate size standards because they unfairly limit DBEs' growth. Several commenters recommended a mechanism that would allow mid-size DBEs to remain certified for a limited time after exceeding the size standards so that they should be able to continue their growth and success. For example,

DBE credit for using a firm could be progressively reduced over a period of three years (*i.e.*, 75 percent in year 1, 50 percent in year 2, 25 percent in year 3) after it first exceeded the size limits for full DBE participation.

With respect to adjustments, commenters generally agreed with the proposal, though some pointed out that adjustment dates had been missed in the past, that stakeholders should be consulted on the subject, that industry-specific data should be used, that White-owned businesses should be omitted from the calculation, or that inflation should be used as the measure for adjustments.

Part 23 Standards

Two commenters, both from the same urban area, asked to retain a standard for pay telephone operators, lest existing contracts with such operators be adversely affected. Those commenters, who addressed the proposal that an ACDBE that is a party to a joint venture must include in its gross receipts its proportional share of receipts generated by the joint venture, approved it.

DOT Response

The Department adopts the NPRM's proposals on these issues. While we understand the objectives that supporters of regional or local standards seek to achieve, we believe that in a national program—especially one in which interstate certification reciprocity will become a reality—a single national standard is appropriate. We also do not believe that a variety of different standards would be consistent with the program's governing statutes. For example, the Department is now working under a statutory requirement for five-year averaging for NAICS code gross receipts size standard purposes, such that a different period—three or seven years—is not something we have the statutory authority to authorize.

With respect to size calculations, the final rule clarifies that certifiers should count on a cash basis, regardless of a firm's choice of accounting method. This is intended to level the accounting playing field among firms.

For part 23, because there are still some airports that have pay telephones, the final rule retains the size standard for existing pay telephone concessionaires. Similarly, the final rule retains the proposed provision that joint venture receipts be included in the ACDBE size calculation in proportion to the ACDBE's demonstrated ownership interests in the joint venture, lest the size of such firms be either overstated or understated.

14. Personal Net Worth (§ 26.68)

NPRM

The NPRM's discussion of proposed changes to the personal net worth (PNW) standard was the most complex portion of its preamble. The discussion noted the reason for having a PNW standard, namely that in its absence persons who are members of presumptively eligible groups but who in fact are not economically disadvantaged could benefit from the DBE program, undermining both the program's ability to assist persons who are truly disadvantaged and the narrow tailoring that is vital to the program's continued legal validity.

The preamble also noted the balancing act that the Department faces in setting a PNW cap. If set too high, persons who are not truly disadvantaged can participate. If set too low, socially and economically disadvantaged owners (SEDOs) whose firms have grown successful can be prematurely excluded.

PNW Cap

Since 2011, the PNW cap has been set at $1.32 million, which had been adjusted upward for inflation from the $750,000 level in its 1989 base year. As explained in the NPRM preamble, 87 FR 43636–38 (July 21, 2022), rather than make a direct inflationary adjustment, based on a measure like the Consumer Price Index (CPI), the Department employed a complex analysis based on the Federal Reserve Board's 2019 Survey of Consumer Finances (SCF), a triennial cross-sectional survey of U.S. families' balance sheets, pensions, income and demographic characteristics. The methodology accounts for differences among racial and ethnic groups (*e.g.*, White, non-Hispanic households have net worth of six to seven times that of Hispanic or Black households).

Specifically, using SCF data on household assets and liabilities allowed the Department to construct a proxy measure of PNW that is close to the how PNW is currently defined by the program but also allows consideration of the impact of removing retirement accounts from the definition of PNW accounts for the relative wealth of potential DBEs by comparing their financial position to other self-employed business owners, rather than the general public. After constructing the proxy measure of the revised PNW definition that removes retirement accounts using the 2019 SCF, the Department constructed a distribution of PNW across white, male, non-Hispanic self-employed business owners. See Table 2 of NPRM preamble. There is an apparent breakpoint between the 80th and 90th percentiles. As described in the discussion of Table 2 of the NPRM preamble, "[t]he 90th percentile of PNW for male, White, Non-Hispanic self-employed business owners is roughly $1.60 million, which is $1.04 million higher than the 80th percentile of $0.56 million, which is in turn just $0.29 million greater than the 70th percentile." 87 FR at 43638. Therefore, there is a substantial jump in PNW between the 80th and 90th percentiles, making it an intuitive breakpoint between wealth groups. A 90th percentile cutoff is commonly used to describe the most wealthy group and to compare the economic position of the most wealthy group to the rest of the population.[3]

Looking to the percentile distribution of personal net worth for male, White, non-Hispanic business owners, the Department calculated that the 90th percentile PNW for persons in this category was approximately $1.60 million (in 2019 dollars). Based on this calculation, the NPRM proposed that $1.60 million be the new PNW cap for SEDOs, meaning that they could continue in the DBE program if their PNW was at the same level as a 90th percentile White, non-Hispanic, male business owner. This would mean, the preamble explained, that 92.6 percent of self-employed business owners who are women, Hispanic, or non-White would fit under the revised cap.

The NPRM proposed using changes in aggregate household net worth data published by the Federal Reserve to adjust the PNW amount in future years. Details of this approach are found at 87 FR 43639. We would make the first adjustment 180 days after the effective date of the final rule and make further adjustments at five-year intervals. The NPRM proposed that we make only upward adjustments.

[3] See Smith, Zidar, and Zwick, "Top Wealth in America: New Estimates under Heterogeneous Returns," 138 Quarterly Journal of Economics 515 (2023) available at *https://economics.princeton.edu/working-papers/top-wealth-in-america-new-estimates-under-heterogenous-returns/*; Kuhn, Schularick, and Steins, "Income and Wealth Inequality in America," Center for Economic and Policy Research (Aug. 9, 2017) available at *https://www.wiwi.hu-berlin.de/de/professuren/vwl/wtm2/seminar-schumpeter/hscf_cepr.pdf*; Bricker, Goodman, Moore and Volz, "Wealth and Income Concentration in the SCF: 1989–2019" in FEDS Notes (Sept. 28, 2020) available at *https://www.federalreserve.gov/econres/notes/feds-notes/wealth-and-income-concentration-in-the-scf-20200928.htm*; Kochar and Cilluffo, "Income Inequality in the U.S. Is Rising Most Rapidly Among Asians," Pew Research Center (July 12, 2018) available at *https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/*.

Reporting

The NPRM proposed several changes affecting asset inclusion and valuation in reporting PNW. Under the proposal:

- The SEDO reports asset values without regard to community property, equitable distribution, or similar State laws. In general, title determines ownership.
- The SEDO reports assets held in qualified retirement accounts at full value but excludes them in full from the calculation of PNW.
- The SEDO may not report loans taken against retirement assets as liabilities, regardless of title.
- The SEDO continues to exclude her share of the equity in the primary residence although in some cases that share may change.
- The SEDO reports 100 percent of the value of household contents unless she and a spouse or domestic partner cohabit, in which case the SEDO reports 50 percent of total value. Total value is deemed to be a least the amount for which contents, including fixtures and appurtenances, are insured,
- The SEDO reports motor vehicle values in the proportion to which she holds title. The Department requested comments concerning how the SEDO should report, if at all, the value of leased vehicles.
- The SEDO reports at full value assets she transferred to certain related parties during the two years preceding an application for certification and in any single year following a declaration of eligibility. The NPRM clarifies which related-party transfers trigger the inclusion and adds a de minimis exception. It further clarifies which "personal expenditures" the SEDO may exclude.
- A natural person's signatory (not guarantor) status on a debt instrument generally determines ownership of the liability. In cases in which another party consistently makes payments on the debt, however, the certifier may determine, as it may under the current rule, that for eligibility purposes the debt does not belong to the formal obligor.

Comments

PNW Cap

Over 50 comments, not only from DBEs but recipients and other non-DBE commenters as well, supported the proposed $1.60 million PNW limit. The basic reason for their support was that the adjustment would increase opportunities for DBEs and avoid penalizing SEDOs for success. One comment suggested that, following SBA's practice, there should be separate entry and retention PNW limits for firms.

Nearly as many comments (including some of the above) said that $1.60 million was still too low a number. One common reason for this view was that the $1.60 million adjustment, based as it was on 2019 dollars, failed to keep pace with recent higher rates of inflation. Even if the proposed methodology were used, the final rule should update the number to be consistent with more recent data, they said. A commenter argued that a higher PNW number was needed to allow DBEs to compete in markets dominated by large corporations. Another noted that data from the Federal Reserve Bank of New York supported the proposition that Black and Hispanic Americans took a bigger hit from impacts on the economy of the COVID–19 pandemic and recent inflation than other persons, suggesting that this be considered in setting PNW numbers.

Other commenters' suggestions included $1.84 million (based on CPI inflation since 1989), $2 million, $2.5 or 2.6 million, $3 million, $5 million, or even $20 million. A few commenters referred to New York State's $15 million cap for its State minority and women business (M/WBE) programs. Several DBE commenters went further, advocating for the elimination of a PNW cap altogether, saying that it was "anti-entrepreneurial" and too limiting on firms' growth.

Using the SCF as the basis for the adjustment was problematic, a few comments said (*e.g.*, because it uses data from the male in an opposite-sex couple, the older person in a same-sex couple, or an individual, making it difficult to use the SCF to determine PNW for DBEs).

A significant number of comments advocated taking regional, or even local, differences in the cost of living and the cost of doing business into account in setting PNW limits, rather than establishing a one-size-fits-all national number. For example, one comment said, the cost of living in the New York metropolitan area was 69 percent higher than the national average. One of these made an analogy to the "locality adjustments" made in the salaries of Federal employees. Differences in the type of business involved (*e.g.*, have higher PNWs for types of firms, like heavy construction companies or ACDBEs) should also be taken into account.

A small number of commenters dissented from the concept of increasing the PNW number. Some said that even someone whose PNW was $1.32 million, let alone $1.60 million, should not truly be regarded as economically disadvantaged. The main reason commenters opposed the increase is that it allowed established DBEs who already get significant amounts of work to remain in the program, limiting opportunities for smaller, newer firms, especially those operated by Black or Hispanic SEDOs.

Two recipients said that they knew of few DBEs that became ineligible for their SEDOs' excess PNW, while a DBE association said that increasing the limit could risk narrow-tailoring challenges to the program. A few comments questioned the economic rationale for the NPRM's calculation or found it confusing.

Commenters generally agreed with our proposal to make future adjustments without formal rule making. While some commenters endorsed the proposed five-year adjustment intervals, others advocated more-frequent adjustments.

Several commenters questioned or opposed the 90th percentile benchmark for the adjustment. Some commenters thought that this choice was arbitrary or confusing, with no compelling rationale. Other commenters said the 90 percent level is unfair because DBEs must compete with extremely wealthy and powerful non-DBEs, and that using 95 percent might be better.

Taking the opposite point of view, some commenters thought using the 90th percentile standard could be over-inclusive, letting too-wealthy individuals into the program, undermining the concept of economic disadvantage, and risking challenges to the program based on a lack of narrow tailoring. One commenter questioned the point of having a PNW cap at all, considering the commenter's assertion that more than 90 percent of small business owners have a PNW below the current cap, and the NPRM would increase the cap and exclude retirement assets.

Reporting

Retirement assets drew well over 50 comments, with a considerably wider divergence of opinion than on the PNW number itself. Supporters of the proposal outnumbered opponents by about two to one. Supporters were primarily DBEs but included some recipients and non-DBE groups as well. Opponents were primarily recipients.

Comments supporting the proposal generally did so for the reasons stated in the NPRM. It would make SEDOs' lives fairer and the program easier to deal with, one of them said.

The most significant reason for opposition to the proposal was a concern that it would be subject to

manipulation and allow wealthier SEDOs to shelter significant assets, perhaps in the millions of dollars in some cases, from the PNW calculation. This would exacerbate inequality among DBEs, disfavoring SEDOs of smaller, newer DBEs and implicitly favoring White females over minority SEDOs. The proposal would likely benefit only a few existing firms, mostly those who already get a large portion of DBE participation and open the door to firms that are not truly disadvantaged, resulting in an uneven playing field among DBEs, one recipient said.

The proposal could have unintended consequences, according to some comments, such as incentivizing transfers of assets to retirement accounts, resulting in unrealistically low PNW asset totals. In addition, comments said, the proposal could disfavor individuals who invested in real property, as distinct from financial instruments, as a means of retirement planning. Retirement savings are a part of someone's wealth, after all, another commenter noted, and should be treated as such. Excluding them dilutes the notion of economic disadvantage and could facilitate the participation in the program of people who are not genuinely economically disadvantaged. Being able to put significant sums into retirement accounts itself suggests a level of affluence that may indicate that someone is not economically disadvantaged.

Some of the opponents of the proposal, and other commenters, suggested modifications of the proposal to deal with what they saw as its problematic aspects. One suggested a $500,000 reduction in excluded retirement assets, with a 10 percent reduction of the remainder. Other comments recommended that only a portion of retirement assets be excluded, such as 10, 20, 50, or 75 percent. Another comment wanted more guidance on what constituted a retirement asset for purposes of the provision.

Commenters addressed several of the NPRM's proposed provisions regarding the SEDO's reporting of assets and liabilities for PNW purposes.

The most contentious issue in this PNW component was the proposal that SEDOs report assets without regard to State community property, equitable distribution, or similar laws or principles. The opinion among commenters was evenly divided on the subject. Supporters generally agreed with the NPRM's rationale for the proposal, some specifically citing the desirability of avoiding inconsistency among States.

A number of the opponents of the proposal were concerned that removing consideration of marital and community property laws could disproportionately favor wealthier SEDOs over less affluent SEDOs, and White female SEDOs over minority SEDOs. Opponents maintained that the proposed rule would allow a SEDO access to a spouse's wealth while artificially reducing her own reportable assets. Excluding these laws from consideration could cause problems for some States in administering the program, others said, and it would be better to retain the current rule.

If household goods are divided equally between spouses or domestic partners, a number of others asked, why should their house itself not be treated the same way? One commenter asked how the Department would treat a house that was titled in a revocable trust (which the commenter said was a common estate planning technique). The commenter suggested that it be counted in the owner's PNW calculation if the SEDO was a beneficiary of the trust for purposes of the house.

The commenters who addressed the ownership of household goods expressed a variety of concerns. Two opposed counting goods at all because doing so, or keeping the information up to date, was too complex and burdensome for applicants (*e.g.*, figuring in depreciation). Another idea was to exclude personal property up to a certain dollar limit (*e.g.*, $250,000). One said that insurance values tend to be understated, and another stated that insurance companies tend to value household goods at a certain percentage of the value of the home itself, a figure which the homeowner should be able to contest in the PNW process. Requiring a copy of the insurance policy for verification would be a good idea, two comments suggested.

Several comments suggested that leased vehicles should be treated neither as a liability or an asset, though a few other commenters thought they should be one or the other. Other comments expressed concern that vehicles, including valuable ones, could be hidden from the PNW calculation by being placed in the name of an applicant's non-disadvantaged spouse. One such comment suggested that a vehicle in a spouse's name should always be counted as part of the SEDO's assets. Two others questioned why a vehicle would be placed solely in the name of its title holder, while other personal property, like household goods, would be divided 50/50 between an applicant and a non-disadvantaged spouse.

One commenter expressed concern that attributing a debt to the signatory on a debt instrument could serve as a way for a wealthy applicant to inflate his liabilities for PNW purposes. Another asked whether a business going into default should be counted as a liability if the owner had guaranteed the loan personally, while a third asked for clarification that a firm's debt, as opposed to a personal debt, should not count as a liability for PNW purposes. Another question concerned how the rule would treat a debt entered into by a SEDO in his or her personal capacity but was being paid off by the firm. One commenter suggested that in connection with the proposal not to consider State marital property laws, having the signatory on the debt instrument determine the ownership of the liability would be a loophole that would favor applicants with non-SED spouses.

Other Comments

A number of comments propose alternative approaches. One commenter advocated not counting any of a spouse's assets for PNW purposes; another took the opposite view, suggesting that all of a spouse's assets be counted. Another said that in addition to excluding contingent liabilities, contingent assets should not be counted. Exclusions should include non-revenue producing property (*e.g.*, timeshares, vacant land) and the cash surrender value life of insurance policies should not be counted as an asset, a commenter asserted. Another comment suggested excluding encumbered assets from consideration.

One commenter suggested that the rule define the time period in which direct payments for health care, education, or celebration of significant family life events should be counted. A DBE association said, with respect to the proposed rule limiting transfers to family members or related entities, there should be an exception for transfers that were irrevocable or were pursuant to a bona fide tax planning, estate planning, family support, or similar strategy, perhaps involving a third-party professional's certification that the transfer was part of such a plan.

DOT Response

The PNW cap is an important feature, among the other eligibility criteria and standards set for the program, that helps ensure that the DBE program remains narrowly tailored. The cap prevents people who are too wealthy to be reasonably considered economically disadvantaged from participating in the program.

The PNW Cap

As explained in the NPRM, and in this final rule, the Department undertook a fresh, comprehensive approach to tailor an original analysis of wealth based on quantitative analysis. The approach in this rulemaking uses SCF data on household assets and liabilities to allow us to construct a proxy measure of PNW that is close to the how PNW is currently defined by the program and also allows us to consider the impact of removing retirement accounts from the definition of PNW. Further, it allows us to allow for the *relative* wealth of potential DBEs—by comparing their financial position to other self-employed business owners, rather than the general public. After constructing the proxy measure of the revised PNW definition that removes retirement accounts using the 2019 SCF, we then constructed a distribution of PNW across white, male, non-Hispanic self-employed business owners. See Table 2 of NPRM preamble.

In arriving at the $1.60 million proposal in the NPRM, the Department used data from the Survey of Consumer Finances (SCF), a survey conducted every three years by the Federal Reserve and U.S. Department of the Treasury. This data was specifically analyzed for business owners by race and gender to reach the proposed $1.60 million PNW threshold. The NPRM proposed to adjust that figure subsequently based on the growth in the Federal Reserve measure of total household net worth from "Financial Accounts of the United States: Balance Sheet of Households and Nonprofit Organizations Table Z.1" using 2019 as the base year.

Determining a threshold beyond which an individual is considered to have accumulated wealth too substantial to need the program's assistance is an exercise in judgment. Nonetheless, as explained in the NPRM and in this final rule, using the 90th percentile to identify a high level of wealth or income is a common convention used to describe economic inequality. Choosing a substantially lower threshold, such as the 80th percentile, would result in a cap that is lower than the current cap and would act to remove businesses that are currently participating in the DBE and ACDBE programs which would be an undesirable outcome for the DBE and ACDBE programs. Choosing a substantially higher threshold would risk the possibility of that the program would no longer be narrowly tailored. However, we deem the 90th percentile appropriate because based on a review of the 2019 SCF data, the mean net worth of White, Non-Hispanic households is roughly 6 to 7 times higher than for Black, Non-Hispanic and Hispanic households. Even at the highest wealth levels, the disparity exists: the wealth of the top 10 percent of White households exceeds the wealth of the top 10 percent of Black, Non-Hispanic and Hispanic households by a factor of 5.

Data from the 2019 SCF suggests that between 88.7 and 90.8 percent of self-employed business owners who are presumed to be socially and economically disadvantaged (*i.e.*, individuals who are women, Hispanic, or non-White) have PNW lower than the current PNW cap as PNW is currently defined.[4] Under the proposed cap of $1.60 million, 92.6 percent of that group would fall under the cap, an increase of 1.8 to 3.9 percentage points.

The final rule adopts a higher number than that of the proposal, not only in response to comments suggesting an increase in the cap, but also because we have modified the methodology used to establish and later adjust the PNW cap. These modifications take into account the inflation that has affected the financial situation of all Americans not only since the publication of the NPRM, but more importantly since the 2019 data on which the NPRM's calculations were based. These modifications also rely on data more recent than the data on which we based the NPRM proposal. The data, as cited in the NPRM, are a combination of households and nonprofit organizations when really only households should be considered. Additionally, by using solely the growth in net worth we are not accounting for the normal population growth. Accounting for population growth is necessary to obtain a figure that represents the average wealth per household rather than an aggregate. Consequently, for purposes of the final rule, the Department has made two adjustments. The first adjustment is a change in the dataset to the "Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h)," effectively removing nonprofit organizations from the net worth calculation. The second adjustment is to normalize household net worth by the number of households as calculated by the Census (Families and Households, Total Households [TTLHH].[5])

With these adjustments and using 2022 data rounded to the nearest thousand, we have set the current PNW limit at $2,047,000. This takes inflation into account and, as in the past, includes in the calculation the most common forms of wealth (*e.g.*, an owner's personal and shared assets, real estate and trust assets, cash and cash on hand, the value of outside businesses, life insurance policies). We have determined that rounding to the nearest thousand is more appropriate than rounding to the nearest ten-thousand (as we do for the statutory gross receipts cap in § 26.65(b)) because of the relative difference between these two caps (the current gross receipts cap is $30.40 million, effective March 1, 2023). It also takes into account the fact that the population of business owners has greater net worth than the overall population. PNW is now, and always has been, a relative concept: how does the wealth of business owners in presumptively economically disadvantaged groups relate to that of business owners generally? With this in mind, we believe that this number effectively meets the objectives of allowing businesses to grow; establishing a PNW limit based on current and relevant data; and ensuring that the program remains narrowly tailored by not creating eligibility criteria that are overbroad.

The Department will use the data discussed above in connection with establishing the current PNW to make future adjustments to the PNW cap, which will be made every three years. We do not believe this will result in a substantially higher amount based on our assessment of the likelihood that the datasets described above will produce large jumps in net worth. An adjustment on a more frequent basis, though favored by some commenters, will not be made because of the issues it may cause in the certification and decertification processes. The Department will post the adjustments on the Departmental Office of Civil Rights' web page. Each such adjustment will become the currently applicable PNW cap for purposes of this regulation.

Reporting

The Department adopts as final the general rule that community property,

[4] The range on this estimate is the result of lack of information in the SCF on how to appropriately adjust the current balances of retirement accounts for early withdrawal penalties and taxes. The lower end of the estimated range (88.7 percent) assumes that the entire balance of retirement accounts is counted toward the PNW cap while the upper end (90.8 percent) assumes that no portion of retirement account balances are counted toward the PNW cap. The Department believes that the true value is likely closer to 88.7 percent than 90.8 percent because the deduction for early withdrawal penalties and taxes is likely to be less than 50 percent, but a more precise estimate is not possible with the available information.

[5] *https://www.census.gov/topics/families/families-and-households.html.*

equitable distribution, and similar laws or principles have no effect on the SEDO's PNW reporting. In most cases, the new provisions either produce the same result or work in the firm's favor. The Program and its stakeholders will benefit from burden reduction and more-consistent, predictable, equitable results.

The final rule adopts the NPRM's proposal to exclude retirement assets in full. We believe that saving for retirement is crucial to wealth creation. We do not think it is appropriate to make it harder for eligible firms to become and remain certified, simply because their SEDOs are planning for their retirement.

We note this rationale mirrors SBA's 8(a) program, which eliminated the counting of these assets for PNW purposes in 2020. (91 FR 27650 (May 11, 2020)). As SBA opined, this accords with the valuable public policy of incentivizing, rather than punishing, saving for retirement; and expands the pool of potential eligible participants "because retirement-age small business owners will no longer be ineligible solely due to their retirement savings." (*Id.* at 27651).

We understand the concern some commenters expressed that wealthier SEDOs could stay in the program longer by sequestering assets in retirement accounts, to the detriment of smaller, newer DBE firms. A certifier's continued ability to rebut an owner's claim of economic disadvantage will help prevent this. That backstop, reworked in revised provisions in § 26.67(c)(2), is an important mechanism to prevent wealthy individuals from gaming the PNW calculation rules and ensures that the program remains narrowly tailored. As explained below, the rebuttal provisions are meant for situations in which a reasonable person would not consider the individual to be economically disadvantaged.

Under § 26.67(c)(2), certifiers may consider assets and income, free use of them or ready access to their benefits, and any other indicators of non-disadvantage that the certifier considers relevant. The provision states that there are no asset (including retirement assets), income, equity, or other exclusions and no limitations on inclusions. Several commenters seem to have understood that the current and/or proposed rules permit the SEDO to exclude the entire value of the primary residence. They do not. Under either rule, the SEDO excludes only his share of the equity in the home. Under the proposed rule, transferring title to a spouse reduces the SEDO's PNW exclusion to zero, and that result is consistent across all States, regardless of the potential application of community property rules in some States, under the old rule. The Department adopts the rule as proposed, with modifications to clarify that the marital/community property change applies to all PNW reporting, not simply to the exclusion of equity in the primary residence. The new rule clarifies and refines but does not change the general rule that actual ownership, normally denoted by title, determines PNW reporting. We disagree with the commenters who opine that the old rule, the effect of which varied by jurisdiction, is preferable to the proposed rule. Under either regime, the SEDO may transfer title to avoid reporting all or part of an asset's value. The final rule makes the result more predictable, and it levels the playing field nationwide. Anti-abuse rules address transfers that have an evasive effect.

Other, targeted NPRM provisions attempt to resolve smaller, thornier issues with bright-line solutions that should ease administration and compliance. We finalize the rule that attributes 100 percent of personal property in a SEDO's primary residence to the SEDO unless the SEDO shares the residence with a spouse or domestic partner. Determining aggregate value is difficult enough; we do not believe it is an effective use of certifiers' or owners' time to pick through property item by item to determine individual ownership and value. In most cases, the value of personal property is not of sufficient magnitude to pierce the PNW ceiling. We adopt the 50 percent/100 percent rule for ease of administration and to curb some of the abuses that concerned commenters.

PNW reporting for leased vehicles is another case in point. We agree with the plurality of commenters that opined that a leased vehicle is neither an asset nor a liability. Thus, the final rule states that leased vehicles should not be reported at all.

We retain the "two-year transfer" rule and adopt as final the changes proposed, again with clarifying edits in response to comments. The broader proposition, that substance trumps form when the asserted transaction, fact, or circumstance is unreal or abusive, remains in effect. The final rule so provides in, for example, sections 26.68(c), 26.69(c)(3)(ii), and 26.69(g)(1) and (g)(2). All of these iterations are anti-abuse rules that apply across the entirety of subparts D and E. We encourage certifiers to make use of them when circumstances warrant.

15. Social and Economic Disadvantage (§ 26.67)

In this section, because the overall topic contains several important subtopics, we have organized the material around the subtopics, with discussions about the NPRM provision, comments, and DOT response pertaining to each individual subtopic.

As a general matter, the final rule notes that Congress continues to recognize present-day discrimination and the ongoing effects of past discrimination against members of certain groups who seek to participate in DOT-assisted contracting opportunities. Under the DBE regulation, members of those groups are rebuttably presumed socially and economically disadvantaged. A certifier's ability to rebut the presumption is a key "narrow tailoring" feature because it prevents the DBE program from being overinclusive. We make clear that questioning the owner's claim of membership in one or more of the groups whose members are presumed disadvantaged is a separate process from rebutting a presumption of social and economic disadvantage. The former requires the applicant to bear the burden of proof to demonstrate that they are a member of a presumed group. The latter requires the certifier to bear the burden of proof to demonstrate that even though the owner is a member of one or more of the presumed disadvantaged groups, they are not, in fact socially disadvantaged.

Group Membership (§§ 26.5, 26.63, 26.67)

NPRM

The general rule in the regulation is that all an applicant needs to claim membership in a group whose members are presumed socially and economically disadvantaged is to check the appropriate box or boxes on the Uniform Certification Application (UCA) and submit a signed Declaration of Eligibility (DOE). We reminded certifiers that this is the *only* evidence of membership owners must provide at the time of submitting the UCA. An exception is that owners claiming Native American status must also provide proof of enrollment in a federally or State-recognized Indian Tribe, or proof that the individual is an Alaska Native or Native Hawaiian. We explicitly stated that certifiers must not question an owner's claim of group membership as a matter of course, as doing so unduly burdens applicants and contravenes the rule itself. The NPRM retained the requirement that when questioning an individual's group

membership, a certifier "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 . . . ." (italics added). Without that requirement, a White male (for example) could suddenly discover he has Black genetic ancestry and apply for DBE certification based on that recent discovery—even though he has never held himself out as Black, and he would likely have no evidence that the Black community regards him as a member of the Black community. Because of confusion expressed by certifiers and applicants alike, the Department proposed defining "a long period of time" as a period of at least five years, marking the first time the Department ever proposed a specific number.

The NPRM placed timelines/deadlines in § 26.67 to ensure that neither certifiers nor applicants unduly delay the process of questioning group membership. We also proposed allowing a firm whose owner's claim of group membership has been rebutted to submit a claim of the owner's individual social disadvantage at any time under § 26.67(d) (§ 26.67(e) in the final rule), without regard to the waiting period in § 26.86(c). A certifier would not be able to require the individual to file a new application; the individual would be permitted to simply amend the original application.

Comments

The majority of comments addressed evidence of Native American group membership and the proposed minimum 5-year time frame for "holding oneself out."

Given that the DOE is the only evidence of group membership an individual must submit with the UCA, some commenters asked whether, and how, certifiers could obtain proof of enrollment in a federally or State-recognized Tribe from an individual claiming Native American group membership. One commenter asked about State-recognized Tribes in the context of interstate certification, as not all States recognize the same Tribes. One commenter suggested that Native American-owned and tribally owned firms be afforded the same exceptions from some certification requirements provided to Alaska Native Corporations.

Of the 15 comments addressing the "holding out for a long period of time" proposal, 10 supported implementing a minimum five-year requirement. One commenter asked when the five-year period started to run (*e.g.*, from someone's first application, a current application?). Some commenters asked for clarity on how to apply the "holding out" provision and examples of evidence. Opponents said that five years is too short a period to meaningfully demonstrate that an individual had held themselves out to be a group member. One commenter suggested 10 years. Another suggested that "since adulthood" would be a better criterion.

A few commenters sought clarification about the definition of a "well-founded reason" for questioning an individual's claim of group membership. Two commenters asked for guidance on how to handle situations involving a transgender person or one whose gender identification is inconsistent with that on her/his/their birth certificate. One commenter noted that looking into someone's claim of disadvantage could run up against the shortened time frame for issuance of a certifier's decision on an application.

DOT Response

The regulation's general rule is that all an applicant needs to do to claim membership in a group whose members are presumed SED is to check the appropriate box(es) on the UCA and submit a signed DOE. However, an individual claiming membership in the Native American group must also provide proof of enrollment in a federally or State-recognized Indian Tribe, or proof that the individual is an Alaska Native or Native Hawaiian. Examples of proof of Tribal enrollment include, but are not limited to, a Tribal identification card, or a letter from a Tribal leader. We recognize that Alaska Natives and Native Hawaiians do not necessarily possess Tribal enrollment documents. Certifiers must verify government-recognized documentation submitted by Alaska Natives or Native Hawaiians, such as enrollment documents from the U.S. Department of the Interior or a State agency. The final rule amends § 26.67(a)(2) to reflect that requirement.

The Department continues to give certifiers latitude in determining whether there is a well-founded reason to question someone's claim of presumptive group membership. We also continue to emphasize our view that a well-founded reason must not be a mere suspicion or a bare expression of a certifier's opinion. Certifiers must continue to fully explain the basis for the well-founded reason and reference specific evidence in the record. Without that, an individual cannot meaningfully respond.

People who are members of the regulation's designated groups are presumed to be disadvantaged because members of those groups have, historically and currently, suffered from discrimination and its effects. If someone has not identified as, or been regarded as, a group member for long enough to have suffered these effects, they are not someone whose situation is intended to be remedied by participation in the program.

The final rule does not include a definition of "long period of time" in order for certifiers to consider the full context of an individual's claim of group membership. Specifying a rigid time period could be subject to manipulation by an applicant who continues to assert a clearly invalid claim of group membership for many years. Members of the regulation's designated groups are presumed to be disadvantaged because members of those groups have, historically and currently, suffered from discrimination and its effects. If someone has not identified as, or been regarded as, a group member for long enough to have suffered these effects, they are not someone who is intended to have the presumption of disadvantage.[6] By not including a definition of "long period of time," we preserve the ability of certifiers to consider a persons' claim of group membership and to demonstrate such by a preponderance of the evidence.

Lastly, the procedures for questioning the membership of a transgender individual, or one whose gender identification is inconsistent with that on the individual's birth certificate, are the same as questioning the group membership of any other individual. If, after a proper inquiry, a certifier rebuts a transgender individual's membership in the "female" group, the certifier must deny the application and inform the individual of the right to apply under § 26.67(e) (individualized showing of disadvantage) at any time and of the right to appeal to the Department. This scenario differs from an instance in which a person does not check the box for "female" and instead writes "transgender" after checking the "other" box. In that instance, a certifier must inform the person that "transgender" is not a group whose members are presumed SED and explain the option of applying under § 26.67(e)

[6] The Department has acknowledged, even as far back as the 1999 final rule preamble, that commenters have wanted further definition of what "a long period of time" means. As we stated then, 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." 84 FR 5116 (Feb. 2, 1999).

to demonstrate SED status on an individualized basis.

Evidence and Rebuttal of Economic Disadvantage

NPRM

The NPRM proposed eliminating the six "ability to accumulate substantial wealth" (AASW) factors by which a certifier could rebut an owner's presumed economic disadvantage, because the Department witnessed the significant extent to which certifiers and firms inappropriately treat the six factors as a checklist of required criteria and treat the examples' numbers as floors or ceilings.

We proposed bringing the "reasonable person" standard from the preamble to the 2014 regulation into the regulation itself, just as we moved AASW from guidance into the regulation in 2014. Via a § 26.87 proceeding, a certifier would bear the burden of proving, by a preponderance of the evidence, that a reasonable person would not consider the individual to be economically disadvantaged even though the individual's PNW did not exceed the regulation's limit. Among the evidence that could be considered are ready access to wealth, income or assets of a type or magnitude inconsistent with economic disadvantage, a lavish lifestyle, or other circumstances that economically disadvantaged people typically do not enjoy. Liabilities and the kind of asset exclusions used in PNW calculations would not be taken into account as part of this determination.

Comments

Most commenters opposed our proposal to replace the AASW factors with a "reasonable person" evaluation. About 30 comments, primarily from recipients but also including some DBE and non-DBE firms, said that it was too vague and subjective. It could lead to inconsistent and arbitrary results and could let in people who should not be in the program. It left too much discretion to the personal opinions of certifiers, leading to conscious or unconscious bias, or a certifier's dislike of a particular firm, being able to affect decisions.

More than 20 commenters (there was some overlap with the first group) advocated retaining either the existing six guidance factors or some other factors more concrete than a reasonable person standard. Many of these comments suggested modifications to make something like the existing provisions work better, such as more guidance. One subject suggested for guidance is how certifiers should look at situations involving S-corporations or LLCs, where business income is passed on to an individual's personal return, enlarging the SEDO's AGI. Some said, given inflation, the AGI criterion should be increased to $400,000–$500,000. Others recommended stronger language to prevent single-factor evaluations using the criteria, or that more than one factor should always be used.

A smaller number of commenters supported the proposal, favoring the "big picture" approach of the NPRM. One recipient said it already used a holistic approach successfully. One of the supporters commented favorably on what it regarded as the NPRM's simpler approach to the issue. Another wanted the certifier to have to prove its case under the proposed approach by the clear and convincing evidence standard. One comment was concerned about the proposal's subjectivity but said the current six factors were worse. It asked that the Department not provide guidance that made decisions on rebutting disadvantage harder for certifiers.

Two comments said that evaluations under the section exclude spouses' assets, while another thought those assets should be included.

DOT Response

The Department's final rule about rebutting economic disadvantage helps ensure that the DBE program remains narrowly tailored and strengthens current safeguards that prevent firms owned by individuals who cannot fairly be viewed as economically disadvantaged from participating in the program. Rebutting an owner's presumed economic disadvantage inevitably requires certifiers to make a judgment call about whether an owner can be reasonably considered economically disadvantaged. We make final our proposal to eliminate the AASW framework and shift the analysis from a list of specific criteria to a "reasonable person" evaluation.

By giving certifiers the ability to make judgment calls, we believe that we place them in the best position to achieve this objective, without needing to engage with factors that, while intended as suggestions, were too often taken as strict regulatory criteria. Retaining and/or revising some or all of the existing factors, as some commenters suggested, will not solve the problem and might inadvertently create additional complexity. We understand commenters' concern about decisions on this matter becoming too subjective. That is why, and consistent with prior final rules, certifiers must articulate, in writing, a detailed explanation and not simply make a conclusory statement.

Individual Determinations of Social and Economic Disadvantage (§ 26.67(d))

NPRM

The Department proposed eliminating its guidance in Appendix E and adding flexible, less prescriptive requirements into the regulation itself. An individual seeking to demonstrate SED status on an individual basis would still have to prove, by a preponderance of the evidence, that he experienced social and economic disadvantage within American society and without regard to the individual's personal characteristics.

Comments

Of the more than 20 comments that addressed this issue, a majority opposed the NPRM's proposal, saying that it was too subjective. It gave certifiers too much discretion, left open the possibility of inconsistency and bias, and might help ineligible firms to obtain certification. Most of these commenters favored retaining the guidance or something like it. A smaller number of commenters favored the proposal for the reasons stated in the NPRM preamble, with two asking for more examples to help certifiers.

DOT Response

We adopt proposed § 26.67(d) with modifications in response to the comments. We believe that the changes provide clearer guidance to certifiers and business owners. The final rule removes the lopsided and, in some cases, insurmountable burdens that the previous rule and guidance imposed and curbs the excesses they enabled. The rule simplifies, specifies, and streamlines. It substantially levels a skewed playing field for owners, which should result in more accurate determinations and the more efficient administration of the certification process.

The final rule reunites the social and economic aspects of "disadvantage," which are intrinsically linked, and explicitly identifies the three elements that the owner must demonstrate. Although the substance deviates very little from that of the superseded guidance, the final rule concisely identifies the "what" and the "how" and does it in plain language. The rule clearly specifies the criteria that an owner must satisfy, and the kind of evidence that he must present, to show that the negative effects of discrimination (social disadvantage) caused economic hardship.

The final rule, as did the previous provision, requires a degree of

subjectivity because each owner presents unique facts and personalized experiences. The checklist approach of the superseded appendix was ill-suited to the evaluation. Although the final rule is less rigid, it continues to require robust proof of individual disadvantage. We are confident that certifiers will evaluate the evidence fully and objectively, in accordance with the restated, simplified criteria, and thereby ensure that only eligible firms become certified.

The reauthorization of the DBE program in successive Congressional reauthorizations, including the Bipartisan Infrastructure Law, demonstrates Congress' intent to facilitate the participation of social groups that have experienced past, and continuing, discrimination in federally assisted contracting. The final rule safeguards against certifiers imposing undue requirements on individuals that are not presumptive group members. The rule focuses solely on essential requirements, ensuring fairness and clarity in the certification process. This matches Congress' and DOT's objective to remove barriers and facilitate certification of eligible firms.

The Department's final rule adopts in full our NPRM proposal for the reasons given there. As with evaluating the SED status of an individual claiming membership in one of the groups whose members are presumed SED, evaluation of an application under § 26.67(e) inherently requires certifiers to make a judgment call. In doing so, certifiers must not simply rely on the quantity of examples of disadvantage an owner provides; rather, certifiers must focus on the *quality* of the evidence presented. Applicants have to submit a personal narrative detailing the experiences that demonstrate the social and economic disadvantages they have had to contend with. While applicants bear the burden of both production and persuasion with respect to all elements of certification, certifiers must holistically evaluate all presented evidence before making a determination.

We reiterate that an owner need not have filed a complaint of discrimination as a prerequisite of claiming social disadvantage. Nor must an owner produce corroborating evidence, as such evidence may not exist. The final rule merely levels the field by removing what amounts to a higher burden than "preponderance of the evidence." [7] The owner still must make his case, and the certifier may disregard a claim of social disadvantage where the individual presents evidence of discriminatory conduct but does not connect that conduct to negatively impact on his own entry into or advancement in the business world. On this point, the Department is following SBA's guidance that individuals need to provide "a complete picture, or additional facts that would make an individual's claim of bias or discriminatory conduct more likely than not." [8] Like SBA, certifiers should not intend as a matter of course, to disbelieve an applicant but should continue to rely on the affidavits and sworn statements, as long as those statements clearly establish an instance of social disadvantage.

Appendix E is modeled after several, but not all, SBA requirements. When it was first introduced by the Department, we modified our guidance to make it fit our needs because of the differences between the two programs. Appendix E was intended by the Department to be guidance only, yet recipients used it to impose rigid, prescriptive requirements that too often excluded meritorious applicants who, by any reasonable standard, proved their SED status. Nonetheless, certifiers found them ineligible because they did not produce a specific type of evidence, in sufficient volume, of each of the several "required" varieties. In some cases, the evidence (*e.g.*, corroboration of malign intent) does not exist; in others, it cannot be obtained. For example, researching and compiling data about other firms in the same or a similar line of business with which to compare the individual's circumstances is well beyond the means of an owner of a small business seeking DBE certification. Competitors tend not to publish information concerning capital, net worth, access to credit, etc. As stated in the NPRM preamble, we believe that this is inequitable. The rule at § 26.67(a) aligns with the Department's surface authorization requirement to follow SBA's definition of members of groups deemed socially disadvantaged; and § 26.67(d) retains SBA's regulatory requirements that a person who is not socially disadvantaged must make an individual showing of disadvantage. To do so, § 26.67(d) requires an owner to identify at least one objective distinguishing feature (ODF) that resulted in racial, ethnic, cultural, or other prejudice against him personally and describe with particularity how the ODF caused personal social disadvantage. The owner may provide evidence related to the owner's education, employment, or any other evidence the owner considers relevant.

16. Ownership (§ 26.69)

The NPRM proposed changes that would streamline the ownership rules and make them easier to understand and administer. The proposal retained the essential substantive elements of the 2014 rule but recast them in simpler language. It distilled from the multitude of prescriptive "real, substantial, and continuing" (RS&C) rules a few general principles and set those out as the main components of ownership. Sub-rules fleshed out the framework. The Department's overall goal was to make certification easier to obtain, maintain, and monitor.

The proposed rule employed a new term, *Reasonable Economic Sense* (RES) as its rationalizing principle. RES, like RS&C in the 2014 rule, was to be a touchstone, shorthand, and umbrella for the underlying concepts and operating rules. We intended for the term to signal flexibility, a common-sense focus, and tighter alignment with small business realities.

Reasonable Economic Sense (RES)

NPRM

The NPRM replaced the term RS&C with RES in describing the rule's unifying principle or overarching requirement. The proposal restated the 2014 rule's essential requirements and organized them more logically. At the top analytical tier, the proposed language simplified and clarified the rule's main components; it changed nomenclature and emphasized more than substance. For example, "proportionality" (broader, less rigid, more clearly defined) replaced the 2014 rule's "real," "substantial," and "commensurate with" language. The changes gave certifiers more latitude than they believed they had before, to encourage them to consider firm-specific facts without undue regard for technical disqualifications. Similarly, the proposal gave owners more control over how to structure their businesses' ownership. Proportionality does not require exactitude. Owners have latitude up the point at which the benefits and burdens of ownership are "clearly disproportionate" or "undue." While the proposed rule described the

[7] SBA uses the preponderance of the evidence standard as well in its eligibility standards. In its final rule, SBA addressed the Supreme Court's decision regarding the DBE program (Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), which requires programs to provide a race-based remedy to be "narrowly tailored." SBA noted that the Department of Justice recommended the "preponderance of the evidence" standard for government-wide disadvantaged business programs; and therefore, based its "preponderance of the evidence" standard accordingly. See 63 FR 35728 (June 30, 1998). The Department follows this standard.

[8] 81 FR 48569 (Jul. 25, 2016).

ownership requirements in plainer, more accessible language, the animating theory remained: substance prevails over form.

Comments

Commenters supported the NPRM's overall approach, including the rule's substantive provisions, by a wide margin. Supporters often cited increased flexibility and the likelihood of better outcomes. However, a sizable majority of all commenters specifically opposed RES. They faulted the term for vagueness, subjectivity, the potential for inconsistent results (*e.g.*, disfavoring WBEs), and the possibility that front companies could become certified more easily. While some of the commenters opposing RES wanted to retain the existing rule, most requested more definitions, guidance, and examples.

DOT Response

Our objectives in promulgating the proposed and final rules are to simplify, clarify, and modernize certification standards; give firms and certifiers more flexibility; and promote consistent, fair results. We intended for RES to capture in a single, overarching term the essence of the DBE ownership standards, as simplified and clarified. The comments, however, persuade us that RES is unhelpful, and on further reflection, we see no need for an overarching term. We therefore delete all references to RES.

The comments also prompt us to explain key concepts and rules more thoroughly and to add substantially more situational guidance and examples. We adopt proposed § 26.69, with these additions and edited for clarity.

We believe that the final rule reduces burdens, increases understanding, and promotes equity.

Investments

The regulation frames ownership in terms of "investments" and provides detailed guidance on which investments in ownership make a firm eligible for certification. Investments are the mechanism through which the rule applies. If the SED owner (SEDO) makes no investment, an insignificant one, or one that is disproportionately low, the firm is ineligible.

Purchases, capital contributions, and gifts are investments if they meet specified standards, including proportionality consistent with the owners' relationships and the business's circumstances. Investments must have real economic effect. The SEDO must have parted irrevocably with (her own) cash or with a combination of cash and tangible or real property. She must stand to lose the entire investment if the business folds. In colloquial terms, the SEDO must have real "skin in the game."

Rules for Acquisition, Proportionality, and Maintenance

Section 26.69(b) retains the proposed rules for acquiring and maintaining ownership interests. In all cases, the principle of proportionality applies. The SEDO's investment to acquire ownership must be substantial, and it must include a significant cash component.

Example 1. SEDO contributes $51 to acquire 51 percent of Newco. The cash outlay is insubstantial, and the capital contribution is therefore not an investment. Newco is ineligible for certification.

Example 2. SEDO contributes $5,100 in exchange for 51 percent of Newco, which does not yet operate any business. Regardless of whether $5,100 is a substantial outlay, Newco is ineligible under § 26.71(a), which requires that an applicant have business operations.

Example 3. SEDO purchases 60 percent of Opco for $30,000 cash. Assuming that the outlay is not clearly disproportionate to value, and the SEDO does not reap benefits or shoulder burdens clearly disproportionate to those of other owners, Opco is eligible on ownership grounds.

Example 4. SEDO contributes a truck worth $60,000 to Haulco in exchange for 100 percent ownership. Without a significant cash contribution, Haulco is ineligible.

Example 5. SEDO buys 80 percent of Opco from Founder, who is retiring, for $8,000. Opco has run at a small net loss for the last 2 years but was profitable in several preceding years. Opco has generated over $3 million of revenue in each of the last four years. Opco is probably ineligible because $8,000 is unlikely to be proportional to the value of 80 percent of Opco.

Example 6. SEDO pays $55,000 to buy 60 percent of the stock of Oldco from Founder, who was Oldco's sole owner. Oldco's book (net asset) value is $100,000. Since there are no other, recent stock sales or other persuasive evidence of fair value, Oldco is probably eligible because $55,000 is not "clearly disproportionate" to the value of the shares purchased.

"Proportionality" requires that the SEDO not derive disproportionate benefits or bear disproportionate burdens of ownership. The SEDO may not make a conditional or revocable investment, and once made, the SEDO must maintain the investment. "Maintain" means both that the SEDO not withdraw her investment and that she keep her investment proportional to those of other owners.

Purchases and Capital Contribution

A purchase is an investment when the consideration is exclusively monetary and not a trade of property or services. A capital contribution is an investment when the owner contributes cash, tangible property, realty or a combination of these assets. Contributions of time, labor, and services (*i.e.*, called "sweat equity") are never investments.

We exclude as unhelpful our proposal concerning contributions of expertise, even though we received no comments about it.

Gifts

NPRM

The NPRM provides that a gift is an investment only if the transferor becomes uninvolved with the applicant or DBE in any capacity and in any other business that performs similar work or contracts with the firm other than as a lessor or supplier of standard support services. This language is a condensation and simplification of current regulation §§ 26.69 (h) and (j). The NPRM removes the prohibition on the transferor's involvement with a non-DBE firm in a similar business; adds the contracting restriction and a documentation requirement; and removes as unwieldy, unnecessary, and unfair the paragraph (h) presumption of non-ownership, two-pronged rebuttal (one wholly unrelated to ownership), and heightened burden of proof.

Comments

One commenter supported the proposal, while another opposed allowing gifts to be considered toward ownership at all. A third opposed the proposal that a non-SEDO providing a gift to a SEDO would have to become uninvolved with the company. It could be a good thing for the business if the non-SEDO could stay involved, the comment asserted. Another expressed the concern that, under the proposal, someone could acquire ownership solely on the basis of a gift.

DOT Response

Paragraph (e) of the final rule replaces paragraph (h) of the 2014 rule. The new rule eliminates the more complex two-prong test and heightened burden of proof of the former paragraph (h), which has proved confusing in practice. Under the final rule, when a non-disadvantaged person gives an ownership interest to a disadvantaged

person, the gift is the donee's "investment" for certification purposes only if the donor becomes completely uninvolved in the business or any that contracts with it. Unless or until that happens, the firm will not be eligible for certification and will remain ineligible until the donor severs all ties. Of course, if other SEDOs own 51 percent of the firm without the donee's contribution, the firm could be certified.

We acknowledge that there are often good reasons for a former, non-disadvantaged owner and a new, disadvantaged owner to work together during a transition period, but we remain concerned that permitting such arrangements across the board presents risks to program integrity. However, we believe that the prohibition on the donor's involvement in similar businesses is unwarranted. Although removing that prohibition marginally increases risk of program abuse, other provisions of the regulation curb those risks. As this restriction may discourage transfers that benefit SEDOs and their businesses, we adopt the proposed rule but strike the "similar business" proviso.

Loans and Debt-Financed Investments

NPRM

Under the NPRM, a SEDO may finance all or part of an investment in the company, including a purchase from a third-party owner. In that case, the company is eligible only when the SEDO has paid at least 15 percent of her total investment from her own funds. The firm may not be a party to the loan, and its property may not serve as collateral. The firm is eligible only if the SEDO meets this requirement before the firm applies for certification.

Comments

One commenter proposed raising the 15 percent requirement to 35 percent, since the higher floor would demonstrate a greater stake in the business. Another commenter opposed the 15 percent requirement as unwarranted because it could impair the ability of younger owners to become certified. Others suggested that, instead of naming a percentage, the rule should require a "commercially reasonable portion of total investment" to come from a SEDO's own resources or that repayment be consistent with the terms of the loan agreement, if consistent with industry standards. Another commenter opposed prohibiting the use of a firm's property as collateral for a loan to the SEDO claiming the investment.

DOT Response

We adopt the debt financing rules as proposed, move them into a new § 26.70, and respond to comments by breaking the definitions into smaller components, reordering the rules for clarity, and adding multiple examples. We do not raise the 15 percent self-funding requirement because we believe that a higher percentage would be too exclusionary.

We move these rules to emphasize a crucial distinction that the 2014 rule did not articulate effectively. While a SEDO may make an investment using funds from a debt, meeting the requirements of this section, the *loans themselves are not investments.* This rule applies regardless of who the creditor and debtor may be. The rule is that, subject to the conditions specified in §§ 26.69 and 26.70, the owner "invests" only when she *contributes the loan proceeds* to the firm or uses them to purchase an ownership interest.

To further explain the distinction and the rationale for it, the SEDO's "contribution" of her debt to the company relieves her of the obligation to repay. Such a transaction is the opposite of an investment: the owner has parted with nothing but a liability, the firm receives no capital, and the firm must *pay out* its own capital to repay the owner's debt. A loan *from* the company is not an investment because the firm cannot contribute capital to itself or buy shares from itself for itself. (Treasury stock is already treasury stock; the asserted transaction is as fictional as it is unnecessary.) Nor may the SEDO use the company's property to secure her loan: a different rule would effectively nullify the general rule that a loan from the company is not an investment. Given this treatment of the owner's debt, a mere guarantee is not an investment.

Section 26.70 also requires regular, level payments of principal and interest over the term of the loan at least until sufficient principal has been repaid to make the owner's out-of-pocket expenditure at least 15 percent of the total investment. Related rules ensure the integrity of the rule's limitations.

Curative Measures

NPRM

Proposed revisions to § 26.69 would adopt by regulation the memorandum that the Department issued on August 7, 2019. Applicants can take curative measures to correct impediments to eligibility, as long as they are legitimate, accurately reflect relevant facts, are made in good faith, and are not prohibited in the regulation.

Comments

A strong majority of comments supported the NPRM proposal. Several commenters said this was a practice they already followed. Some of these comments suggested that the use of curative measures should be limited to minor administrative matters rather than serious issues concerning the organization or structure of a business. Opponents were concerned that the provision would allow firms to circumvent the rules or put certifiers in the position of "coaching" applicants on how to get certified.

DOT Response

The final rule adopts the proposal, essentially for the reasons explained in the NPRM preamble. It will encourage recipients to catch problems that often unwittingly lead particularly new, inexperienced, but otherwise potentially eligible firms into mistakes that result in denials and the application of a waiting period before the firm can try again. We believe that certifiers can exercise sound judgment concerning the kinds of matters on which they can usefully assist such firms. We do so with the safeguard that, like all actions by participants in the program, abusive or sham actions are prohibited. When part or all of a transaction or series of transactions involved with the certification or participation involving a firm have no apparent purpose other than camouflaging facts or circumstances which more likely than not render the firm ineligible, the final rule's § 26.69(g) calls for sanctions against the offending parties.

Other Ownership Issues

There were a variety of comments regarding aspects of ownership that the NPRM did not address. One suggested there should be more guidance on firms that had more complex ownership arrangements, like "simple agreements for future equity." Another would delete the requirement that a SEDO own 51 percent of each class of ownership, which it found too restrictive. This commenter would instead say that a SEDO should have enough shares of any or all classes of ownership to control the firm and receive 51 percent of its profits.

Other comments requested clarification on what information an applicant is required to provide to show ownership and on the status of trusts under the proposal. Another comment expressed concern that deleting provisions concerning marital property would make it easier for applicants to circumvent the intent of the rules.

Another opined that non-SEDOs should not be able to be part owners of a DBE firm if they were involved in non-DBE firms in the same type of work, a relationship that could enable pass-throughs. A final commenter believed that certifiers should take workforce diversity as well as ownership into account in certifying firms.

DOT Response

The final rule retains the joint ownership provision as proposed, for the reasons stated in the NPRM: consistent results across jurisdictions, federalism, and expertise. Fairness, prudence, and practicability underlie the final rule.

Any issues arising from the other concerns noted by commenters can, if needed, be addressed through future guidance or on a case-by-case basis as a matter of program administration.

17. Control (§ 26.71)

In this section, because the overall topic contains several important subtopics, we have organized the material around the subsections, with discussions about the NPRM proposals, comments received, and DOT responses pertaining to each subtopic.

The thrust of the Department's final rule is to shift the focus from the actions and experience of non-disadvantaged participants in the firm to those of the SEDO, to reflect the original intent of the regulation's control requirements. A SEDO must pass the three-part test of managerial oversight, revocable delegation of authority, and critical and independent decision-making.

"Operations" Requirement

NPRM

The NPRM proposed several changes to the current § 26.71. One proposal stated that firms (except ACDBEs) would have to have "operations" in the type of business in which they seek certification. The NPRM said that this would allow certifiers to make decisions based on actions the SEDO takes and avoid wasting certifier resources on firms that are not conducting business and have no ability to perform DBE contracts.

Comments

Of the nearly 40 comments that addressed this issue, a majority opposed the NPRM proposal. The principal argument of opponents was that requiring a business to have operations before being certified would be a barrier to new firms or those seeking to expand into new areas of work. The program should encourage, not discourage, firms seeking their first contract. It would create a disincentive to entrepreneurship in non-traditional types of work. It should be enough, commenters said, for the SEDO to have experience in the type of work involved with a new firm. For example, it should suffice if an engineer had work experience relevant to the field a new engineering firm wanted to work in as a DBE, even if a newly formed firm had not yet obtained a contract.

Among commenters who either supported or did not object to the proposal, some said that it made sense to prevent situations in which a certifier would be asked, in effect, to certify a business plan. The provision would save staff time, in that staff would not have to do certification workups on firms that would not be able to perform contracts. A commenter thought that an applicant should have at least a year of experience in its type of work.

Several commenters asked for clarification of what constituted "operations" for purposes of the proposed section, and what applicants would have to show in order to meet the requirement. Would they need to have already performed work on a contract? Others suggested that certifiers should have discretion to decide the question, given that more operational experience may be needed in some fields than others (*e.g.*, heavy highway construction vs. landscaping). A number of commenters questioned or objected to the exception to the proposed requirement for ACDBEs, asking why the same standards should not apply to an ACDBE.

DOT Response

A DBE must have business operations. Certifiers should not be involved in what amounts to certifying a business plan. It does not make sense for a certifier to engage in the certification process for a firm, which, if certified, is not in a position to work on a DOT-assisted contract. This is no less true for new businesses than for long-existing businesses. For this reason, the final rule retains the proposed requirement.

This is not to say that an applicant must have had previous contracts in order to be certified. We expect certifiers to make the necessary judgment calls to determine when an applicant firm is sufficiently ready to participate in the program if certified.

The Department explains how to apply these concepts in the context of the ACDBE program in the preamble discussion on § 26.71 regarding the operations requirement for DBEs, including ACDBEs.

Control (SEDO as the Ultimate Decision Maker) (§ 26.71)

NPRM

The NPRM would require a firm to demonstrate that, beyond formalities of business structure and governance documents, the SEDO "runs the show," having the final say on all matters, regardless of the size or complexity of the business. Governance continues to matter, however, and provisions that require non-SEDO concurrence or consent for the SEDO to act, including provisions related to board of directors, quorums, and votes, would prevent the SEDO from being determined to control the firm (there would be an exception allowing non-SEDO members to block an extraordinary action, like sale or merger of the company, that would affect their ownership rights). The SEDO must hold the highest officer position and have voting authority over all other participants.

As under the former rule, a SEDO would have to understand and be competent in the substance of the firm's business. The NPRM noted that the degree of understanding the owner should have can vary with the type and complexity of the business. A SEDO would have to *actually* make major decisions, not just have the ability to do so as under the former rule. Control determinations would be based on a three-part test: (1) the firm would have to show that a SEDO gets pertinent information from subordinates, (2) a SEDO analyzes the information, and (3) a SEDO makes independent decisions. Tasks can be delegated, as long as the SEDO can revoke the delegation. Everyone in the company must recognize and abide by the chain of command, with a SEDO at the top.

Comments

By about a three-to-one majority, commenters endorsed the new control framework, saying that less prescriptive requirements would simplify the certification process. There were supportive comments on a number of the specific points in the proposal, such as the SEDO being the ultimate decision maker and having the top position in the company and the three-part test with respect to how and by whom decisions are made. Commenters asked for more guidance on what an applicant would have to show in order to carry its burden of proof on these matters.

Comments opposed to the proposal said that the proposal would lower standards and compromise program integrity. Others thought the approach too subjective. One said the three-part test was not realistic for certifiers to

apply; it boiled down to whether a certifier thought what an applicant said was credible.

One commenter supported the NPRM's proposal about boards of directors, saying it would clarify matters. Another opined that firms should be able to set up their boards as they wish because boards of directors are generally not decision-making bodies. Another said that non-SEDOs should not be able to block extraordinary actions of the company and still have the SEDO regarded as controlling the firm, while another commenter supported the proposed provision concerning extraordinary actions.

One comment asked for a clarification continuing the present rule's allowance of control by any SEDO, not only the one having the largest stake in the company. Another suggested that § 26.71 be made broader and more "big picture" in nature. Another said that if the certifier determined that the owner does not control the firm, it should be required to state who does control it.

A few commenters expressed concern about certifiers' ability to verify the reality of decision-making power within a company. One commenter noted that anyone can be placed at the top of an organizational chart. Another commenter asked how a certifier would know whether other participants faithfully follow the SEDO's directives. Would the certifier have to interview all key participants as part of an on-site review? This commenter also was concerned that what it saw as the proposal's emphasis on formal authority could cause certifiers to overlook situations in which someone other than the SEDO had the bulk of expertise and clout within the firm. Other commenters thought the proposal's bright line approach to a company's chain of command, and the importance of the SEDO's ability to revoke delegations, would add clarity to the certification process. Commenters opposed to the proposal said that the proposal would lower standards and increase the possibility of opening the program to increased fraud. Others thought the approach was too subjective. One said the three-part test was not realistic for certifiers to apply; it boiled down to whether a certifier thought what an applicant said was credible.

DOT Response

The Department believes that the overall approach taken to control matters in the NPRM is sound and will meet the dual objective of removing unnecessary obstacles from applicant firms while ensuring that only those firms that are genuinely controlled by SEDOs are certified. It comes down to whether the SEDO in fact—not just in theory or on paper—runs the show. The SEDO must show that they possess not only the authority to make decisions, but in fact make those decisions.

With respect to control, certifiers must necessarily make a judgment call: does the SEDO, based on the complete record, including the application and the on-site interview, really "run the show?" The NPRM clearly stated this responsibility on the certifier's part. One of the best ways a certifier can do this is to make in-depth inquiries, during the on-site interview, to determine if SEDOs critically analyze information provided by others and make reasonable business decisions based on independent analysis. Do other key employees bring issues or problems to the SEDO, who asks good questions, and then makes the decisions, which others carry out? Or do others make decisions autonomously, without involving the SEDO, or disregarding direction from the SEDO? Interviewing not only the SEDO, but also other key employees where relevant, to get a full picture of how decisions are made is crucial to good control decisions by the certifier. To the extent possible, the certifier should ask for examples about how real-life decisions were made within the firm in the past. The Department believes this approach, as stated in the NPRM, makes sense and is consistent with the intent of the program and maintaining program integrity, and we are adopting it as final.

The NPRM discussed, in § 26.71(c), the point that governance provisions of a company must ensure that the SEDO, in addition to having the highest officer position in the company (*e.g.*, CEO), must not be constrained from fully controlling actions of the company by quorum, by-law, or other provisions. Non-SEDO consent for certain extraordinary actions (*e.g.*, sale or dissolution of the company) would be permitted. However, similar provisions in the former rule often proved to be problematic for small or inexperienced companies, who in our certification appeal practice we have found used templates for governance documents that limit SEDO actions without non-SEDO concurrence. This is a classic example of where a certifier can vindicate the intent of the program by pointing out such problems to an applicant and allowing the applicant to take curative measures.

Expertise and Delegation

NPRM

As under the current rule, the NPRM proposed that SEDOs would have to understand and be competent in the substance of the firm's business. The NPRM noted that the degree of understanding that the owner should have can vary with the type and complexity of the business. The SEDO would have to actually make major decisions, not just have the ability to do so as under the present rule. Control determinations would be based on a three-part test: the firm would have to show that the SEDO receives pertinent information from subordinates, that the SEDO analyzes the information, and that the SEDO makes independent decisions. Tasks can be delegated, as long as the SEDO can revoke the delegation. Everyone in the company must recognize and abide by the chain of command, with the SEDO at the top.

Comments

A few commenters were concerned about how certifiers would verify the reality of decision-making power within a company. Anyone can be placed at the top of an organization chart, after all, one comment noted; and another asked how a certifier would know whether other participants faithfully follow directives from the SEDO. Would the certifier have to interview all key participants as part of an on-site review? This commenter also was concerned that what it saw as the proposal's emphasis on formal authority could overlook situations in which someone other than the SEDO had the bulk of expertise and clout within the firm. Other commenters thought the proposal's bright-line approach to a company's chain of command, and the importance of the SEDO's ability to revoke delegations, would add clarity to the certification process.

Three commenters supported the proposal as written. Another said that there should be language telling certifiers not to reject a firm because a SEDO, even if clearly the decision maker, has employees who have greater experience or expertise than the SEDO. On the other hand, one commenter said that an unlicensed or non-expert person should not be viewed as controlling a firm (*e.g.*, a non-electrician in charge of an electrical services firm). One commenter said the SEDO should be qualified in the NAICS code(s) the firm is seeking, while others asked for more clarification and examples, especially in professional services firms and for ACDBEs, where the commenter expressed concern that inexperienced

people were getting certified as a part of joint ventures.

DOT Response

The Department adopts the NPRM proposal without change. It emphasizes that the SEDO, while permitted to delegate authority and functions, must be able to revoke that authority. There must be a recognized chain of command within the company in reality, and not just on an organizational chart, for example. Making probing inquiries on this point, and on the recognition and acting upon this authority structure, is something certifiers should, as described above, ensure is part of the on-site interview process.

The Department emphasizes, in the final rule, that the proper focus for certifiers is the role the SEDO plays and the SEDO's being the ultimate decision maker. We have often seen that certifiers go astray by determining that a SEDO does not control a company simply because other participants have experience or expertise in a given aspect of the firm's operations. The contribution of non-SEDOs to the operation of a company is not a ground for denying eligibility to a company, so long as the SEDO runs the show in all aspects of the business, including with respect to areas of work that may be delegated to others.

While we do not believe it is necessary to include rule text language on these points, we agree with commenters that, as under the present rule, in a situation where there is more than one SEDO, control by any SEDO is sufficient to meet § 26.71 requirements. This is consistent with the definition of a DBE under § 26.5. For example, if one SEDO owns 45 percent of a company, and the other owns 10 percent, the firm can meet control requirements if the 10 percent owner runs the show.

Independence

NPRM

With respect to independence, the proposed rule (redesignated as § 26.71(g)) clarifies that a firm must prove that it is independently viable, notwithstanding a relationship with another firm from which it receives or shares essential resources. A pattern of regular dealings with a single or small number of firms would not necessarily render a firm ineligible as long as it was not operating as a front or pass-through for another firm or individual. The proposed rule clarifies that relationships and transactions between firms of which the SEDO has 51 percent ownership and control does not violate the rule, although the relationship may raise a business size issue.

Comments

While a few commenters supported this proposal as written, others asked for more clarification of what a certifier needs to know in order to determine if an applicant is independent. One request for clarification asked whether independence concerns relationships with any firms, or only relationships with non-DBEs. Another thought that the reference to "commercially reasonable terms" in the proposed § 26.71(g) was too vague, while another comment asked how a certifier should evaluate whether firms "shared essential resources." Another asked for clarification in the context of leasing trucks, suggesting that a DBE should lease trucks from leasing companies that lease trucks to the general public.

With respect to the proviso that dealings with only one or a small number of firms does not necessarily compromise independence, one commenter agreed while another asked how a certifier would determine when such a situation was problematic. Two commenters expressed concern about a situation in which, after a firm is certified, it enters into an exclusive or nearly exclusive relationship with a prime contractor. One commenter suggested that this should be prohibited.

Among other suggestions by commenters were to retain the present language because independence determinations would be harder to make under the proposed language; to substitute language from the identity of interest provision of the SBA regulation (13 CFR 121.103(f)(2) and (i)). If the Department modeled its provision after § 121.103(f)(2) the commenter argued, certifiers could presume an identity of interest based upon economic dependence if the concern in question derived 70 percent or more of its receipts from another concern over the previous three fiscal years. Likewise, adopting a similar provision as SBA had done, this presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser.

Another commenter suggested allowing prime contractors to provide specialized training to DBEs through a shared foreman or superintendent.

DOT Response

As in the NPRM, the final rule provides that a key element of meeting the control requirements of the rule is that a firm must be independent. Independence in this context refers to the relationship between the firm in question and other firms, whether those other firms be DBEs or non-DBEs. A firm cannot be independent if, absent such relationships, it would not be viable. If a firm cuts the ties that bind applicant Firm X to Firm Y—whether those ties, be sharing of facilities, resources, or personnel, common ownership or management, exclusive or nearly exclusive contracting or business relationships—would Firm X continue to be able to do business? If not, then Firm X is not independent.

The regulation does not prohibit relationships with other firms, including relationships that may create affiliation. Nor does the regulation prohibit a firm from providing services only to one business, or only a few businesses. That scenario might arise in a locale that has a limited number of potential customers. However, the DBE must not be used as a conduit or pass-through to obtain DBE credit. In any case where an applicant has relationships with other firms, the applicant must demonstrate that it is independently viable, notwithstanding relationships with another DBE or non-DBE firm.

We disagree with the commenters who suggested that the Department should adopt the Small Business Administration's 8(a) or 8(d) program rules about independence. The Department's final rule sufficiently equips certifiers to make the necessary judgment calls, without unnecessarily leaning on another agency's regulations.

It is likely that allowing a prime contractor to share experienced personnel with a DBE, especially if they have a contractual relationship, has a high probability of compromising the DBE's independence. Certifiers should carefully investigate any such relationships.

Licensing and Other Specific Sections Proposed for Deletion

NPRM

The NPRM proposed removing several control provisions from the former rule, including § 26.71(h) (licensing); § 26.71(i) (differences in remuneration); § 26.71(j) (outside employment); § 26.71(k) (family relationships); § 26.71(l) (transfer of a

firm to a SEDO when the non-SEDO transferor remains involved); § 26.71(m) (ownership and leasing of equipment); § 26.71(p) (ability of non-SEDOs to bind the firm without SEDO's consent); and § 26.71(q) (use of employee leasing companies).

Comments

Supporters of the licensing proposal thought that deleting § 26.71(h) would make the certification process less onerous for applicants and less likely to lead to decisions based on a misunderstanding of the regulations. Slightly more opponents recommended retaining § 26.71(h) to prevent licensed non-SEDO participants from having *de facto* control of the firm. Others said that, especially in specialized fields, the SEDO should be the license holder. Two commenters noted that in their States, the majority owner must have a license to operate certain kinds of professional services firms. One commenter advocated that the SEDO of a trucking company should have a CDL.

Commenters also raised the question of how, in the context of reciprocal interstate certification, differing licensing requirements of different States would be handled. One recipient suggested that an additional State could deny certification to an out-of-state firm in a NAICS code for which that State required a license, but the jurisdiction of original certification (JOC) did not, while still certifying the firm in other NAICS codes.

Several commenters asked that the Department retain all or most of the other specific existing provisions in § 26.71 that the NPRM proposed to delete. Considering issues covered by these provisions was an important element of doing a good job of certification, these commenters suggested. The proposed rule would shift the burden of proof from applicants to certifiers, one commenter said. Among specific provisions mentioned by commenters were those concerning family businesses, outside employment, differences in remuneration, and leasing of equipment. In the absence of these provisions, another commenter said, DOT would need to provide more guidance on how to make control determinations when these issues arose.

DOT Response

Consistent with the NPRM, the final rule deletes §§ 26.71(h), (i), (j), (k), (l), (m), (p), and (q) as duplicative and outdated. The overhaul of the control provisions described in this final rule are more than adequate for certifiers to properly evaluate whether a SEDO controls a firm.

The proposed deletion receiving the most comment concerned licensing (§ 26.71(h) of the former rule). We wish to remind certifiers that, in many cases, it is the business as an entity, not the SEDO as an individual, who is required to have a license. For example, an engineering firm must have someone with an engineering license. The firm may still be certified if the license holder is someone other than the SEDO, as long as the SEDO meets all the "running the show" requirements of § 26.71. We also note—this is an issue that has frequently arisen in certification appeal cases—that it is not essential for the SEDO in a trucking or transportation company to personally hold a CDL (commercial driver's license); as long as the SEDO establishes control of the company as this section requires.

In the context of interstate certification, if a firm is certified in its JOC, it can obtain certification in any other State. But suppose that the firm lacks a professional license in an additional State that is not needed in the JOC or that the firm's licenses the JOC are not valid in another State? In such a case, the firm would be certified in the additional State—because it met basic size, disadvantage, ownership requirements via its certification in the JOC—but would not yet be able to do business in the additional State.

While § 26.71(l) of the existing regulation, concerning firms where a non-disadvantaged individual who formerly owned and controlled a company remains involved with the company, we note that the ownership requirements of the final rule require the former owner to immediately become uninvolved with the company or other business that performs similar work or contracts with the applicant firm other than as a lessor or provider of standard support services. We take this action in the final rule because parties have not understood how to handle the rebuttal procedurally or apply the stricter burden of proof. The crux of the rule states that the new owner needs to still show that he/she is in control, notwithstanding the presence of the old owner. The final rule preserves and emphasizes this.

While the specific outside employment provision of the existing rule is being removed, certifiers may still consider the effect on outside employment as they determine whether a SEDO is in a position to really run the show for an applicant firm. For example, when a SEDO has a full-time job for another employer, how does the SEDO find the time to analyze information and make independent decisions for the applicant firm? How does the SEDO communicate with employers and customers if the SEDO has duties for another employer that conflict, in terms of time and place, with the applicant firm's work? The applicant has the burden of proving to the certifier that the SEDO can do everything needed to control the firm, notwithstanding the SEDO's duties for another employer. Delegations by a SEDO with outside employment must meet the same requirement as other delegations; the SEDO must remain in active control of those to whom the SEDO has delegated duties.

North American Industry Classification System (NAICS) Codes

NPRM

The NPRM proposed removing material concerning NAICS codes from the control requirements to a new § 26.73, making minor technical corrections in the process.

Comments

While there were no comments on the proposal to put NAICS code provisions into a new section of the rule, as such, there were comments on the general subject of NAICS codes. A few commenters said that the ability of firms to expand into additional codes should be expanded, for example by relaxing the requirement that the narrowest applicable code be used for a firm, allowing expansion based on staff capabilities, or allowing a SEDO to be considered qualified to control a firm in a related NAICS code to that one a firm already has been assigned. One commenter suggested that a firm should be able to remain certified in a narrower NAICS code even if it exceeded the size standard for that code as long as it continued to meet the size standard for a broader NAICS code that encompassed the subject matter of the narrower code.

A few comments also asked that NAICS code assignments be made more consistent among certifiers, though they did not suggest how this would be done. Another suggested updating NAICS codes and making them more specific. Another wanted firms to be certified in State work codes, where applicable, as well as NAICS codes. Two comments said that existing NAICS codes do not work well for TVMs, and that the Department should find another way of classifying especially subcomponent manufacturers for transit vehicles.

DOT Response

The Department is adopting the NAICS code provisions of the NPRM—which are substantively identical to the those of the existing rule—without change. We continue to believe that the narrowest appropriate code should control for purposes of certification; doing otherwise would allow circumvention of the intent of small business size standards for firms. It is important for certifiers to avoid overly broad NAICS codes. For example, NAICS code 237310, concerning highway and bridge construction, has sometimes been applied to specialty contractors who perform only one or two of the functions under that code's broad umbrella. We intend that certifiers, in such a case, assign only the narrower code applicable to the specialty functions that the firm performs.

As under the present rule, states may employ State work codes or categories, but they cannot supersede NAICS codes for purposes of DBE eligibility or credit toward goals. Certifiers cannot certify firms as DBEs using State work codes, or limit opportunities for DBE credit to firms certified in a given NAICS code to types of work named under a State code that is in effect a subset of the work encompassed by the NAICS code in which the firm is certified.

Subpart E—Certification Procedures

18. Technical Corrections UCP Requirements (§ 26.81)

We did not receive any comments on our proposal to remove outdated references in § 26.81 (a)—the original due date for recipients to sign a UCP agreement (March 4, 1999) and § 26.81 (g)—the requirement that UCP directories be made available in print. The rule is revised to reflect these changes.

19. Virtual On-Site Visits and Other On-Site Comments (§§ 26.83(c)(1) and (h)(1))

NPRM

The Department proposed making an option for virtual on-site visits a regular part of the certification process based on positive experiences with permitting on-site certification visits to be conducted virtually as an accommodation to conditions during the COVID–19 pandemic. This change would reduce administrative burdens and costs for certifiers and applicants. As stated in the NPRM, the Department believed that virtual on-site visits were equally as effective as in-person visits and were a more efficient means of achieving the purpose of the visits. The software used for virtual visits would also permit recording of the conversations between applicants and certifiers, which would permit certifiers to prepare more accurate on-site visit reports and create a fuller record for cases that resulted in a certification appeal. The NPRM still gave certifiers the discretion to conduct on-site visits in person.

Comments

Almost all commenters, particularly recipients, but DBE and non-DBE contractors as well, supported the Department's proposal, citing the reasons stated in the NPRM preamble. Commenters also supported certifiers' discretion to choose whether to conduct on-site visits in person or virtually. Only one commenter, a DBE association, said that in-person on-site visits should continue to be conducted for both initial applications and subsequent certification reviews. Another commenter asked why the NPRM used the term "on-site" at all, given that it proposed having interviews conducted remotely rather than actually on site.

Around 10 commenters suggested that the use of virtual on-sites be somewhat limited, for example, by using in-person on-site visits for initial certification applications, with virtual on-site visits being reserved for post-certification reviews. These same commenters suggested that on-site visits for heavy construction firms or other businesses requiring specialized expertise or equipment (*e.g.*, a medical laboratory) be conducted in person.

Other Comments About On-Site Visits

Comments also addressed other subjects related to on-site visits. Several commenters urged the Department to develop a uniform on-site questionnaire for all certifiers to use. One commenter asked whether establishing a practice of periodic on-site reviews (*e.g.*, at 3, 5, or 7-year intervals) was allowed. Another commenter suggested that follow-up on-site visits be required at three-year intervals.

DOT Response

Under the current rule, recipients must take several steps in determining whether a firm meets all eligibility criteria for DBE certification. An on-site visit to a firm's principal place of business and job sites are a crucial component of this review.

The Department's experience after authorizing virtual on-site interviews during the early years of the COVID–19 pandemic has been overwhelmingly positive. Virtual on-sites are more efficient for certifiers, avoiding sometimes lengthy time periods needed to travel to an applicant's office. That said, there may be situations where an in-person visit to an applicant's office or job site will be beneficial. Particularly in the case of construction firms or others that have field operations, a job site visit can be very useful, and in such cases (as distinct, for example from the case of a professional services firm, all of the work of which is done in an office) the final rule will direct certifiers to go to the job site, if feasible. The decision belongs to the certifier. Certifiers can also set their own schedules for virtual or in-person interviews to certified DBEs in the context of periodic reviews.

There will continue to be no standard form for on-site interviews, and we strongly urge certifiers to avoid using routine questionnaires or checklists because they are not probative and ask for information that duplicates what is found in a UCA. They also miss the point of an on-site interview, which is to comprehensively investigate how the SEDO acquired ownership, how the firm actually operates, and whether the SEDO has enough knowledge to independently make daily and long-term decisions. Interviews should be a conversation tailored specifically to the circumstances of each firm. The conversation must be with the SEDO, as well as with other principals and key employees.

For example, one of the common situations we see is a firm where there is a SEDO and co-owners or key employees who work together to accomplish the firm's goals. In the interview, it would be beneficial to ask specifically how decisions are made. When an issue comes up, does a participant other than the SEDO bring the matter to the SEDO's attention, as opposed to handling the matter autonomously? Is the SEDO able to ask knowledgeable questions about the matter? Does the SEDO then decide based on information or options presented by the other participant, and does the other participant then carry out the SEDO's decision? The certifier should seek real-world examples of how this decision-making process has worked in practice.

The final rule will require certifiers to make audio recordings of interviews. In cases where certifiers have done so, the Department has found them highly useful in deciding certification appeals. They tend to provide much more thorough and nuanced information than certifier staff summaries or paraphrases of what has been said during an interview. Making these recordings will provide fuller context for the information on which certification decisions are based and will help to

prevent misunderstandings or decisions based on paraphrases of what an interviewee says. Whether in a virtual or in-person interview, current technology readily permits recordings to be made with negligible additional burden.

20 and 23. Timely Processing of In-State Certification (§ 26.83(k)) Applications and Denials of Initial Certification Applications

NPRM

Currently, when a certifier receives all required information from an applicant, it has 90 days to complete review and issue a written decision. However, a certifier may, upon written notice to the applicant, extend this period for another 60 days. The NPRM proposed to reduce the extension period to 30 days, though a certifier could get approval for a further extension from an OA. One reason stated in the preamble was to give a firm the chance to cure a defect in its application. Failure by a certifier to meet the deadline would be treated as a constructive denial of the application, and the certifier could become subject for noncompliance under §§ 26.103 and 26.105.

Under the present rule, when a certifier denies an application, the certifier must establish a waiting period of no more than 12 months before the firm can reapply. The NPRM would remove a current requirement for OA approval before a certifier could establish a shorter waiting period. The date on which the waiting period would start to run would be the date of the denial letter.

Comments

Supporters of the proposed change to shorten the extension time frame from 60 to 30 days, among them both recipients and DBEs, outnumbered opponents by a 3–1 ratio. The proposal would encourage quicker and more timely decisions, supporters said. Opponents said that the shorter time frame would impose an undue burden on certifiers' staff, particularly given that staff are often small. Rushed decisions could be poor decisions, one said, suggesting that the 90-day deadline should be a target to be met, if practicable, rather than a mandate.

Some commenters suggested modifications of the proposal. One said that extensions should be for 45 days, rather than for 30 or 60. Two comments said that the process should accommodate delays in the transmission of information from the applicant to the certifier. Another idea was that, if applicant did not get complete materials to the certifier within 90 days, the certifier could return the application without deciding on the merits. Another suggestion was that, during the time that a firm was making curative changes in its application, the clock for the certifier's deadline should pause. Two commenters suggested adding specific consequences for tardy certification actions, such as being able to appeal constructive denials to the Department.

One commenter supported the ability of certifiers to have reapplication waiting periods shorter than 12 months without seeking permission from an OA.

DOT Response

Existing provisions are designed to ensure that recipients afford adequate procedural due process to DBE applicants, standardize certification practices, and develop an adequate record of certification actions. The 2014 final rule explained the Department's rationale for setting 90 days as a reasonable time for recipients to render a certification decision. We believe 90 days remains sufficient and that notifications to firms about a 60-day extension beyond that point are rare. The Department is keeping the proposal to shorten this extension period to 30 days, because this is in the best interests of firms that may be seeking contracting opportunities as a DBE and the recipient, who can assign sufficient staff to perform the certification function in an efficient manner. In our view, the ability of all certifiers to email questions and requests for information to firms and their ability to conduct virtual on-site visits will mitigate the concerns of the handful of commenters on this issue. We believe that 90 days is more than enough time.

The Department proposed adding verbatim language that recipients must include in all denial and decertification letters, essentially directing firms what to include in their appeal letter, how to appeal to DOCR, and their right to request information. This language was communicated to recipients by DOCR, and we have noticed its inclusion in most of the adverse decision letters processed since that time. This final rule references that language, which will be posted on the Departmental Office of Civil Rights website.

The Department is also finalizing the proposal to remove the current requirement for OA approval before a certifier could establish a shorter waiting period for the firm to reapply for certification to less than 12 months from the date of denial. This change to the new § 26.86(c) gives UCPs the leeway to improve wait time to certify firms without OA approval. The final change clarifies that the date on which the waiting period would start to run would be the date of the denial letter. This information, per § 26.86(a), must be included in all denial letters.

We want to call to participants attention the provisions of § 26.83(h)(2), which prohibit certifiers from requiring a DBE to reapply for certification, "renew" a certification, or a similar requirement. We are aware that recipients sometimes use commercial software that calls on recipients to submit information associated with an initial certification in order to complete the annual DOE process. This is contrary to the regulations, which limit the material that must be submitted with a DOE to documentation of a firm's size and gross receipts. For a recipient to, in effect, require more because a software program calls for it amounts to noncompliance with the regulation. We expect a recipient, in such a situation, to work with the vendor to conform the software to the requirements of the rule.

21. Curative Measures (§ 26.83(m))

NPRM

The NPRM proposed a new § 26.83(m) that would permit, though not require, certifiers to notify an applicant of ineligibility concerns and allow the applicant an opportunity to rectify the deficiencies in a timely manner. The NPRM cited two examples of matters that might be subject to curative measures: proof of a financial contribution meeting § 26.69 requirements and revising an operating agreement or bylaw provision to meet control requirements of § 26.71.

Proposed § 26.69(f) would create a parallel curative measures provision concerning ownership. There was not a parallel provision in § 26.71 concerning curative measures for control, though the second example in the discussion of proposed § 26.83(m) applies that provision to a control issue.

Comments

The comments below apply to the proposed curative measures sections in proposed §§ 26.83(m) and 26.69(f).

Of the over 20 comments on this subject, about two thirds, from both recipients and DBEs, supported the concept. Many of the supporters, however, asked for additional guidance or examples concerning what kinds of defects would be subject to curative measures. How much help should certifiers provide to applicants, and what should that help concern (*e.g.*, minor administrative matters, governance issues like organization of boards of directors, larger matters affecting the structure of a company)?

Opponents, most of which were recipients, expressed the concern that the proposal would allow firms to circumvent the rules and enable fraud. Certifiers should not be cast in a "coaching" role in which they tell applicants how to structure their firms. Applicants should be responsible for getting things right as they present companies for certification.

DOT Response

The Department contemplated curative measures as far back as 1992. We do not agree with commenters who felt that allowing a firm to take curative measures increases the possibility of fraud. Our view is that to be considered non-fraudulent, curative measures must be a legitimate effort to correct impediments to certification made in good faith. A firm bears the burden of showing that it undertook curative measures in good faith and not in an attempt to circumvent the requirements and intention of the DBE program.

The DBE program exists to facilitate participation of small, disadvantaged businesses in DOT-sponsored contracting projects and airport concession opportunities. The program is not intended for certifiers to create hurdles for firms that would be eligible but for minor deficiencies that the firm could easily rectify. As described in the Department's August 7, 2019, memorandum and in the NPRM preamble, startup firms created by inexperienced SEDOs have been particularly vulnerable to this, causing them to endure a 12-month waiting period for reapplying. Such situations can be avoided if a certifier notifies the firm of potential denial grounds and offers the firm an opportunity to address them before the certifier renders a final decision. The August 7, 2019, memorandum explicitly encourages certifiers to do so and provide a reasonable time for the issues to be resolved before the certifier renders a decision. This would result in lifting the burden on a certifier to begin the eligibility evaluation anew should the firm reapply.

The Department codifies in § 26.83(m) of today's final rule the language of the August 7, 2019, memorandum. We agree with commenters that this provision is not intended to make certifiers "coaches" for all aspects of the certification process or require certifiers to pause the evaluation process to allow firms to make time-consuming changes, such as major organizational restructurings. We agree with commenters who pointed out that firms bear the burden of proving that they fully meet the regulation's certification requirements, while emphasizing that we view the task of certifiers as reasonably balancing the interest in ensuring that only eligible firms participate with the interest of the program in providing opportunities for small, disadvantaged businesses, including those that may not be sophisticated in the details of the certification process.

Section § 26.83(m) amounts to "if you see something, say something." While it is not a mandate, the Department believes strongly that certifiers should call situations potentially solvable through curative measures to applicants' attention, in order to better serve the program's objectives of improving opportunities for DBEs.

Doing so does not impose an unnecessary time crunch on certifiers with respect to the final rule's deadlines for action on applications. If a certifier notices a problem, notifies the applicant about it in writing, and the applicant takes, for example, 14 days to fix it, that period would be added to the certifier's timeline for completing the decision. The certifier could also set a realistic deadline for the applicant to fix a problem the certifier mentioned; if the applicant did not respond in a timely fashion, the certifier could then decide on the basis of the original documentation. In all cases, it will be important for the certifier to memorialize corrective measures, notifications, dates, and responses in its records.

The NPRM preamble mentioned two types of problems that the Department has seen frequently in certification appeals. One involves proof of a financial contribution. For example, sometimes a SEDO who is married to a non-disadvantaged individual will make an initial capital contribution from a joint bank account, not realizing that, absent a renunciation of interest in the funds by the spouse, only 50 percent of the contribution will be counted toward ownership, insufficient to support an assertion of 51 percent or greater ownership.

Similarly, a bylaw provision–often one seemingly copied from an online template–will say that a majority of the members of the board of directors is needed to form a quorum or act on behalf of the board. In a two-person company, this inadvertently can result in the possibility of a deadlock on the board, even though the SEDO clearly owns 51 percent or more of the stock and thus is able to control stockholder votes. Mere paper changes, without substantive changes, would not "cure" a defect.

These are not the only problems to which this provision could apply, but they exemplify the scope of the sorts of issues the Department has in mind in adopting this provision.

22. Interstate Certification (§ 26.85)

NPRM

The NPRM proposed major changes to the interstate certification provisions of § 26.85, which became effective on January 1, 2012. For the first time in the program's history, there would be nationwide reciprocity among UCPs. The NPRM would also reform the way that UCPs share information about firms certified in more than one State.

The NPRM proposed to eliminate the "home State first" requirement of the present rule, and instead allow a firm to apply for its initial certification to any UCP. Then, any other State would be required to accept the original UCP's certification. All the firm would have to submit to an additional State would be a short cover letter, an image of its Original State of Certification (OSC) directory entry, and a Declaration of Eligibility (DOE). Unlike under the present rule, the firm would not have to send an additional State its entire certification package.

Following the interstate certification by an additional State, that State and others that have certified the firm, could ask State A or other UCPs for information on the firm, which would need to be provided within 10 business days, as part of all program participants' obligation to cooperate. The Department said that this should not be unduly burdensome, given electronic file sharing technology.

A firm would have to submit an annual DOE to each State in which it is certified. The NPRM asked whether it would be helpful to create a centralized database to reduce the burden on firms certified in multiple States. The NPRM also would allow States to participate in oversight and enforcement activities with other States about a firm, including joint removal procedures that would be voluntary among the UCPs involved.

A proposed provision would state that if a firm certified in more than one State were decertified (for any reason except failure to cooperate with one State), the firm then appealed the decision to DOT, and DOT affirmed the decertification, the firm would then automatically be decertified in all States, without further right of appeal. That is, if one State decertifies a firm and DOCR upholds the action, then the firm would be automatically decertified in all States in which the firm was certified without the need for further process in those States.

Comments

Interstate certification proposals have long inspired input from a significant number of commenters, and the response to this NPRM was no exception. About twice as many commenters expressed general support for the NPRM's nationwide reciprocity proposal as expressed opposition, but there were also a wide variety of nuances and suggestions among commenters on the topic.

The largest number of supporters were DBEs or their associations, who cited the reduced burden on firms who have often had to submit extensive documentation to become certified in more than one State. One DBE, for example, mentioned having to submit about 3,000 pages of paperwork to become certified in another State, but was unsuccessful because it did not have its original application. Another spoke of inconsistencies in acceptance of NAICS codes from one State to another, long delays by certifiers outside of its home State, and differing paperwork requirements and regulatory interpretations among States. One DBE owner related their difficulty with tracking different deadlines for renewal each year, citing a burden in preparing and submitting materials for each State in which it was certified in. The same owner expressed that it takes some UCPs a long time to process renewals or notice of change, which results in their view of an expiration date passing without renewing paperwork. On these points, we reiterate that there is no DBE renewal process, nor does certification expire.

A significant number of recipients also supported the proposal, one citing reduced staff time demands that would allow its staff to focus on other program tasks (*e.g.*, compliance). It said that it now takes them 38 staff days to process an out-of-state certification and believed the proposal would reduce this to 10 staff days. Other recipients also cited reduced processing time or greater flexibility as potential benefits. One recipient noted that it had already been doing a good deal of reciprocity and found that it reduced their burdens.

Some of the supporters of the reciprocity proposal and other commenters, among them both DBEs and recipients, suggested going to what might be called national certification. This would involve a single national directory, with a Federal certification database. A DBE firm, for example, mentioned that it has to send annual updates to 15 different States. Sending one update to a centralized database would be far less burdensome, it said.

This group of commenters supported the concept that once a firm was certified in its original State of certification usually its home State, the firm's status would be reflected in the database, and it would automatically be certified in all States, without having to submit additional documentation elsewhere. Annual update issues or decertification actions could be handled through the centralized database or by the firm's home State. If universal certification of this kind were put into place, there would be a greatly reduced need for individual State systems and the resources needed to run them.

Generally, commenters with a variety of views on the overall question of interstate certification supported the idea of a centralized database and/or national portal, though three recipients warned that questions about control of such a database and a variety of implementation problems that could beset it might create serious risks to the program.

Recipients made up a large majority of commenters opposing reciprocity. One reason was the long-standing concern that given what they saw as the varying quality of other recipients' certification programs, unqualified firms could become certified in its OSC and then become certified in other States without further review. The proposal puts too much trust in other certifiers, one recipient said, preventing recipients from exercising due diligence for their own programs. One large recipient complained, for example, that another large recipient never looked at the personal net worth of firms following initial certification and was concerned about having to deal with other certifiers' out-of-date records.

Some certifiers wanted to vet each firm that sought certification in their jurisdictions, and doing the job right would require seeing the firm's documentation before granting eligibility. Absent that ability, questionable firms could get contracts in other States before they had adequate time to review their bona fides, and after-the-fact decertification was too little and too late as a remedy for such problems. Accordingly, some certifiers claimed that reciprocity would consequently undermine program integrity. To mitigate this problem, one recipient suggested that reciprocity be limited to five UCPs in its region.

Moreover, the proposed system would encourage DBEs to join the directories of multiple States (a "land rush," one commenter called it), multiplying the workloads of certifier staffs to oversee the continued eligibility of firms (*e.g.*, with respect to annual DOEs), some of whom might never work in their jurisdictions. A DBE was concerned that if there were different DOE due dates for different States in which a firm was certified, it would be all too easy for small businesses to miss submission deadlines, resulting in decertification. DOEs should go only to the home State, not other States, some commenters said. A non-DBE contractors' association said that, in general, a home State should bear the burden of oversight to prevent increased burdens for other States. For example, it said, its State already has over 400 out-of-state firms in its directory, and reciprocity could require it to oversee many more.

One concern expressed by several commenters pertained to State licenses. For example, if the OSC does not require the person running an engineering company to personally have a professional license, but another State does, how is that other State to enforce its licensing requirement in the proposed reciprocity regime? Commenters also expressed concern about data security issues, as entries in online directories multiplied without regard to the cybersecurity protections that would guard sensitive business data and personal protected information.

A recipient association said that interstate certification should not be implemented until a robust oversight system could be established everywhere. Commenters doubting the wisdom of the proposal also said that 10 days was too short a time to exchange information among UCPs, especially because all certification records are not yet electronic. Sixty days would be more realistic, one recipient said. A DBE expressed concern that large out-of-state prime contractors would travel with their favorite DBE firms, crowding out local DBEs in other States.

A recipient and a non-DBE contractors association raised the issue of how an influx of out-of-state contractors would affect goal setting and disparity studies. Would out-of-state entries in a UCP's directory be used as a measure of the availability of ready, willing and able contractors? If so, it could distort the goal-setting process, these commenters feared.

Commenters who either favored or opposed the reciprocity proposal in general, and other commenters as well, suggested a variety of ideas that they believed would improve the certification system. One DBE suggested that States should recognize other States' business and professional licenses as well as certifications. A UCP asked DOT to create a uniform interstate application form. A non-DBE association wanted to make sure that the

rule did not allow other States to second-guess State A without a "well-founded" reason.

Three recipients favored creating a "challenge procedure" to allow an additional State to prevent an out-of-state firm from immediately becoming certified immediately, if the additional State had a good reason to believe that OSC certification was based on faulty or missing data. A non-DBE firm suggested that if an OSC's certification is more than 10 years old, another State in which the firm is certified should be able to do a review of its eligibility.

A group of recipients suggested that an additional State could choose to require an out-of-state firm to provide a statement that it intended to work in that State before the firm would be certified there. They and other commenters also supported retaining the "home State first" provision of the existing rule, rather than the NPRM's idea that any State could become a firm's OSC. Another recipient suggested that an interstate application firm should include details about its licenses to work in that State. Two recipients suggested that, to minimize recipients' burdens, requests from one UCP to another about a firm be limited to the original application, its supporting documentation, and the most recent four years of DOEs. A similar suggestion was that it should be enough for the OSC to submit its most recent on-site report to another State.

The proposal to give nationwide effect to DOCR certification appeals decisions upholding a decertification action in one State was discussed in several comments. Two comments supported it, and three opposed it. Opponents said the proposal would deter firms from appealing and raise due process and federalism concerns for both firms and certifiers. Another commenter said that other States should be able to conduct their own decertification process. A third said that a firm should be decertified only in those States that had joined the decertification proceeding. One commenter wanted the Department to look at the other side of the coin, by imposing retraining requirements or other consequences on UCPs that had had a decertification decision overturned on appeal.

Two comments raised questions about this proposal. One asked how and when firms decertified in this manner could reapply in the States in which they were automatically decertified. A second asked what would happen if a firm decertified in one State declined to appeal.

DOT Response

In the original version of the DBE program in the 1980s, each recipient certified applicant firms independently. If there were a State highway agency, three airports, and four transit agencies in a State, then a firm wanting to work throughout the State might need to get certified by eight different agencies, each with its own certification process. This proved inefficient and burdensome. First proposed in 1992 and added to the rule in the major 1999 revision, the creation of unified certification programs (UCPs) ensured that a firm would have to be certified only once to work in any recipient's DBE program in the State.

The DBE program is a national program, and the same kinds of inefficiencies and burdens that adversely affected DBEs within States in the pre-UCP era continued to affect firms that wanted to work in more than one State. A firm certified in one State would have to go through a new certification process in another, complete with the submission of extensive documentation and having to wait for the completion of the second State's administrative process. Because certifiers' views of a given firm's *bona fides* could differ among States, a firm could be approved for participation in one State while denied in another, all based on the same facts.

The idea of nationwide reciprocity among UCPs was raised, but rejected, in the 1999 rulemaking, though the Department at that time encouraged cooperative arrangements among States to reduce certification burdens. Unfortunately, few certifiers chose to enter into such agreements. Consequently, in a 2010 NPRM, the Department proposed an interstate certification system that sought to occupy a middle ground between full-fledged nationwide reciprocity and an approach that allowed UCPs to challenge and reject DBEs certified in other States. This became the basis, in 2011, for what became § 26.85 of the current regulation.

Under this current provision, a firm certified in its home State ("State A") would submit its certification credentials to "State B," which could either accept the firm or require the firm to submit a much more extensive document package. Within 60 days, State B would either accept the firm's certification or determine that there was "good cause" of a kind specified in the regulation for rejecting the firm. In the latter case, the firm would then bear the burden of proof of showing State B that it was nonetheless eligible.

As documented in the preamble of the 2022 NPRM, § 26.85 has not worked well (see 87 FR 43647). Few UCPs have accepted out-of-state firms without requiring lengthy and burdensome additional certification processes. Some UCPs have effectively ignored interstate certification procedures, treating all or nearly all out-of-state applicants as if they were applying for certification for the first time. The "good cause" reasons for questioning an out-of-state firm's eligibility have been widely misunderstood or misapplied (*e.g.*, "factually erroneous or inconsistent with the requirement of this part" being used to mean a simple disagreement about a judgment call). The result is that a large majority of interstate certification cases appealed to the Department have been reversed.

As long ago as the 2010 NPRM, the Department stated that true nationwide reciprocity is a worthwhile objective, and in the 2022 NPRM we proposed to make it a reality, so that a firm in a nationwide program under a single national set of eligibility criteria could expect to be eligible throughout the country. As noted above, the comments on the proposal followed the lines of the long-term debate on the subject. Generally speaking, most DBEs favored this approach, for its value in reducing burdens, while many certifiers opposed it, out of concern about having to accept firms whose qualifications they questioned. Having found, over many years, that approaches short of nationwide reciprocity have been unsatisfactory, the Department is convinced that it is time to treat certification on a meaningfully national basis. For this reason, we are, with some modifications in detail, adopting the NPRM proposal, intending to reduce burdens on all participants while building trust, encouraging teamwork, and improving the quality of certifications. As with the adoption of UCPs in 1999 within States, we believe that the adoption of nationwide reciprocity among States, while necessitating some adjustments in current practice, will result in a system that works better for everyone concerned.

Under the final rule, a firm would initially be certified in the State in which it maintains its principal place of business. We no longer use the "home State" or "State A" terminology, instead speaking in terms of a firm's "jurisdiction of original certification" (JOC). The JOC would normally be the State in which the firm maintains its principal place of business, though there could be unusual cases that could lead to the JOC being a different State

(*e.g.*, a situation in which a firm's principal place of business has moved to another State after it has been certified). However, the additional State may not deny a DBE's application based on questions regarding the location of the firm's JOC.

Once a firm is certified in its JOC, all it needs to submit to become certified in any other State is a short cover letter and a signed Declaration of Eligibility (DOE). The cover letter must state that the firm is applying for certification in the additional State and all other States in which the firm is certified. The cover letter may also list any licenses (*e.g.*, business or professional licenses) that the firm has in the additional State. The additional State could request the JOC's documentation concerning the firm, which the JOC would be required to provide within 30 days (modified from the NPRM's 10 business days to reduce burdens on the JOC). Ten days, in the view of a commenter that still retains paper copies of certification materials, is too short a period to scan and send these materials manually. We agree and modified the rule accordingly.

We acknowledge that implementing the revised interstate rule will require additional monitoring of businesses, and we would like to remind recipients that the current rule allows UCPs to charge reasonable application fees. These fees can help alleviate some of the burden associated with managing the increased number of businesses under reciprocity. Application fees may also deter firms that seek certification in multiple jurisdictions without any intentions of conducting significant work within each jurisdiction. As noted in the discussion of control provisions above, an out-of-state firm and owner that lack a necessary business or professional license in an additional State, while it would be certified and listed in the directory, would not be able to conduct business there until it obtained the required license(s).

When a firm is certified in its JOC, it becomes responsible for submitting a DOE to that State each year on the anniversary date of its certification. When the firm then becomes certified in other States, it also becomes responsible for submitting annual DOEs to them. We believe the most convenient way of handling this requirement is to use the JOC anniversary date as the date for submission of DOEs to all States in which the firm is certified. This will likely result in firms initially submitting a second DOE to an additional State before a year has elapsed, but after that will avoid the potential confusion of multiple submission dates. This alleviates the burden on firms certified in multiple jurisdictions.

For example, suppose a firm is certified in its JOC on September 1, one additional State on October 7, and a second additional State on the following January 8. The firm would submit its first DOEs to all three States on the next September 1, and then on every September 1 thereafter. Doing so will inform all the States involved that the firm has a continuing interest in working there. Having a single DOE date, reduces the burden on firms, some of which noted in their comments that it can be burdensome to submit paperwork to each State on different timelines. With this change, the Department also believes the annual submission requirement is not onerous. Some commenters asked that there be a national, centralized database for DBE certifications. While we understand the attractiveness of the concept, we do not believe that it is feasible at this time. In addition to budgetary limitations, concerns about ensuring that data are updated and secure would need to be addressed. Until it is possible to deal successfully with the issues involved, the program must continue to rely on UCP directories, which are responsible for treating out-of-state firms in the same way as in-state firms for directory and other program administration purposes.

Some commenters expressed a concern that having larger numbers of out-of-state firms in their directories could skew goal setting. Recipients commonly use bidders lists as a primary source of data for setting overall goals; thus, only those out-of-state firms that bid or quote on projects should be included in the methodology's base figure. Recipients using other primary data sources should review their UCP database, including the NAICS codes associated with each firm, and consider whether out-of-state firms will likely submit bids or quotes prior to including them in their base figure.

A few commenters asked to have a "challenge procedure" available, through which they could delay certifying an out-of-state firm for a given period (*e.g.*, 30 days), giving them an opportunity to raise issues concerning the firm's eligibility with the OSC. We believe implementing such a procedure would not facilitate the certification process but would rather introduce an additional bureaucratic step. Our goal is to streamline the interstate certification process. We view the "challenge procedure" as a slight modification of the old interstate rule, which was a complex and burdensome certification framework. Instead, we aim to adopt a more streamlined and transparent process that eliminates unnecessary barriers to certification. Given the procedure described below, for collective action to decertify a firm that appeared not to be eligible, we do not believe such a preemptive procedure is needed.

One of the issues considered in the NPRM was how, in the context of a firm that is certified in multiple States, a decertification process would work. Proposed § 26.85(g)(4) said that any UCP could join a decertification proceeding initiated by another State, on the same grounds and facts alleged by the initiating State. The joining UCP could present evidence at the hearing. The result of the ensuing decision would apply to all States that are parties to the action. Under paragraph (g)(6) of the proposed section, if a decertification by any UCP in which the firm had been certified is upheld on appeal by the Department (except with respect to actions concerning a failure to cooperate or send a timely DOE to the decertifying State), then the firm would lose its eligibility in all States in which it was certified.

As noted above, some commenters said that UCPs should be able to conduct their own certification proceedings, that the effect of a decertification should apply only to States that have joined a decertification proceeding in another State, and that the nationwide effect of a DOT decision upholding a decertification by one State was unfair to the firm as well as the other certifiers involved.

In considering these comments, the Department believes that a modification of the proposal would serve not only the interest of fairness to certifiers and firms but also further the Department's policy goal of encouraging cooperation and interaction among certifiers. Therefore, the final rule will establish procedures that would apply to a scenario in which a firm is certified in more than one State and one of the States believes it has a ground under proposed § 26.87(e) to decertify.

The procedures are best illustrated by an example. DBE X is certified in its JOC and in five additional States via reciprocity. One of the additional States believes that it has reason to decertify the firm. It notifies not only the firm, but also the other States in which the firm is certified, that it is considering beginning a decertification proceeding, as well as the grounds for doing so and the evidence supporting such an action. The other States have 30 days to respond. They may comment on proposed basis for its proposed actions, concur or non-concur. A certifier would

be deemed to concur in the proposed action if it did not respond. If it had grounds under § 26.88, the certifier proposing decertification may impose a summary suspension without affecting the status of the firm in other States, though we encourage the certifier to notify the other States of its action so that they could take similar action if warranted.

If after considering the input from other States, the State proposing decertification decided to pursue the matter, it would then issue its formal NOI and proceed to a decision. Any of the other States could decide to file a brief or other arguments and evidence. In its final decision, the State that proposed decertification may address arguments and evidence from other States involved, as well as those made by the respondent firm. This is in effect a "speak now or forever hold your peace" provision. We note that the resolution of the matter is an independent decision of the UCP proposing the decertification, not dependent on the "votes" or views of other certifiers.

Because a decision by a UCP to decertify the firm would only be issued after soliciting views from the other States involved, the decision would represent the collective view of the UCPs involved and would take effect in all the States involved. If the firm appealed, any certifier that did not agree could submit its views to the Department. The Department's decision to affirm or reverse the decision would apply to all the States in question, since all would have had the opportunity to participate and make their views known.

23. Denials of In-State Certification Applications (§ 26.86)

See discussion above, item 20.

24. Decertification Procedures (§ 26.87)

NPRM

The NPRM emphasized that certifiers must strictly follow the regulation's procedural requirements concerning decertification proceedings, putting the certifier's burden of proof up front in the revised § 26.87 and clarifying what must be included in certifiers notices of intent (NOI) to remove the firm's certification.

If a DBE fails to submit the required annual Declaration of Eligibility (DOE) required under § 26.83(j) in a timely manner, the NPRM proposed that a certifier could initiate decertification proceedings on that basis without offering the opportunity for a hearing. If within 15 days of the issuance of a certifier's NOI to remove the firm's certification, the certifier could issue a final notice of decertification.

The NPRM would say that, if a ground for decertification is a change in DOT's certification standards or requirements, the certifier would have to offer the firm, in writing, the opportunity to cure resulting eligibility defects within 30 days.

The Department proposed authorizing, on a permanent basis, virtual hearings (*i.e.*, via video conferencing) in decertification cases. Virtual hearings are more efficient, can be more easily scheduled and better protect the health of participants. Other requirements, like those for verbatim transcripts, would remain intact. To avoid dilatory tactics, the NPRM would impose a 45-day deadline for submission of written responses to an NOI or a hearing. Once the hearing had happened, or written responses received, the certifier would have 30 days to issue a final decision.

When there is a hearing, the NPRM would require that only the SEDO be permitted to answer questions concerning the firm's control. While an attorney or other representative could be present and participate, and answer questions concerning other aspects of a firm's eligibility, only the SEDO could testify about control matters. An attorney or other representative could ask follow-up questions to the SEDO concerning control, however.

Comments

Decertifications for Lack of a Timely DOE

Almost all comments on the issue of decertifications for lack of timely submission of a DOE supported the idea that there need not be a hearing in such cases. However, several of these commenters thought that the 15-day window for response to a NOI concerning a late DOE was too short. A 21-, 30-, 45-, or 60-day time period for response before a final decertification was issued would be fairer, some commenters said, pointing to the difficulty that especially small firms may have keeping up with paperwork or potential increases in certifier workload. One comment cautioned that, because of the uncertainties of email, the time period prior to a decertification action start to run only on confirmation that the DBE received the certifier's NOI.

To avoid confusion and potential decertification actions, firms should have to submit only one DOE per year, the commenter said. Another commenter said that it did not want lack of a timely DOE to be the sole ground for removal of eligibility.

Deadlines

There were few comments about the proposed deadline in the NPRM for issuance of a final decertification decision, all of which were from recipients. One would prefer no deadline at all, but if there is one, believed 60 days for the issuance of a final decision would be appropriate. Another supported 60 days, saying that 30 days was too short a time to handle complex cases, especially for high volume certifiers. A third found the proposed 30-day deadline acceptable but wanted to allow a 15-day extension on a case-by-case basis.

With respect to the proposed deadline for conducting a hearing, a recipient suggested that the hearing should be scheduled 45 days from the firm's request for a hearing, rather than from the issuance of the NOI by the recipient.

Hearing Procedures

Concerning representation at hearings, a large majority of the comments addressing the issue supported the NPRM's proposal that only the SEDO should testify about control issues. Attorneys and other representatives should be able to speak about other matters (*e.g.*, PNW), several added. The commenters who disagreed thought that the requirement would impinge on the due process owed to DBEs in a proceeding that could remove certification, a property right, from a firm. A recipient thought that panel members at a hearing should be able to use their discretion with respect to who is allowed to testify on issues being discussed. One comment said that only owners should be able to testify about ownership and other issues, as well as control.

All the comments that addressed the proposal for allowing virtual decertification hearings supported it. One said that, however, a firm should be able to have an in-person hearing if it wanted one.

Among other comments, one thought that an "informal hearing" should be better defined, and that there should be additional safeguards against abusive or dilatory tactics by attorneys. This comment also said that it was important that hearing officers and decision makers in decertification actions really understood the rules well, suggesting that additional training from DOT for such persons would be useful. Another commenter thought that hearings should not be heard by staff from recipients in the same State as the certifier proposing certification, as this could lead to

rubber-stamping of the proposed removal. A comment said that firms needed stronger protections in decertification actions, as they can be subject to burdensome information requirements and harassment, especially in cases involving rebuttal of the SEDO's presumption of economic disadvantage.

Other Comments

Once a firm has been decertified, a few recipients said, the certifier should notify all other States in which the firm is certified. DOT should notify States if a decertification is upheld on appeal, another said.

DOT Response

Filing a timely DOE is an affirmative obligation of certified firms. Given that all DOEs to all States would now be due on the same date—the anniversary date of certification in the JOC—firms should not be confused about the time they are supposed to send DOEs to all the States in which they are certified. We believe that summary suspension is the most efficient provision for enforcing failures in filing § 26.83(j) material. Nevertheless, the final rule allows the certifier the discretion to choose either § 26.87 or § 26.88 as the most appropriate course of action.

With respect to the date for a hearing on other decertification actions, we believe that it is prudent to require certifiers to set a hearing date that is no less than 30, but no more than 45, days from the date of the NOI. This prevents both undue delays in the process and schedules that do not allow a firm to prepare adequately. The firm must let the certifier know within 10 days whether it wants a hearing, and the parties can negotiate an agreed-upon date for the hearing. If the firm does not want a hearing or does not notify the certifier in a timely manner that it wants one, the firm can still submit written information and arguments.

In cases in which the firm elects not to go to a hearing, and rather only submits written materials, we believe that the firm should have the same amount of time to prepare as in the case where it chose to appear at a hearing. Therefore, the material would be due by what would have been the hearing date. If a firm does not show up for a hearing, or does not submit written materials, the certifier makes its decision on the basis of the information it already has.

In the interest of simplifying the procedure, we are not specifying by rule who can speak to issues at the hearing. We emphasize that, during a hearing, a SEDO or other witnesses should have a reasonable opportunity to consult with counsel, other witnesses, or experts. It is appropriate neither for a certifier to deny the firm such an opportunity, nor for the firm to unduly delay or interfere with the conduct of the proceeding. Dilatory tactics are prohibited and may be sanctioned by a certifier. It is up to the hearing officer to make sure that information presented is relevant and is provided by the most knowledgeable sources. For example, if an attorney or other witness attempts to speak to a matter affecting control, it could be appropriate for the hearing officer to say, in effect, "I want to hear directly from the SEDO on this matter."

It is incumbent on certifiers to conduct thorough on-site interviews—including a review of a certified firm prior to considering decertification—so that information about the roles of other key participants and the firm's decision-making process can already be part of the record before the hearing.

We agree with commenters that the decisionmaker in a decertification hearing must, in addition to complying with separation of functions requirements, have extensive familiarity with the program regulation. We urge certifiers to make sure that any officials who may be tasked with this responsibility have received thorough training concerning the regulation, such as the Department has made available. We also note that, as under the previous versions of the regulation, the deciding official must also be an individual who was not involved in the earlier stages of the proceeding or who is not supervised by anyone who was. This could be someone in another part of the certifier's agency or someone who works for another agency.

In administrative law, a "formal" hearing is one that involves a trial-type hearing with administrative law judge and detailed rules of evidence. At the Federal Government level, sections 554–557 of the Administrative Procedure Act (5 U.S.C. 554–557) provide a model for what such a proceeding looks like. One example of such a proceeding within the Department of Transportation is the process for aviation enforcement proceedings under 14 CFR part 300. Anything other than that is an "informal hearing." The structure of informal hearing in the DBE program can vary among certifiers, but in all cases must provide reasonable administrative due process to the respondent and other participants.

Commenters agreed with the proposal to authorize virtual hearings in decertifications proceedings. While in-person hearings are also permitted, we note that in an interstate decertification case in which staff from other States are participating, a virtual component would be essential. The requirement to provide a transcript of any hearing, virtual or in-person, to the Department in the event the firm appeals remain in place.

The NPRM proposed that once a hearing had been held, or written arguments received, a certifier would have 30 days to issue a final decision. Some commenters thought that time period was too short, given certifiers' workloads. A firm remains certified until the NOD is issued, so the effect of a certifier's delay beyond that period has the effect of keeping in effect a certification that the certifier believes should be removed. A certifier that often fails to meet this deadline may be the subject of DOT compliance and enforcement action.

In the interest of simplifying the rule and avoiding disputes over the basis for a decertification, the proposed § 26.87(g), specifying the grounds on which a decertification can take place, is not included in the final rule. In our experience, these provisions have often led to confusion (*e.g.*, concerning whether a certifier's previous decision was "clearly erroneous" or simply change of mind). The key question in any decertification action is whether a firm meets eligibility criteria at the time of the action. If a certifier certifies a firm in September, and the following April comes to believe, on the same facts, that the firm is not eligible, it is likely to have a difficult time meeting its burden of proof in a decertification proceeding.

25. Counting DBE Participation After Decertification (§ 26.87(j))

NPRM

In addition to clarifying the effect of the removal of a firm's certification prior to a DBE obtaining a prime contract or subcontract, the NPRM proposed changes to § 26.87(j) concerning how DBE participation is counted with respect to firms that lose their certification partway through a contract. The Department proposed that a prime contractor would only be permitted to add work or extend a completed contract with a previously certified firm with the prior written consent of the recipient.

This proposal was responsive to the concern that, especially in a long-term project of the sort that is often done via a design-build contract, prime contractors had an incentive to give work to decertified firms that were already working for them, rather than find new eligible DBEs to do the work going forward. At the same time, the proposal would give recipients

flexibility to permit a brief amendment to or continuation of a contract with a decertified former DBE.

Under the current rule, when a DBE is decertified in the midst of a contract, after the subcontract is executed, the prime contractor gets to count credit for its use through the end of the contract. The NPRM proposed to make an exception to that rule, saying that if the reason for the DBE's ineligibility is that it was acquired by, or merged with, a non-DBE firm, the prime contractor could no longer count the former DBE's participation for the remainder of its contract. This means that, under these circumstances, continuing to count the former DBE's work for credit would deprive other DBEs of opportunities.

Comments

A narrow majority of commenters opposed the NPRM's proposals concerning § 26.87(j). Opponents, including non-DBE contractors and recipients, but some DBEs as well, said the proposal concerning merged or purchased DBE firms would impose burdens on prime contractors who, after engaging a DBE in good faith, found that the DBE had later merged with or been purchased by a non-DBE. This would unfairly penalize the prime since the DBE's relationship with the acquiring firm was not the prime's responsibility. One of these comments suggested that the proposed exception should apply only if the non-DBE that bought or merged with the DBE was the prime contractor itself. One opponent of the proposal said that it could place DBEs in an unequal position compared to non-DBEs, who can use mergers and acquisitions for business growth purposes.

Some comments opposed to the proposals said that requiring recipients' consent to count credit for added or extended work for a decertified DBE would be an extra burden on both recipients and prime contractors. A comment said that added tasks for the DBE within its scope of work, including via change orders, should be counted. Denying DBE credit for added or extended use of decertified DBEs could disrupt projects, another comment said. Recipients should make case-by-case judgments on such matters, it added.

Proponents of the proposals, also from a variety of stakeholder types, supported them for the reasons stated in the NPRM preamble. Some of these comments specifically mentioned favoring prior recipient consent for any extension of or addition to the former DBE's work, wanting prime contractors to seek new DBE participation in the absence of such consent.

One comment that supported the proposal asked for clarification about its application in situations where a DBE had exceeded the size standard or had withdrawn from the program. Another did not want firms who had exceeded the size standard during the contract to lose credit. In the context of the ACDBE program, a DBE commenter that supported the proposal nevertheless thought it should be waived if a decertified ACDBE showed that it had made good faith efforts to sell to another ACDBE.

DOT Response

We continue to believe that in most instances, if a DBE loses its eligibility during contract performance but after execution of the subcontract and continues to perform a commercially useful function, its participation should continue to count toward contract goal credit; prime contractors should not bear the burden of finding a DBE replacement if the firm was certified at the time the subcontract was executed. However, many have raised concerns about a prime contractor's ability to continue to count toward goal credit the performance of a DBE that was certified at the time the subcontract was executed but loses its eligibility during contract performance *because it merges with, or is acquired by, a non-DBE* (at times by the prime itself). This may occur early in the performance of a multi-year contract and result in a non-DBE receiving goal credit at the expense of other ready, willing, and able, certified DBEs.

We agree that the standard rule should have an exception if a DBE loses its certification eligibility after execution of the subcontract because it merges with or is acquired by a non-DBE. In that instance only, we believe that the benefit to the DBE program of directing the prime contractor to seek DBE participation to make up the now-ineligible firm's contribution to the goal outweighs the costs to the prime contractor of doing so. Similarly, seeking the recipient's consent for a prime contractor's practice of adding work or change orders, typically in the context of a design-build project, to extend the performance of a DBE that has lost certification during project performance, is a good check on actions that could go counter to the interests of the program. Recipients should reach out to a prime contractor when it becomes apparent that the prime is repeatedly extending the work of a firm after the firm becomes ineligible to determine if the extensions are made for the purpose of avoiding soliciting other DBEs. If so, the program benefits when the recipient withholds consent to add further work to an ineligible DBE to allow room for certified DBEs to participate.

26. Summary Suspension (§ 26.88)

NPRM

The existing summary suspension rule permits or requires certifiers to immediately suspend a DBE's certification in extraordinary situations that could jeopardize program integrity or when time is otherwise of the essence. It is an extraordinary remedy that certifiers should not use lightly and to which a firm should have an adequate opportunity to respond.

The changes proposed to § 26.88 in the NPRM remedy problems in the current language that in effect converts what was intended as swift summary suspension action into a slower § 26.87 process. Notice of the suspension would be by email, rather than certified mail to ensure that the firm received immediate notice of the action and a time certain when the parties would know requisite timelines begin. Credible evidence of the firm's involvement in criminal or fraudulent activity would be added as mandatory grounds for suspension. The death or incarceration of the SEDO, on the other hand, would trigger a discretionary elective summary suspension only if there is "clear and credible evidence" that the DBE's continued certification poses a substantial threat to program integrity. This bar allows for more certifier discretion to determine if either event demanded immediate action. Failure to file a timely DOE, which is essential to a firm's continued eligibility, would also be elective grounds for a suspension. This change expands the ability to remove ineligible firms without invoking a § 26.87 proceeding.

Elective summary suspensions could be based on only a single ground, while mandatory suspensions could cite multiple grounds. The NRPM also provided procedural details for § 26.88 proceedings, designed to bring the proceedings to conclusion within 30 days. A new elective suspension occurring within 12 months of a previous elective suspension would be null and void, and subject to "injunctive relief" from the Department.

Baked into the proposed rule are balanced due process parameters framing both certifier and firm actions. This includes a certifier explaining with specificity the reasons for the actions, their consequences, and the evidence replied upon. The firm may elect to present information and arguments or explanations but is required to

affirmatively respond to the certifier's scheduled hearing—opting in or responding in the timeline specified. If the firm fails to cancel or appear at the hearing, it forfeits its certification. Boundaries on what evidence the certifier may present are delineated in the proposed rule as is the applicable burdens of production and proof by both parties. Lastly, the proposed changes make suspensions immediately appealable to DOT.

Comments

The nearly 20 comments addressing this section of the NPRM had a variety of things to say about it. Several supported the proposal as written. One comment asked whether the "clear and credible evidence" standard for an elective suspension is the same as "clear and convincing evidence," while another thought that the "clear and credible evidence" standard placed an undue burden on certifiers.

One commenter thought that the proposed scheduling requirements would be difficult for certifiers to meet. Two commenters asked for more detail on the timing and procedures for the process, such as who could attend and who the decision maker would be. Others believed that a certifier should be able to suspend a firm more than once in a 12-month period, if circumstances supported doing so (*e.g.*, there are two separate events in such a period that would justify a suspension).

One comment suggested adding bankruptcy, especially under Chapter 7, as a trigger for a suspension. Another suggested that, after a bankruptcy, death of a SEDO, or another basis for an elective suspension, there should be a 90-day grace period to allow a firm to deal with the issue before it could be suspended. On the other hand, another commenter thought there should be a mandatory suspension whenever ownership of a firm changes in a way that could affect its eligibility. One commenter said that certifiers should be able to cite multiple grounds for a discretionary suspension if such grounds existed.

A number of commenters said that in addition to or instead of sending an email, a certified letter should be used to provide notice of a suspension. Emails were too uncertain, these commenters thought, and a certified letter would provide evidence of receipt. Given the difficulties that small firms often have keeping track of paperwork, another commenter said, imposing a suspension for a late DOE seemed unduly harsh.

DOT Response

Summary suspension is an important tool for protecting the DBE program in situations involving serious, often rapidly developing situations that could adversely affect its integrity. It is intended to be used rarely, in situations that present an obvious threat to program integrity. It is not intended to be used in situations where a certifier merely has a suspicion or a hunch that a firm may be ineligible, or where there is uncertainty about whether the suspension is justified. It is intended to be used when the cause is certain, and when the need for action to protect the integrity of the program is time-sensitive because delay in action could lead to real harm to the program or participants in it. It is not intended to be a shortcut for removing the eligibility of firms whose status is properly addressed under the normal decertification provisions of the regulation.

The NPRM used the term "clear and credible evidence" to describe the proper basis for a summary suspension which, perhaps because of its seemingly similarity to the "clear and convincing evidence" term used in sections of the current rule and in other proceedings, raised questions for some commenters. The Department is not creating a new legal standard or a variation on an existing standard. We are simply saying that to serve as the basis for a summary suspension, the certifier's evidence must be clear. It must be credible. If not, then summary suspension is not an appropriate remedy.

The credible, clear evidence must pertain to specific types of facts. The death of a SEDO, leaving the ownership and/or control of a DBE in question, is one situation that could lead to a summary suspension. Likewise, incarceration, a medical condition (*e.g.*, a seriously disabling stroke), or a legal disability (*e.g.*, having one's affairs placed in a conservatorship) that prevents a SEDO from controlling a firm could be a basis for a summary suspension. As a commenter suggested, an event putting the viability of the firm into serious question, like a Chapter 7 bankruptcy or a merger or acquisition involving a non-DBE firm could also be a basis for action by a certifier under this section.

A DBE or its SEDO's involvement in fraud or other serious criminal activity affecting business integrity or potential to impact continued eligibility could be another basis for suspending the firm. This is not an exclusive or exhaustive list of offenses that could form a basis for a suspension; certifiers should use good judgment to invoke the provisions of this section when misconduct on the part of SEDOs or DBE firms warrants prompt action. We also note that not all criminal offenses are necessarily grounds for suspension. For example, a conviction for driving under the influence of alcohol or drug possession would not provide a basis for a suspension in most cases.

The Department is maintaining the NPRM's distinction between mandatory and discretionary grounds for suspension. If an OA directs a certifier to take suspension action, or in a case involving fraud or other serious criminal activity, then taking suspension action is mandatory. Otherwise, including cases involving the failure to file a timely DOE, the action is discretionary.

Few commenters addressed the timing and procedural provisions of the proposed summary suspension section, and we are adopting them without change. We believe that the provisions are clear and appropriate to what is intended to be a summary procedure. In a hearing under this section, we would apply the same requirements (*e.g.*, with respect to representation by attorneys, separation of functions) as applied to decertification proceedings under § 26.87. To make sure that the firm has received the notice initiating the procedure, we recommend that certifiers send emails having a "read receipt" feature.

We wish, however, to clarify that, once a certifier issues a notice of suspension, the firm has the burden of production. This means coming forward with evidence to argue that a suspension should not be issued. Just as in a decertification action, however, the ultimate burden of persuasion rests with the certifier that proposes the action. It is the certifier that must show, by a preponderance of the evidence, that the suspension is appropriate, and that the firm's eligibility should be removed.

What kind of evidence might a firm produce to show that a suspension should not be issued? While this evidence would necessarily vary from case to case, some examples might be that, even without the participation of a deceased or incarcerated SEDO, other SEDOs' participation is sufficient to meet ownership and control requirements. In the case of a SEDO whose affairs were placed in a conservatorship, a firm might be able to show that the conservator was a socially and economically disadvantaged individual who can maintain the required degree of ownership and control.

The NPRM proposed notifying DBEs of a notice of suspension by email.

Some commenters suggested that the requirement for certified mail be retained, in order to provide greater certainty that the notice had been received. We believe, however, that email is more prompt, important in a time-sensitive matter like a summary. DBEs have to provide email addresses to certifiers as part of the normal certification process and are responsible for updating the address as needed and reading emails when they arrive. Moreover, many email systems include features that confirm receipt of a message.

One result of a summary suspension proceeding can be the decertification of a firm. In a case where a firm is certified in more than one State through interstate certification, however, the suspension and a resulting removal of eligibility apply only in the State that took action to suspend the firm. This is unlike the regular interstate decertification procedure included in the final regulation, in which a decertification action can apply to all States in which the firm is certified.

We have noted that, with respect to firms that fails to file a timely DOE and documentation of gross receipts, the summary suspension process of § 26.88(b)(2)(ii) enables more rapid action than the decertification procedures of § 26.87. The final rule provides failure to file a timely DOE as an optional ground for summary suspension.

Where a certifier fails to follow the procedures of this section properly, the rule makes available to an affected firm a petition for an enforcement order that could vacate an improper second elective suspension within a 12-month period or require a certifier that did not take final action on a suspension within 30 days to lift the suspension and reinstate the firm's certification.

27. Appeals to the Departmental Office of Civil Rights (DOCR) (§ 26.89)

NPRM

The NPRM proposed reinserting language from the 2014 rule that was inadvertently omitted. This includes the requirement that appellants notify DOCR in its appeal decision of other certifiers that have denied or decertified the firm.

The Department proposed modifying existing procedures for certification appeals to the DOCR to improve administrative efficiency. The time for appellants to file appeals would be reduced from 90 to 45 days. Our proposals sought to streamline the process and balance the needs of firms, recipients, and DOCR. We left intact the firm's ability to demonstrate that there was good cause for a late filing and explain to the Department why it would be in the interest of justice to accept the appeal.

The requirement that records be sent from certifiers to DOCR in an indexed and organized fashion would be strengthened by allowing DOCR to reject poorly organized records, resulting in a directive to send a corrected record within 7 days. Failure by the certifier to do so would be a failure to cooperate under § 26.109(c). The NPRM proposed new language wherein DOCR could summarily dismiss an appeal if warranted, such as situations wherein the firm does not set forth a full and specific statement under § 26.89(c), if a firm withdraws its appeal request, or if a certifiers requests to reconsider its decision. The rule would explicitly state that DOCR does not issue advisory opinions and that the 180-day target for issuing an appeals decision would be met "if practicable."

Comments

Several comments from recipients supported the NPRM's time frames for setting the time frame for appeals at 45 days rather than the current 90 days, while a DBE organization suggested using 60 days as a middle ground. Two commenters said DOT should not have more than 180 days to decide a case once a complete record had been received. One of these also suggested that the effect of a UCP's decertification decision should be stayed until DOCR had decided the appeal. A recipient noted that, especially with respect to voluminous records in large cases, indexing and organizing the record can be a major task that may not be able to be accomplished in 45 days.

DOT Response

The final rule incorporates all the proposed changes. Forty-five days is reasonable in our view for appellants to state in their appeal the reasons why they believe the certifier's decision is erroneous, what significant facts the certifier failed to consider, or the provisions of the rule the certifier did not properly apply. On this point, we reiterate language in our 2014 preamble, that the appeal "is not an opportunity to add new factual information that was not before the certifying agency; [H]owever, 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." (79 FR 59579 (October 2, 2014).

To ensure that certifiers' records sent to the Department for certification appeal purposes are as complete and useful as possible, the final rule requires that the records include video or audio recordings, or written transcripts, of any hearings in the case. In addition, certifiers must make audio recordings of on-site interviews. This information is invaluable, particularly in cases hinging on ownership and control issues.

The NPRM sought to streamline DBE and ACDBE processes and balance the needs of firms, recipients, and DOCR. In the last several years, the number of appeals has been low compared to the number of adverse certification decisions. Also, many UCPs have transitioned to electronic application processing. We think it is rare that a UCP could not submit organized and indexed records to DOCR, even those that may be voluminous, within 45 days. This is reasonable in our view particularly considering that effort it takes for both program participants (firms and certifiers) to submit/review application material, participate in an on-site interview, craft and review denial or decertification letters, then appeal.

The Department takes seriously the appeal obligations of firms and certifiers. DOCR will dismiss firms' non-compliant appeals (as § 26.89(c) specifies) and remand matters to certifiers with instructions to augment or fix its record within a specified time, and the OAs will act upon non-compliance (*e.g.*, by conducting compliance reviews).

The Department has decided not to include in the final rule the proposed provision setting a 180-day time frame for decisions in appeal cases. The parallel provision in the current regulation has often proved confusing. It did not relate, as some have thought, to a clock that starts when an appeal letter arrives. Rather, it related to the time when a complete record is available to the Department, something that has often occurred well after the Department received an appeal letter and the precise date for what is often an iterative process can be uncertain. Moreover, the "if practicable" language of the proposal made the timeframe essentially aspirational. The proposal that the Department send a letter when the timeframe was exceeded would likely occupy staff time that could otherwise be more productively used in completing appeals cases. Using its resources, the Department will do its best to respond to appeals promptly. If there is a systematic delay in processing appeals (*e.g.*, because all available staff are assigned to a major project for a

time), the Department intends to place a notice on its website informing the public of the situation.

28. Updates to Appendices F and G

NPRM

The NPRM proposed to remove the Uniform Certification Application and personal net worth (PNW) forms from Appendices F and G, respectively. In addition, the NPRM proposed technical and terminological changes within the appendices, most notably renaming the current affidavit of certification the "Declaration of Eligibility" (DOE). The DOE would be used both in initial applications and in the annual submission to certifiers. Consistent with the proposals concerning personal net worth, the "retirement accounts" line item would be deleted from the PNW form.

Comments

There were few comments on these proposals. One recipient supported them. Another expressed concern about how changes in the forms would be communicated to certifiers if the forms were no longer to be found in the regulation itself. It was also concerned about maintaining uniformity in the absence of a regulatory requirement. One commenter suggested changing the submission requirement of a DOE to every other year because, in their view, there is not much change between years and the change would lower the paperwork burden on certification agencies.

DOT Response

The final rule fully adopts the Department's proposed changes. The annual submission by firms of a DOE is made easier in our view by the widespread use of electronic systems that notify firms and recipients when the DOE is due.

29. Miscellaneous Program Elements and Concerns

There were a wide variety of comments that did not fit neatly within the NPRM's numbered areas of proposed change.

Legal Defensibility of DBE Program

Commenters on this issue expressed deep concern that, in the present legal climate, the DBE program was vulnerable to renewed legal challenges. Consequently, commenters said, it was important to have a discussion in the preamble to the final rule of the continuing compelling need for a race-conscious program, based on recent disparity studies and material that has been provided to Congress in the context of authorizing legislation. A recent report from the Department of Justice was mentioned as a possible source of evidence supporting a continuing compelling need.[9] Given some of the proposals in the NPRM, another comment said, it was important to demonstrate how revisions to the program would remain consistent with the narrow tailoring requirement for race-conscious programs.

Paperwork Reduction Act

Two commenters said that the Paperwork Reduction Act statement in the NPRM underestimated the burdens on airports in the ACDBE program. For the small business ACDBE program, an airport said it would take 120 staff hours rather than the estimated 5.6. For the active participants list, the commenters believed that the staff hour commitment would be 40 hours rather than the projected 42. For other proposed reporting requirements, the commenters said that the burden would be 25 or 40 hours, rather than the projected 3.2 hours. Other commenters thought proposed reporting, directory and related requirements, would increase costs beyond the Department's projections. Recipients would have to make organizational changes, hire staff, and acquire or modify software. The Department should, commenters said, retain existing flexibility and provide funding for changes that a final rule requires.

Advisory Committee

A commenter said that the Department should create a standing advisory committee under the Federal Advisory Committee Act to provide ongoing feedback and recommendations to the Department concerning implementation issues and to suggest guidance that could be helpful in the future. The committee would include representatives of all the principal interests involved in the program such as DBEs and ACDBEs, non-DBEs, recipients in various OA programs, and organizations representing them. Similarly, another commenter suggested having a national roundtable of people to share data and experiences.

Training

Several commenters suggested that the Department provide additional training to program participants, including DBEs, prospective applicants, recipients, and certifiers. The program, a commenter added, should encourage technical guidance and instruction for DBEs.

Incentives for Prime Contractors and Recipients

Several commenters suggested giving incentives to prime contractors who meet or exceed goals, analogous to incentives given for finishing a contract ahead of schedule. There could be incentives for prime contractors to form joint ventures with DBEs. Recipients could publicize good performance by prime contractors. Stipends could be provided to encourage prime contractors to enter mentor-protégé programs. Mentor-protégé programs could be made more attractive by removing some of the restrictions in the current mentor-protégé provision of the regulation (§ 26.35(b)(2)(i) and (ii)). There could be "extra credit" toward DBE goals on a federally assisted contract for having used DBEs on private sector work, or by giving points on the next procurement for a contractor who exceeded DBE goals on a previous one. Prime contractors could also be encouraged to set up "one-stop shopping" hubs to inform DBEs of opportunities. Recipients could provide incentives to prime contractors to use newer, smaller DBEs rather than old standbys.

A commenter suggested that States with excellent DBE programs receive preferences in discretionary grant programs.

Add Other Types of Firms to the Program

A letter-writing campaign resulted in numerous docket entries recommending that there be a national MBE program and goals, in addition to the DBE program and goals. Other commenters suggested allowing SBA-certified 8(a) firms into the DBE program automatically.

Term Limits

Two comments suggested either term limits—like those in SBA programs—for all DBEs/ACDBEs or "graduation" for firms who had been in the program for a lengthy period and received many contracts.

Miscellaneous Program Suggestions

Among ideas suggested by commenters to improve the program were set-asides, sole-source contracts for DBEs, providing surplus recipient or DOT property to DBEs, simplifying prequalification standards and requirements for responding to solicitations for small firms, making

[9] U.S. Department of Justice, "The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence," (Jan. 31, 2022), See *https://www.govinfo.gov/content/pkg/FR-2022-01-31/pdf/2022-01478.pdf* and *https://www.justice.gov/crt/page/file/1463921/download.*

provisions like those concerning Alaska Native Corporation firms or SBA programs available to African-American firms, assistance with bonding and insurance requirements (*e.g.*, by reducing performance bonds for DBEs to 50 percent or having prime contractor take out subcontractor default insurance in place of requiring bonds for DBEs), increasing overall goals to more than 10 percent, maintaining a national DBE database at DOT, doing more to encourage unbundling on all types of contracts, giving DBEs the first opportunity to get contracts under $500,000, supporting greater use of mentor-protégé programs, requiring recipients to conduct updated disparity studies, adding supplier outreach and diversity programs, strengthening the role of DBE liaison office and require additional reporting from them, adding an "ombudsman" function to help newer firms get work, and channeling funds to "subject matter experts" to provide technical assistance to DBEs.

Other Program Concerns

Some comments referenced the longstanding concern that only a few established DBE firms get most of the work, limiting opportunities for the rest. One commenter said that in their State, 10 DBEs got 46 percent of the work, while 30 did 80 percent of the work. A study from a non-DBE contractors group said that DBEs had the most capacity in the smallest areas of contracting opportunity, but the lowest capacity in the most significant contracting areas (*e.g.*, heavy highway and bridge work). Commenters expressed continuing concern about fraud in the program.

DOT Response

The DBE program "has the important responsibility of ensuring that firms competing for DBE contracts are not disadvantaged by unlawful discrimination." This statement, in the preamble to the Department's 1999 final DBE rule (64 FR 5096, 5096 (February 2, 1999)) encapsulates the program's longstanding purpose. That preamble discussed, at length, how the program and its regulation met the constitutional "strict scrutiny" requirement for programs using racial classifications, including how the part 26 provisions met each of the elements of the "narrow tailoring" prong of strict scrutiny articulated by the courts. *See id.* at 5101–5103. The constitutionality of the program has been challenged several times in Federal court, but in each case, the courts have upheld the program. *See Midwest Fence Corp.* v. *Dep't of Transp.*, 840 F.3d 932, 941, 935–36 (7th Cir. 2016); *W. States Paving Co.* v. *Wash. State Dep't of Transp.*, 407 F.3d 983, 995 (9th Cir. 2005); *Sherbrooke Turf, Inc.* v. *Minn. Dep't of Transp.*, 345 F.3d 964, 967–68 (8th Cir. 2003); *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000). Courts have also relied upon these decisions' findings about the constitutionality of the program when "as applied" challenges have been brought. Here again, the program has withstood these strict scrutiny challenges, largely due to the fact that recipients properly following program mandates may rely upon the Congressional findings of compelling need. *See Mountain West Holding Co.* v. *Montana*, 691 F. App'x 326 (9th Cir. 2017, memorandum opinion); *Dunnet Bay Construction Co.* v. *Borggren*, 799 F. 3d 676 (7th Cir. 2015); *Northern Contracting, Inc.* v. *Illinois*, 473 F.3d 71 (7th Cir. 2007); *Associated General Contractors of America, San Diego Chapter, Inc.* v. *California Department of Transportation*, 713 F. 3d 1187 (9th Cir. 2013); *Geyer Signal, Inc.* v. *Minnesota Department of Transportation*, No. 11–321 (JRT/LIB), 2014 WL 1309092 (D. Minn. Marc. 31, 2014; *Geod Corporation* v. *New Jersey Transit Corporation*, 678 F. Supp. 2d 276 (D.N.J. 2009), and 746 F. Supp. 2d 642 (D.N.J. 2010).

Repeated reauthorizations of the program by Congress (listed in § 26.3 (a) of the rule), and extensive evidence supporting it, underscore the continuing compelling need for the program to combat discrimination and its effects.[10] These actions have been based on statistical and anecdotal evidence of the persistence of discrimination affecting firms seeking work in DOT-assisted contracts, often in the form of the numerous disparity studies that have been conducted on behalf of DOT recipients and other parties. In this important respect, the DBE program differs significantly from other programs that may use race-based classifications in order to advance worthy, but conceptually distinct, objectives such as achieving diversity.

We emphasize that the present part 26 and the revisions this final rule makes to modernize administrative provisions of the program and leave intact the mechanics of goal setting as has been the case over many decades. Part 26 does not allow quotas nor impose any penalties for failing to meet goals, and it requires that recipients use race- and gender-neutral means to the maximum extent to achieve DBE participation goals before resorting to race- and gender-conscious means. The program retains the basic narrow tailoring building blocks which, as noted above, have repeatedly been upheld by courts.

We believe there would be value in establishing a standing Federal advisory committee to provide input to the Department on the continuing implementation of the program and suggestions for guidance on issues that may arise in the future. However, this and several other suggestions for changes in the program (*e.g.*, applying term limits to firm's participation) are outside the scope of this rulemaking, beyond the Department's statutory authority, or both.

Part 23

Subpart A—General

30. Aligning Part 23 Objectives With Part 26 Objectives (§ 23.1)

NPRM

The NPRM proposed to add two new program objectives to part 23 to align it with the objectives in part 26. These objectives, similar to those in §§ 26.1(f) and (g), promote the use of ACDBEs in all types of concessions activities at airports and assist the development of firms that can compete in the marketplace outside the ACDBE program. The proposal received support from trade associations, consultants, and airport recipients, with one trade association cautioning against simply adding similar objectives due to differences in business activities between the DBE and ACDBE programs. Instead, the commenter suggested adopting the following single objective: "To support the development of ACDBEs that can compete independently for concessions opportunities at airports receiving DOT financial assistance."

DOT Response

The change suggested by the one commenter is not substantively different from language proposed. In addition, support for adding the two program objectives is unanimous. Therefore, the final rule retains both objectives as proposed.

[10] *See* BIL, Sec. 11101(e)(1) (". . . testimony and documentation . . . provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination . . . ."); *Congressional Record—Senate*, S5898, S5899 (August 5, 2021); *Congressional Record—House*, H3506, H3507 (June 30, 2021); "DRIVING EQUITY: THE U.S. DEPARTMENT OF TRANSPORTATION'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM"—Remote Hearing Before the Committee on Transportation and Infrastructure, 116th Cong. 64 (Sept. 23, 2020), available at *https://www.govinfo.gov/content/pkg/CHRG-116hhrg43413/pdf/CHRG-116hhrg43413.pdf.*

31. Definitions (§ 23.3)

NPRM

For consistency and clarity, the NPRM proposed that § 23.3 adopt existing definitions in part 26 which are also applicable to part 23. The definitions for terms such as, "Alaska Native," "Assets," "Contingent liability," "Days," "Immediate Family Member," "Liabilities," "Operating Administration" or "OA," and "Socially and economically disadvantaged individual" were proposed to be added or amended to ensure that the definitions and terms contained in both parts aligned. Additional definitions for "Airport Concession Disadvantaged Business Enterprise (ACDBE)," "Part 26," "Personal Net Worth," "Affiliation," "Concession," "Subconcession or subcontractor," and "Sublease" were either proposed to be added or amended to clarify existing requirements in part 23 or to correct errors and replace obsolete cross-references within the regulation.

Comments and DOT Response

A majority of commenters in general supported the addition or alteration of the definitions at large.

Assets

For the definition of "assets," one commenter suggested that the Department clarify the requirements for demonstrating ownership of sole and separate property. For example, if ownership of property or assets were to be demonstrated by evaluating the title, this should be clarified in the "assets" definition.

The Department adds the part 26 definition of "assets" to part 23 without revision to ensure consistency in its meaning across both parts. We added other definitions from § 26.5 to § 23.3 for this same reason. The final rule does not adopt the commenter's proposed "asset" definition in part 23 because it would otherwise make the definition inconsistent with its counterpart in part 26.

Airport Concession Disadvantaged Business Enterprise (ACDBE)

Commenters were evenly divided in support and opposition of the NPRM's proposal to modify the definition of "ACDBE." The proposed change is intended to clarify that a firm does not need to be operational or demonstrate that it previously performed contracts at the time of its application for certification. Comments in favor of the change indicated that the proposal would increase the number of available ACDBE firms and that previous experience of the firm was less important in the concessionaire industry, as long as airports are permitted to consider experience of the individual owner when selecting a firm. The commenters opposing the change expressed concern about how an unqualified firm could become competent in a particular line of work in which the firm has no experience.

The final rule adopts the definition of ACDBE as proposed. The Department acknowledges the distinction between the experience of a firm and SEDO and believes that the experience of the individual owner is more relevant for purposes of certification in the concession context. Moreover, conditioning certification on a firm's experience would present significant barriers for firms seeking ACDBE certification status. See preamble discussion on § 26.71 for discussion on the operations requirement for DBEs.

Concession

The final rule incorporates the term "traveling public" into the "concession" definition to clarify that businesses that do not primarily serve the traveling public should not be considered concessions. A majority of commenters supported this change. However, the comments in opposition expressed concern that a revision restricting the term "concession" to the traveling public would negatively impact an airport recipient's ability to meet its participation goals by limiting the number of businesses that may be considered an ACDBE concession. The commenters said that without additional guidance or clarity, this change would result in confusion within the industry because there is significant subjectivity involved in determining what businesses are intended to serve the traveling public.

The final rule adopts the definition of concession as proposed. The legislative and regulatory history of the concessions provision has always focused on businesses that serve the traveling public at the airport, which supports the final rule's revision. The Department does not believe that including the term "traveling public" in the definition will cause confusion or inhibit airport recipients' from achieving participation goals. Instead, it merely reflects the Department's longstanding interpretation of the regulation.

Personal Net Worth (PNW)

The Department received several comments on changes to the PNW definition in part 26, ranging from the PNW cap adjustment to other aspects of the PNW calculation (*e.g.*, exclusion of retirement assets, removal of community property rules, etc.). These areas are discussed at greater length in the part 26 preamble. For part 23, we are limiting the discussion of the definition of PNW to what the NPRM's preamble referred to as the "third exemption." That term refers to the exclusion from the PNW calculation those assets that a SEDO can demonstrate were necessary to obtain financing for purposes of entering or expanding a concessions business subject to part 23 at an airport.

The final rule's amendments to part 23 aligns the PNW definition with that of part 26, effectively eliminating the PNW's "third exemption." While one trade association supported this change, another requested that the Department consider retaining the exclusion due to significant cost increases associated with doing business as an ACDBE.

The Department recognizes the substantial cost increases associated with concessions and addresses this concern, in part, through proposed increases to the PNW cap to $2,047,000. and other changes to the PNW calculation. However, the final rule removes the "third exemption" language from the PNW definition in part 23. In the 2005 final rule, the Department under the third exemption allowed the exclusion to a maximum of $3 million. As noted in the current rule § 23.3, the Department suspended the effectiveness of the provision with respect to any application for ACDBE certification made or any financing or franchise agreement obtained after June 20, 2012. As proposed, the definition removes this reference entirely, and the definition of personal net worth in part 23 refers back to that found in part 26.

Sublease, Subconcession or Subcontractor

For the proposed definitions of sublease, subconcession or subcontractor, all commenters were unanimous in their support. However, several commenters requested the proposed definition of "sublease" be expanded to clarify the requirements to be considered a subtenant. Commenters suggested that a definition of sublease address whether a capital investment from the ACDBE is required or whether the facility development cost can be paid monthly as a "lease cost." They also suggested that the definition address if the terms of the primary lease must be a direct pass-through and whether a concessionaire must manage a location with its own personnel.

This final rule adopts the term sublease as proposed to clarify how airport recipients should count direct

ownership arrangement participation generated by ACDBEs in subtenant arrangements. Generally, airport recipients may credit the entire amount of gross receipts generated from a sublease completely operated and owned by an ACDBE. However, airport recipients must look beyond the agreement to evaluate the capacity the ACDBE is performing and ensure that the agreement does not improperly restrict the ACDBE's ownership and control.

Under the sublease definition, all requirements applicable to the concession under the primary lease passes on to the sublessee, including the management of personnel. The ACDBE must also be responsible for its proportionate share of facility development costs and capital investment. Facility development cost can be paid monthly as a "lease cost". However, the total lease costs to be paid must be proportionate to the ACDBE's responsible share of capital investment required under the primary lease.

For the definition of subconcession or subcontractor, the final rule removes the term subcontractor from the definition title and adopts the definition as proposed by the NPRM. With this change, the term subconcession is now found in the definition section, as well as in Appendix A of the regulation.

Other Definition Changes

Commenters proposed additional amendments or changes to definitions that were not addressed by the NPRM.

One commenter proposed revisions to the definition of "joint venture." The commenter expressed that the current definition in which the ACDBE is "responsible for a distinct, clearly defined portion of the work of the contract," places restrictions on minority joint venture partners' financing, management, and operations that would not be required of a majority joint venture partner. The commenter believed that the language unfairly restricts ACDBE joint venture partners in that it imposes conditions on their participation that are not similarly imposed on the non-ACDBE participants. To address this, the commenter proposed revising the definition to balance the one-sided conditions that the current language imposes on ACDBE joint venture partners.

The final rule retains the existing definition of joint venture. Credit toward ACDBE goals must be based on a commercially useful function. Any change to remove the requirement for an ACDBE joint venture participant to perform independently a distinct portion of the joint venture's work would adversely affect the integrity of the program.

In addition to the definitions above, another commenter suggested that the Department add a definition for "contract award" to clarify the term's use in other sections in Parts 23 and 26.

The Department has opted not to define contract award in the regulatory text as commenters requested. Given the wide array of contexts the term contract award appears across Parts 23 and 26, we decided against adding a definition for the term to avoid confusion.

Subpart B—ACDBE Programs

32. Socially and Economically Disadvantaged Owned Financial Institutions (§ 23.23)

A commenter suggested that the Department consider options to address capital access issues that hinder small businesses from competing for concession opportunities. The Department is sensitive to concerns regarding access to capital. The FAA's 2023 updated Best Practices for Fostering Participation from New DBEs and ACDBEs at Airports (April 11, 2023) letter recommended evaluating the availability of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in an airport recipient's community. See *https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program.* The letter recommends airport recipients make reasonable efforts to use such institutions and encourage prime concessionaires to use them, as well.

Recognizing that capital access has historically been, and continues to be, a significant barrier to ACDBE participation within the program, the final rule seeks to reduce this barrier by amending the administrative provisions under § 23.23 to add a new paragraph that applies the related requirement in § 26.27, to part 23. This change codifies best practices in the letter by requiring recipients, for their ACDBE programs, to thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in their communities and to make reasonable efforts to use these institutions. Recipients must also encourage prime concessionaires to use such institutions.

The term "financial institution" under this provision includes but is not limited to traditional banking institutions and Community Development Financial Institutions (CDFIs).

33. Direct Ownership, Goal Setting, and Good Faith Efforts Requirements (§ 23.25)

NPRM

The NPRM proposed changes to § 23.25 clarifying that all businesses must make good faith efforts to meet the concession-specific goals as set by recipients pursuant to this section regardless of whether a concession-specific goal is based on goods and services or direct ownership arrangements. Airport recipients may set concession-specific goals on purchases or leases of goods and services only after performing an analysis that shows there is de minimis availability for ACDBE direct ownership arrangement participation for that opportunity.

Comments

The majority of comments, which were received from trade associations, consultants, ACDBEs, and recipients, generally supported the NPRM's clarifying modifications to § 23.25. However, one commenter noted supplying evidence to support setting concession-specific goals based on goods and service purchases versus direct ownership arrangements, in some instances, would not be possible until a successful proposer is selected. The commenter explained that recipients are not able to obtain a firm's purchase commitments at the time of award. Moreover, purchase goals could be impacted by purchase requirements if the firm is a licensed or franchised operation.

Another commenter suggested that the Department add an appendix to part 23, similar to the detailed guidance in part 26 Appendix A, to reflect the differences in good faith effort requirements for DBE and ACDBE program bidders and offerors.

DOT Response

The Department adopts the changes to § 23.25 as proposed by the NPRM. The timing of when evidence may become available in order to perform the analysis required under this section should not present an issue to recipients who are determining whether to set a concession-specific goal based on goods and services purchases. In addition, airport recipients do not need a firm's actual purchase commitments at the time of award to perform the analysis in paragraph (e)(1)(i) of this section.

Recipients calculate their overall ACDBE goals for concessions other than car rental by evaluating the relative availability of ACDBEs in the categories of work that concession operations will

likely entail. Because the rule at § 23.47 provides that the base of an airport's goal for concessions other than car rental is the total gross receipts of concessions, this approach is necessary when setting overall goals. Recipients may meet their overall goals through the application of concession-specific goals, as explained in § 23.25. Under the revised § 23.25 (e)(1)(i), an analysis that finds a particular concession opportunity has only de minimis availability of direct ownership arrangement participation may be used by recipients as evidence in support of setting a concession-specific goal based on goods and services for that opportunity. Such analysis would satisfy the good faith efforts requirement that recipients must make to explore, to the maximum extent practicable, opportunities for participation via direct ownership arrangements.

In response to comments, the Department will not add a separate appendix for guidance on good faith efforts to part 23. Appendix A to part 26 provides guidance on good faith efforts concerning DBE contract goals. This guidance is referenced in § 26.53(b)(2)(vi), which is made applicable to concession-specific goals through § 23.25(e)(1)(iv). Notwithstanding differences between the ACDBE and DBE program, we do not believe this issue is significant to warrant creating a new appendix on good faith efforts in part 23.

34. Fostering Small Business Participation (§ 23.26)

NPRM

The NPRM proposed to add a provision that would closely mirror the § 26.39 requirement for recipients to create an element for their ACDBE Program specifically designed to foster small business participation in concession activities. As part of the proposed element, recipients would be required to actively implement their programs through various strategies that include race- and gender-neutral small business set-asides, prime subleasing opportunities and alternative concession contracting approaches (*e.g.*, direct leasing). One feature proposed for part 23 that is distinct from part 26, is the requirement for recipients to periodically report on the implementation of race-neutral strategies under the small business element for their ACDBE programs.

Comments

ACDBE Small Business Element

Support for the proposed ACDBE small business element was expressed by several members of a trade association, who commented that part 23 needed to make the small business element (SBE) a requirement in order to achieve small business participation for airport concessions. An airport consultant believed the proposed part 23 SBE requirement would foster creativity among recipients when structuring their small business elements.

Comments opposing the proposal were concerned that the new SBE requirement would be overly burdensome and that the Department underestimated the time it would take. However, commenters' estimated range of time to complete the task varied. One airport authority estimated it would take 120 hours, not the 5.6 hours estimated by the Department; a member of a trade organization thought "at least 40." Another commenter mentioned that small hub and non-hub airports would be particularly affected, as they have limited concession opportunities and revenue streams, making it difficult for them to attract bidders.

Others opposing the new requirement expressed that SBE would not work for part 23 as it does for part 26 because the industries involved in the DBE program (federally assisted contracting) and the ACDBE program (airport concession opportunities) are different. They noted that set-asides under the small business element could unintentionally harm both small businesses and other concessionaires by forcing a choice between them for feasible concession locations. Others expressed doubt about the feasibility of subleasing opportunities for airport concessions, as such opportunities are rare, and multi-unit operations do not support subleasing. If adopted, commenters recommended that recipients should conduct a small-business analysis on opportunities without an ACDBE goal to determine the viability of a small business sublease.

Reporting on Small Business Element

The Department received some comments, both from trade associations and recipients, on the proposed requirement for recipients to periodically report on the implementation of race-neutral strategies under their small business element. These commenters viewed the requirement as unduly burdensome and costly. However, if adopted in the final rule, one commenter recommended that the Department establish a supplemental report to the Uniform Report for reporting on a recipient's small business element in order to minimize the administrative burdens.

DOT Response

The Department believes that the ACDBE SBE requirements will not impose any significant burdens on recipients because it mirrors the current DBE SBE requirements that recipients must currently implement under § 26.39. Instead, the ACDBE SBE requirement should serve as a mere extension to the SBE requirements that recipients have currently in place for their DBE programs.

Smaller hub airports may benefit from statewide small business element consortiums permitting them to pool resources with other recipients who are required to actively implement SBEs under both DBE and ACDBE programs. Upon request, FAA will engage interested recipients on the mechanics and steps needed to establish and implement statewide consortiums for SBEs.

Furthermore, distinctions may exist in how certain small business strategies apply across the DBE and ACDBE programs. The list of strategies in the proposed § 23.26 for the ACDBE program is designed to give recipients some ideas on how to accomplish the objectives of the rule. It is not an exhaustive list, nor is any strategy listed in the regulation mandatory. Airport recipients may choose one or more of the listed strategies or may develop any alternative strategy that can be effective in creating airport concession opportunities for small businesses.

In selecting SBE strategies, the Department still expects airport recipients to be forward-looking and innovative in their approaches. This means that recipients should not completely foreclose the possibility of using certain strategies (*e.g.*, subleasing opportunities for small businesses) over others because they do not appear to be viable options at the time. Rather, they should continuously explore creative ways on how to make those strategies possible.

Section 23.26(c) mandates that airport recipients incorporate certain assurances within their SBEs. These include the confirmation that their SBEs are authorized under State law, and that certified ACDBEs meeting the specified size criteria are presumptively eligible to participate. In addition, airport recipients must assure that no limitations are placed on the number of contracts awarded to participating firms and that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses.

Reporting on Small Business Element

The ACDBE SBE requirement needs a reporting feature for the Department to

evaluate not only the effectiveness of each recipients' element, but also whether recipients are actively implementing their SBEs, as required by 23.26(g). In an effort to minimize burdens, the Department will adopt the recommendation that the part 23 SBE reporting requirement be added as a supplemental report to the part 23 Uniform Report. This will alleviate the time burden noted by a commenter as described above. However, as explained in the supporting statement developed by the Department in support of the rulemaking and associated information collection that has been submitted to OMB for approval, we disagree with their estimate of 120 hours. Recipients are already required to implement SBEs for DBE programs, and they also must collect and report their race neutral participation annually, so this minimal supplemental information is not burdensome. Therefore, we believe that the Department's estimate of 5.6 hours is appropriate.

35. Retaining and Reporting Information About ACDBE Program Implementation (§ 23.27) (Active Participants List)

Comments

The Department received numerous comments on the NPRM's proposal to add an active participants list requirement to part 23, with the majority opposing the proposal. Supporters believed the change would benefit the program administration and assist car rental companies in locating certified ACDBE vendors. However, many opposed the change, finding it unduly burdensome and costly, and highlighting the logistical complexities in acquiring all the data from every firm that reaches out via email, phone, or fax inquiring about concession opportunities. One trade organization member thought 60 hours was more appropriate for this task than the 42 proposed by the Department.

Commenters also raised concerns about the active participants list not meeting its intended purpose of providing accurate data on ACDBE and non-ACDBE firms seeking concession opportunities. They noted that the NAICS codes used by various concessionaires are inconsistent, and the data from proposals and responses to solicitations and negotiated procurements would not provide accurate information. Commenters argued that this approach would result in an undercount of actual active participation and lead to incorrect calculations of goals and participation. A commenter suggested that the number of firms certified in concession-operating trades would be a better indicator of the number of ACDBE firms wanting to participate.

One commenter recommended that the Department provide a clarifying definition for "active participants" at the end of § 23.27(c) to include individuals or firms that have submitted proposals, attended outreach events, or made inquiries about concession opportunities from the recipient.

DOT Response

The final rule is adding a requirement that recipients develop and maintain an active participants list. The "active participant" list adopted in this rule is parallel to the bidders list requirement in § 26.11. Similar to the bidders list requirement in part 26, creating and maintaining an "active participants" list gives recipients another valuable way to measure the relative availability of ready, willing and able ACDBEs when setting their overall goals. It also gives the Department data to evaluate the extent to which the objectives of § 23.1 are being achieved.

The Department has elected to adopt the proposal and require recipients to collect the data from all active participants for concession opportunities by requiring the information under this section to be submitted with their proposals, or with initial responses to negotiated procurements. The Department acknowledges that the collection of active participants data from only these sources may not capture every firm that seeks to perform work on concession opportunities. However, in absence of concession-specific NAICS codes, the Department believes that narrowing the source of this data collection to only proposals and initial responses to negotiated procurements would produce the most accurate and consistent data on firms who compete for and perform work on concession opportunities. The commenter's estimate of 60 hours to complete the task is slightly above our estimate that it would take around 42 hours to complete. We believe 42 hours would be a rough average, with small airports taking much less time.

Recipients should not rely exclusively on an active participants list that does not reflect the relative availability of ACDBEs in their local market area to the maximum extent feasible. Such reliance may result in skewed goal calculations and potentially undercounting of participation. This is not the intent, nor should such a scenario occur under the rule. The FAA will not approve a goal-setting methodology that is not rationally related to the relative availability of ACDBEs in a recipient's market. If a recipient decides to use an active participants list that is not demonstrative of all ready, willing and able ACDBEs relative to all businesses that are ready, willing and able to participate in a recipient's ACDBE program, then the active participants list must be used in combination with other data sources to ensure that it meets the standard in the existing regulations that apply to alternative methods used to derive a base figure for the ACDBE availability estimate. See § 23.51.

Subpart C—Certification and Eligibility of ACDBEs

36. Size Standards (§ 23.33)

See discussion of requirements in § 26.65.

37. Certifying Firms That Do Not Perform Work Relevant to the Airport's Concessions (§ 23.39)

NPRM

Section 23.55(k) prohibits recipients from counting costs incurred in connection with the renovation, repair, or construction of a concession facility (sometimes referred to as the "build-out") toward ACDBE goals. The NPRM proposed to add a paragraph to § 23.39 clarifying that certifiers may not certify applicant firms that intend to perform activities exclusively related to "build-out" for which participation cannot be counted.

Comments

The Department received comments from recipients, prime concessionaires, consultants and trade associations, all of whom generally supported the NPRM's proposed change. Some commenters requested that the Department ensure the change does not exclude the certification of firms that provide services such as electrical, plumbing or work to concessionaires as a maintenance service, not related to initial construction (*e.g.*, car rental offices, advertising displays). Other commenters expressed concern that the change would allow certifiers to make discretionary decisions about businesses they are unfamiliar with, unless that business has an opportunity to appeal the decision in the event they are denied.

DOT Response

The Department is not adopting its proposal to permit certifiers to refrain from certifying applicant ACDBE firms if they determine the firms intend to perform only activities exclusively related to the renovation, repair, or construction of a concession facility

("build-out"). We agree with the comments and seek to avoid a change that could result in erroneous certification denials based on subjective determinations by certifiers on whether the work an applicant firm intends to perform is exclusively related to build-out.

Notwithstanding our position, the Department shares similar concerns to comments raised above for the definition of disadvantaged business enterprise for applicant firms that cannot have their participation counted toward ACDBE goals under § 23.55(k). The Department strives to reduce wasted time and effort that UCPs encounter when processing applications from firms that seek certification in construction-related work that cannot be credited toward ACDBE goals.

To address this, we adopt a similar approach to that taken under part 26. The Department will include an item in the ACDBE portion of the Uniform Certification Application (UCA) asking applicants to detail the kinds of work that they anticipate performing on concession opportunities. Accordingly, if the applicant's response reasonably suggested to the certifier that the work it performs would be construction-related activities exclusively in connection with build-out of concession facilities that otherwise could not be counted toward ACDBE goals under § 23.55(k), we would encourage the certifier to recommend that the applicant withdraw its application, thereby avoiding certification of firms that would not be able to utilize their ACDBE status to obtain an airport concession opportunity.

38. Removing Consultation Requirement When No New Concession Opportunities Exist (§ 23.43)

NPRM

The NPRM proposed to amend § 23.43 to require consultation only when the recipient's ACDBE goal methodology includes opportunities for new concession agreements.

Comments

The majority of commenters, predominantly recipients, endorsed the NPRM's proposal to remove the requirement for recipients to perform consultation when there are no concession opportunities to evaluate or promote. They cited that the proposal would alleviate burdens on recipients and preserve the resources of ACDBEs who may attend a meeting only to learn that there are no opportunities in which they can participate.

The Department received one comment from a car rental concessionaire that disagreed with the proposed change to remove the consultation requirement even when the recipient wishes to change its ACDBE goal requirement as long as there are no new concession opportunities. They were opposed to any change that would remove the consultation requirement when recipients propose to adjust their ACDBE goal. Therefore, they recommended the Department revise the proposed amendment to § 23.43 to remove the consultation requirement only when there are no new concession opportunities and when no adjustment is being made, or is proposed to be made, to the recipient's ACDBE goal.

DOT Response

Section 23.43 requires consultation only when the ACDBE goal methodology includes opportunities for new concession agreements. The Department agrees that consultation under § 23.43 is still necessary when an adjustment is being made, or is proposed to be made, to the base figure of the recipient's ACDBE goal. However, we do not believe it is necessary to make this explicit in the regulatory text since adjustments usually arise only when there are new concession opportunities.

That aside, the Department is concerned that the text of § 23.43 references only opportunities for new concession agreements that become available during the goal period. It is silent on new goods and service purchase opportunities. This omission may be construed to mean that consultation is required only when new direct ownership opportunities become available during the goal period. This is not the case. The final rule intends for the consultation requirement to apply when there are new concession opportunities for both direct ownership arrangements and purchases of goods and services.

For this reason, the Department makes a minor revision to the § 23.43 to account for new opportunities that may arise in the form of both direct ownership arrangements and goods and service purchases. Depending on the nature of the opportunities, this revision in addition to the overall change will allow recipients to focus their consultation efforts on firms in the position to take advantage of those opportunities available.

39. Non-Car Rental Concession Goal Base (§ 23.47)

Comments

The NPRM would have amended § 23.47(a) to clarify that airport recipients may use the alternative method in § 23.51(c)(5) to supplement with goods and service purchases those portions of the base figure of their overall non-car rental goals where there is no feasible direct ownership arrangement participation available. The Department received several comments from industry trade associations, recipients, consultants, and non-ACDBE firms, who generally supported the clarifying changes to § 23.47(a) but felt that additional clarification was necessary.

One commenter sought clarification on whether the proposed changes would require setting purchasing goals for every contract without a direct ownership goal. Another commenter suggested the final rule address reporting of gross revenues for concessions in the Uniform Report.

Finally, the Department received one comment requesting clarification on the term "substantial majority" in § 23.51(b)(3) and asked whether it should be based on a count of the number of interested concessionaires or their size. The commenter also inquired about how a recipient should account for the relative availability of concessionaires outside its putative geographic area if the NPRM's proposed changes to interstate certification expands the number of concessionaires in a recipient's geographic area.

Although not raised in the NPRM, one commenter requested that the Department adopt a national ACDBE goal setting process for car rentals similar to Transit Vehicle Manufacturers (TVM). The commenter stated that adopting a national goal would better achieve the objectives of the ACDBE program and increase participation in the car rental industry.

DOT Response

The final rule will not adopt the proposed changes to § 23.47. As proposed, the revisions to this section would have allowed recipients to supplement with purchases and/or leases of goods and services the portion of their base where no feasible direct ownership arrangement participation is available. With few exceptions, § 23.47 is clear that the base of a recipient's overall goal for concessions other than car rentals includes only the total gross receipts of all concessions. The base does not include the dollar value of purchases and/or leases of goods and

services. The Department does not intend to change that. Instead, the Department intends only to clarify when goods and services concession goals can or should be used in light of the statutory requirement for recipients to explore, to the maximum extent practicable, direct ownership arrangements.

We believe the final rule achieves this objective with its revisions to § 23.25(e)(1)(i).

The boundaries of a recipient's market area should be determined by the number of firms which seek to do concession business with that airport and their locations. The market area may be different for different types of concessions, so another factor is the area in which the firms which receive the substantial majority of concessions-related revenues are located.

We recognize that the changes to interstate certification may increase the number of interested concessionaires located outside a recipient's putative geographic area. The Department's Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program (*https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise;* June 25, 2013), however, makes clear that a recipient's local market area is not necessarily the same as the political jurisdiction in which it is geographically located. Therefore, the changes to the interstate certification provisions do not impact how airport recipients determine the relative availability of ACDBEs under § 23.51(c). Recipients still must determine their market area for goals in accordance with § 23.51(b).

The final rule will not adopt regional and national car rental goals for the ACDBE program. The recommendation to establish these goals is outside of the scope of the rule.

40. Counting ACDBE Participation After Decertification (§ 23.55)

NPRM

Sections 23.39(e) and 23.55(j) allow for participation of ACDBE firms that lost certification for exceeding size and PNW limits to count towards ACDBE goals for the remainder of a concession agreement. However, this continued participation depends on those decertified firms maintaining their eligibility in all other respects (*e.g.*, control, ownership). The current regulation does not contain any provision that instructs airport recipients on how they must monitor these decertified firms to ensure their eligibility in this regard.

The NPRM proposed requiring declarations from decertified firms to track their eligibility for continued counting purposes. Under the rule, airport recipients would be responsible for gathering declarations and monitoring eligibility, not the certifying entity. If a decertified firm becomes ineligible due to ownership or control changes, its participation will no longer count. Failure to provide a "no-change affidavit" also stops the continued counting of participation of these firms.

Comments

Most comments were in favor of the requirement for former ACDBE firms to submit declarations to § 23.55. However, many were opposed to making the airport recipient, rather than the certifying agency, responsible for submission and monitoring. These individuals and organizations argued that this responsibility might be too burdensome for airports and that the State UCP, as the certifier, is better equipped to monitor those firms. They also pointed out that airports are not certifiers and do not have the necessary expertise to monitor submissions.

Finally, one commenter recommended counting decertified firm participation beyond the current concession agreement term, as it is a common industry practice to extend concession agreements. They argued that an ACDBE that has secured a contract should be allowed to continue to benefit from the agreement as long as they maintain eligibility in all other respects.

DOT Response

The Department believes that the steps arising under proposed § 23.55(j) should not be burdensome since they are not significantly different or greater than those recipient obligations currently performed. Non-certifying airport recipients are already required to include the monitoring and compliance measures that they will use in their ACDBE programs, including levels of effort and resources devoted to this task. In implementing these measures, non-certifying recipients must, at a minimum, conduct annual verifications of the status of the ACDBE's certification eligibility and review records. They must also perform on-site reviews of concession workplaces to determine whether ACDBEs are actually performing the work for which credit is being claimed and that participants are not circumventing program requirements.

Section 23.55(j) does not expand these monitoring obligations. Rather, it provides non-certifying airport recipients a framework and tools to monitor former ACDBE firms that lost certification for exceeding small business size standard or PNW. This monitoring is necessary for airport recipients to determine if these firms' participation can continue to be counted towards ACDBE goals for the remainder of a concession agreement. If the non-certifying recipient finds through its monitoring efforts that the former ACDBE has relinquished an element of control or ownership during the performance of an agreement, the monitoring recipient would immediately cease counting that firm's participation toward the goal.

Counting a decertified firm's participation beyond the current concession agreement term deprives eligible ACDBE firms of opportunities. Therefore, the Department will not change the status quo under paragraph (e) of § 23.39, which prohibits a recipient from counting a former ACDBE's participation toward goals beyond the termination date for the concession agreement in effect at the time of the decertification. The regulation will continue to require recipients to ensure that prime concessionaires make up any loss of ACDBE participation with good faith efforts.

41. Shortfall Analysis Submission Date (§ 23.57)

NPRM

Section 23.57 requires recipients to submit a shortfall analysis and corrective action plan if they do not meet their ACDBE participation goal. The plan explains the reasons for the differences between their overall goal and the awards and commitments in that fiscal year and the specific steps and milestones they will take to remedy the shortfall. The Department proposed extending the due date for submitting a shortfall analysis from within 90 days of the end of the fiscal year to 30 days after submitting the Uniform Report per 49 CFR 23.27(b).

Comments

Commenters unanimously supported the proposed amendment noting the 30-day extension would allow recipients to perform a more thorough shortfall analysis using current data from the Uniform Report.

DOT Response

The final rule adopts the change to the shortfall provisions in § 23.57 and

sets the due date to April 1 for the shortfall analysis, which is 30 days after Uniform Report due date on March 1.

Subpart E—Other Provisions

42. Long-Term Exclusive Agreements (§ 23.75)

Comments

Five-Year Term for Long-Term Agreements

The NPRM did not propose to redefine "long-term" to a longer period greater than five years because of concerns that doing such would reduce the degree of FAA's oversight to ensure that long-term concession agreements include adequate ACDBE participation. However, the NPRM did request additional comment from stakeholders on keeping the term at 5 years rather than revising it to 10 years.

Several commenters agreed on extending the term to 7 to 10 years or more. The reasons for extending the term included attracting a diverse pool of bidders/proposers, allowing for investment amortization, establishing brand recognition, improving customer service, and reducing the workload for recipient staff during concession solicitations. The Department received one comment stating that the definition of long-term agreement should be revised to State that agreements are only considered long-term if an agreement contains options that result in a lease period of more than ten years.

Options and Definition of an Exclusive Agreement

The current regulation does not define the term "exclusive," nor does it include "options" in its definition of "long-term" under § 23.75(a). To ensure that these terms are addressed in the rule, the NPRM proposed to revise the definition of "long-term exclusive agreement", under § 23.75(a) to include the definition of "exclusive" and to state an agreement is long-term if it includes options that result in a lease period of more than five years.

In response to the proposal to define "exclusive agreements" in § 23.75(a), commenters asked why the proposal still required FAA approval for an exclusive agreement with an ACDBE. They also suggested defining "exclusive agreement" as a contract that does not have ACDBE participation at the airport's approved goal levels for the applicable trade. Another commenter asked for clarification on the term "type of business activity."

Long-Term Agreements and Holdovers

The NPRM raised concerns over holdover tenancies that may cause an exclusive agreement to become long-term and preclude potential ACDBE competitors from participating in agreements in the same manner as other agreements currently prohibited under the rule. While the NPRM did not put forth any specific proposals on how best to address holdover tenancies in the context of § 23.75, the Department sought public comment on the matter.

The few comments received in response to holdover tenancies in the NPRM recommended the Department to provide flexibility and allow holdovers up to 12 months without triggering long-term exclusive agreement requirements.

Special Local Circumstances

One comment requested the Department define the term "special local circumstances." The commenter believed that without further explanation, the evaluation of "special local circumstances" is completely subjective for each application and may lead to unfair inconsistencies across the country and, possibly, within a single airport. Another commenter requested clarification on whether the amortization period required for investment was sufficient to be considered a "special local circumstance."

Amending Document Requirements

In response to stakeholder concerns about the documentation and information that recipients must submit to the FAA for approval of long-term exclusive agreements, the NPRM proposed several changes to § 23.75(c). These changes aimed to address unclear, unfeasible, or non-pertinent documentation requirements. This included removing or replacing requirements under paragraph (c)(2)(ii) to review the extent of ACDBE participation before the exercise of each renewal option and the assurances under paragraph (c)(3) that require any ACDBE participant to be in an acceptable form. The proposal also included changes that allow for certain documentation and information required for approval of long-term exclusive (LTE) agreements to be submitted prior to the release of the solicitation or request for proposals and others, prior to award of the contract.

The Department received a comment stating that the proposed revisions to the information and documentation requirements would significantly increase the time between when a solicitation is prepared and when it can be released, which could impair an airport's ability to obtain timely, market-relevant proposals. The comment explained that the timelines proposed would require airports to initiate a solicitation process about 12 months in advance of a contract's expiration in order to ensure that a new contract is in place. They noted that this was of particular concern because market conditions can change significantly over a 12-month period. They urged delaying the implementation of the proposed changes to the documentation requirements to avoid disrupting ongoing and planned procurement processes.

The Department also received a comment that recommended completely overhauling the long-term exclusive agreement approval process and adopting a two-step process. This process would require the airport recipient to submit a goal analysis to the FAA as a notification before solicitation. After the solicitation process concluded, the airport recipient would send FAA information on the level of interest and availability of ACDBEs and show that the contract was awarded to a proposer that met the goal or made good faith efforts to meet the goal. Another commenter suggested that the final rule only require a recipient to perform a goal analysis for the specific opportunity, along with the type of concession and term of the proposed long-term exclusive agreement, which would both be sent to the FAA for approval.

DOT Response

Five-Year Term for Long-Term Agreements

The Department recognizes that most concession agreements extend beyond a term of five years. Thus, the final rule extends the definition of long term to ten years to ease burdens that fall on airports required to implement LTE requirements under part 23. We note that this aids smaller hub airports that have fewer concession opportunities, increasing the likelihood of long-term exclusive agreements subject to FAA approval under § 23.75(c). Extending the definition to ten years also aims to mitigate any additional burdens placed on smaller hub airports by the new FAA approval requirements of leases that become long term as a result of holdovers as discussed below. The Department elected not to extend the term beyond ten years in order to maintain FAA oversight to ensure long-term exclusive concession agreements maintain adequate ACDBE participation.

Long-Term Agreements and Holdovers

Holdover provisions of an airport lease, agreement, or contract may permit

a recipient airport to extend the terms of an existing airport lease, in the event both the airport recipient and the tenant desire to continue the relationship as it exists, without executing a new lease. The length of holdover periods is often not defined in the lease and may continue on a month-to-month basis once the lease term ends.

Notwithstanding that holdovers may bridge gaps to meet short-term needs, the Department is starting to see longer holdover periods following the end of concession lease terms. These extended holdover periods have a similar effect of precluding potential ACDBE competitors from participating in opportunities as long-term exclusive agreements that require approval by the FAA pursuant to § 23.75. If not addressed, the use of holdovers in these cases, without FAA oversight, circumvents the requirements under § 23.75. For this reason, the final rule now makes clear that exclusive leases, agreements, or contracts that become long-term as a result a holdover, absent an approved plan to release a solicitation for that opportunity or renegotiate the lease or contract, are generally prohibited.

The final rule adds an oversight mechanism in the new paragraph (e) for FAA to monitor short-term leases that become long-term as a result of holdovers. Under the rule, airport recipients must submit a "holdover plan" to FAA for approval at least 60 days prior to the expiration of the current contract, agreement, or lease. Holdover plans include the same information and documentation for LTE agreements under the amended paragraphs (c)(3), (c)(4), (c)(6) and (c)(7) of § 23.75, in addition to a written explanation for the holdover and the method and date the airport recipient will use to solicit or renegotiate the concession contract, agreement, or lease in holdover status.

The written explanation for a holdover is similar to the existing special local circumstance provision. Airport recipients must articulate a need for a holdover period that causes an exclusive agreement to become a long-term lease or contract. Reasons that may support a holdover are bridging operational gaps that might occur due to renegotiations and transitions of lessees or expected delays in solicitation or re-bidding processes. The requirement for airport recipients to submit the solicitation method that they intend to apply, as well as a date it will renegotiate or re-bid a concession opportunity, provides a definitive strategy and timeframe to afford an opportunity for ACDBE participation.

Under this provision, recipients are also required to submit the information and documentation required under § 23.75(c)(3), (c)(4), (c)(6) and (c)(7). This includes an ACDBE contract goal analysis, ACDBE certification documentation and investment information, and the final long-term exclusive concession agreement. These items are necessary for FAA to determine the anticipated length of the holdover period and the level of ACDBE participation precluded by the holdover. Airport recipients that are unable to produce this information or documentation must submit an explanation as to why the item is not available or cannot be submitted as part of their holdover plan.

Definition of an Exclusive Agreement

The final rule adopts the definition of "exclusive" as proposed. Evaluating whether an agreement is "exclusive" requires examining the agreement in reference to the type of business covered (*e.g.*, management contract, advertising, web-based or electronic businesses, food and beverage, parking). A determination on whether a certain business activity under a contract, lease or agreement is exclusive should be made based on the totality of the circumstances. *See* Principles for Evaluating Long-Term, Exclusive Agreements in the ACDBE Program, June 10, 2013, § 1.2, at pp. 5–6.

In response to comments, the Department will not adopt a definition of "exclusive" that exempts LTE agreements with ACDBE participation from the requirements of § 23.75. Such a change is inconsistent with the intent of § 23.75, which is to provide for the review of LTE agreements to ensure adequate ACDBE participation throughout the term of the agreement, irrespective of whether an ACDBE or a non-ACDBE enterprise is the prime concessionaire being considered for award of an exclusive, long-term agreement. See 57 FR 18401 (Apr. 30, 1992). Not requiring the review of a long-term concession agreement with ACDBE participation would allow low ACDBE goals set on contracts to remain in place for extended lease periods without justification, thereby precluding those opportunities from generating more meaningful ACDBE participation.

Special Local Circumstances

We are not defining "special local circumstances" in this final rule. The term is intended to be broad and flexible to account for a wide range of scenarios that may justify the use of a long-term exclusive agreement. Contrary to the comment's concern that without further explanation, the evaluation of "special local circumstances" may lead to unfair inconsistencies, to date, FAA has not disapproved any request for approval of an LTE agreement based on an inadequate special local circumstance.

In response to the comment seeking clarification on whether the amortization period required for investment was sufficient to be considered a "special local circumstance," the answer is no. The LTE Guidance provides several examples of special local circumstances, which include the market size relative to the number of available vendors, reduced enplanements, an extreme act of nature, new business concepts, and severe economic factors (for instance, an airline goes out of business). The LTE Guidance makes clear that the amortization of the initial investment alone is not sufficient to justify approval of a long-term exclusive agreement, but may be a factor among others (*e.g.*, marketplace concepts and full-kitchen restaurants that require more costly development) to support the special local circumstances provision under the rule.

Amending Document Requirements

The Department is electing to amend the document requirements under § 23.75. First, paragraph (c)(2)(i) is removed from § 23.75, eliminating the requirement that an LTE agreement provide the "number of ACDBEs that reasonably reflects their availability in a recipient's market area, . . . and account for a percentage of the estimated annual gross receipts equivalent to a level set in accordance with § 23.47 through § 23.49." This provision is removed since the agreement may not provide opportunities for direct ownership and is now included via the new requirement to submit an ACDBE contract goal analysis under paragraph (c)(3).

Second, paragraph (c)(2)(ii) is removed, eliminating the requirement that airport recipients "review the extent of ACDBE participation before the exercise of each renewal option to consider whether an increase or decrease in ACDBE participation is warranted." Removing this provision is necessary to prevent a prime concessionaire from terminating an ACDBE from an LTE agreement after it made an investment simply because a decrease in participation may be warranted upon the exercise of an option.

Third, paragraph (c)(2)(iii) is removed, eliminating the requirement that an LTE agreement include a

provision that provides for the termination of an ACDBE during the term of the LTE agreement, without the recipient's consent. This provision is redundant and unnecessary since § 26.53, which applies to part 23 by reference, already establishes the requirements for the replacement or substitution of the ACDBEs, including those that are party to an LTE agreement or contract.

Fourth, the requirement in paragraph (c)(3), which requires recipients to submit assurances that any ACDBE participant will be in an acceptable form such as a sublease, joint venture, or partnership is replaced. The new provision now requires recipients submit an ACDBE contract goal analysis which captures goals set on both direct ownership arrangements and goods and service purchases.

Next, the requirement in paragraph (c)(7) for recipients to provide information on the estimated gross receipts and net profit to be earned by the ACDBE is removed. This financial disclosure requirement applies only to the ACDBE and may be a discriminatory practice since the process does not require the same from the non-ACDBE.

Section 23.75(c) is amended to now require airport recipients to submit items in paragraphs (c)(1) through (3) of this section prior to releasing the solicitation or request for proposals (RFP) and items in paragraphs (c)(4) through (7) prior to award of the contract.

The Department agrees that the 90-day period to submit those items before the solicitation is released may be shortened to mitigate impacts to some airport recipients' planned procurement processes. The FAA does not anticipate 90 days will be required to review and approve LTE agreements. Therefore, the final rule shortens the 90-day period to submit the items in paragraphs (c)(1) through (3), to at least 60-days prior to release of the solicitation. The 45-day period to submit items in paragraphs (c)(4) through (7) before contract award will remain unchanged.

Next, the Department disagrees with comments to simplify the information and documentation requirements under § 23.75(c) to two items (*e.g.*, contract goal analysis, and evidence that goal was met, or good faith efforts were made, etc.). ACDBE participation is a key part of the information needed for approval and each item in paragraphs (c)(1) through (c)(7) is valuable for FAA to determine whether arrangements have been made for adequate ACDBE participation throughout the LTE agreement. For this reason, the final rule retains the information and documentation requirements in § 23.75(c) as proposed by the NPRM.

The final rule adds a new paragraph (d) to § 23.75 that addresses the requirements for agreements awarded through direct negotiation. Because there is no competition for awards made through direct negotiation, this provision omits the requirement under paragraph (c)(2) for airport recipients to submit a copy of the solicitation because solicitations are not used for direct negotiated procurements. Under the rule, airport recipients are still required to submit the items in paragraphs (c)(1) and (c)(3) through (7) of the updated § 23.75.

43. Local Geographic Preferences (§ 23.79)

NPRM

The current § 23.79 prohibits recipients from using local geographic preference, which is defined under the rule as any requirement that gives an ACDBE located in one place an advantage over ACDBEs from other places in obtaining business as, or with, a concession at an airport. The proposed revision to § 23.79 clarifies that regardless of a concession's certification status, any local geographic preferences that gives a concession located in a local area an advantage over concessions from other places is prohibited.

Comments

There was unanimous support for the NPRM's proposed revisions to § 23.79. Commenters agreed with the revisions to clarify that local geographic preferences are not permitted regardless of concession certification status but that recipients may request concepts that are local to a specific region when soliciting proposals.

One commenter suggested that the Department include within the regulation examples of what requirements could constitute "advantage" for local concessionaires over other concessionaires from other places.

DOT Response

The final rule adopts the changes to § 23.79. This clarifying change makes clear that the provision prohibiting local geographic preferences applies not just to ACDBEs but all firms, regardless of their concession certification status. The final rule also leaves the existing definition of local geographic preference unchanged. Section 23.79 defines local geographic preference as any requirement that gives a concessionaire located in one place (*e.g.*, [recipient's] local area) an advantage over concessionaires from other places in obtaining business as, or with, a concession at [recipient's] airport.

Under the definition of local geographic preference, an example of what may constitute an advantage is a preference criteria used in the evaluation of bids or proposals based on a firm's geographic location, or owner's residency. Another example of what may constitute advantage is the placement of unreasonable local requirements on firms in order for them to qualify to do business. Nothing in this section should be construed as preempting State licensing requirements or prohibiting concepts that are local to a specific region when soliciting proposals. However, airport recipients should still report to the FAA all other State or local law, regulation, or policy pertaining to minorities, women, or disadvantaged business enterprises concerning airport concessions that adds to, goes beyond, or imposes more stringent requirements than the provisions of part 23. The FAA will determine whether such a law, regulation, or policy conflicts with this part, in which case the requirements of this part will govern. See § 23.77.

44. Appendix A to Part 23: Uniform Report of ACDBE Participation Form

NPRM

Section 23.27(b) requires recipients to submit an annual report on ACDBE participation using the Uniform Report found in Appendix A. The Department proposed to remove the Uniform Report of ACDBE Participation from Appendix A to Part 23 and instead post the form on DOT's website. This is an administrative action that does not affect the public's ability to comment on any amendments to the information collections in the form.

Comments

In the NPRM, the Department estimated that it would take primary airports 3.2 hours to comply with the proposed ACDBE Annual Report of Percentages of ACDBEs in Various Categories in § 23.27(d). The commenter objected to the Department's estimate, approximating that it would take at least 40 hours.

Block #5 Instructions of Appendix A, Definition of Goods and Services

The NPRM proposed revising the definition of "goods/services" in the block #5 instructions to clarify that only participation in the form of goods and services purchased by concessionaires and management contractors from ACDBEs should be reported. The

majority of commenters supported the proposal to revise the definition of "goods/services." However, concerns were raised on the calculation of Columns A and C in block #5 of Appendix A. Some commenters inquired about why purchases were not included in the total line for Column A but included in Column C, which could lead to misrepresentation of data.

A few commenters focused on goods/services and recommended that the Department revisit the calculation, as recipients are not clear on how to utilize goods/services. One commenter noted that goods/services were not sufficiently addressed in the NPRM, and another requested clarification on reporting gross revenues if the goal is based on purchases.

Block #5 New Joint Venture Participation Category

No comments were received in response to the NPRM's proposal to amend the instructions in all blocks of the Uniform Report to include the definition of "joint venture" as defined in § 23.3 as a new participation category. The purpose of the change was to provide guidance to recipients on how to count ACDBE participation derived from joint ventures.

Blocks #10 and #11 Reporting of ACDBEs Owned by Members of Different Socially Disadvantaged Groups

The Department received several comments on the NPRM's proposal to amend the requirements under block #11 in the Uniform Report to allow for participation to be reported by ACDBEs owned by multiple partners who are from different groups and whose members are presumed socially and economically disadvantaged (SED).

Two stakeholders provided comments regarding the proposed change to block #11, expressing concerns about the amount of time it would take to complete the reporting and the lack of detailed information that airports may have regarding ownership demographics. As a result, neither commenter supported the proposed change to Appendix A, blocks #10 and #11. Instead, they recommended that recipients report the ethnicity and gender of the largest socially and economically disadvantaged shareholder, the owner with primary control, or the owner who holds the highest position within the business. Additionally, commenters suggested that certifying entities should make detailed information on the owners and their firms more easily accessible to non-certifying airports.

DOT Response

The final rule adopts the Department's proposal and will post the Uniform Report of ACDBE Participation on Department's website as amended below. A commenter's estimate of 40 hours to complete this task is unreasonable; based on the supporting statement DOT developed in support of this rulemaking and the information collection that has been submitted to OMB for approval, this task should take −4 hours, much less time on average.

Block #5 Instructions of Appendix A, Definition of Goods and Services

For the goods and services to be credited toward goals, goods and services must be purchased by concessionaires and management contractors from firms that meet definitions of "concession" and "ACDBE" under § 23.3. Purchases of goods and services by the airport cannot be credited toward goals. For this reason, the final rule adopts the definition of "goods/services" in the block #5 instructions as proposed, with the clarification that only participation in the form of goods and services purchased by concessionaires and management contractors from ACDBEs should be reported.

In response to comments, the existing Block #5 instructions are clear that recipients should enter in Column A, purchases of goods and services (ACDBE and non-ACDBE combined) at the airport.

Block #5 New Joint Venture Participation Category

The final rule will adopt the new participation category for joint ventures as proposed.

Blocks #10 and #11 Reporting of ACDBEs Owned by Members of Different Socially Disadvantaged Groups

The final rule adopts the proposed amendment to the requirements under block #11 in the Uniform Report to allow for participation to be reported by ACDBEs owned by multiple partners who are from different groups and whose members are presumed socially and economically disadvantaged (SED). The Department disagrees with comments that information on individual SEDOs would be difficult to obtain and that implementation of this new reporting requirement would be burdensome. Demographic information of individual SEDOs should be readily available to non-certifying airports since they are already obligated to collect racial and ethnic data of lessees, concessionaires and contractors under the existing Title VI nondiscrimination requirements in 49 CFR part 21.

In addition, the final rule expands the MAP–21 reporting requirements under § 26.11 to include ACDBEs and the number and percentage of in-state and out-of-state SEDOs by gender and ethnicity. Non-certifying airports will be able to more easily obtain information on individual SEDOs and their firms and report this information each year on the Uniform Report.

45. Technical Corrections

Commenters unanimously supported the Department's proposal to make the provisions in part 23 consistent with the provisions of part 26, clarify existing requirements, correct typographical errors, and revise obsolete and/or duplicative provisions, and make cross references, as appropriate. The final rule fully adopts the proposal.

46. Duration

The Department received a comment on the length of time that a certification remains in effect. The commenter suggested the Department cap the number of years that a firm may remain certified for. In their view, the indefinite nature of certification stifles outreach and implicitly closes the door to other small eligible firms. By adding a maximum duration for certification, the program could open opportunities for new and developing firms to take advantage of the program.

The final rule will not adopt the above recommendation. The authorizations and statutes governing the airport improvement program do not provide the Department flexibility to place limitations or timeframes on certification of firms.

Regulatory Analysis and Notices

A. Executive Order: 12866 ("Regulatory Planning and Review"), Executive Order 13563 ("Improving Regulation and Regulatory Review"), Executive Order 14094 (Modernizing Regulatory Review), and 49 CFR Part 5 and DOT Order 2100.6A

This final rule has been deemed significant under section 3(f) of Executive Order 12866, "Regulatory Planning and Review," as amended by Executive Order 14094 ("Modernizing Regulatory Review") and the Department's regulations and orders (49 CFR part 5 and DOT Order 2100.6A, available at *https://www.transportation.gov/sites/dot.gov/files/2021-06/DOT-2100.6A-Rulemaking-and-Guidance-%28003%29.pdf*), because of its interest to the small business community and

transportation industries. It has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

The objective of the rule is to amend reporting and eligibility requirements for the Department's Airport Concession Disadvantaged Business Enterprises (ACDBE) program and Disadvantaged Business Enterprise (DBE) program. These programs are implemented and overseen by recipients of certain Department funds. The changes in this rule would affect businesses participating in the programs, recipients of Department funds who oversee the programs, and the Department.

The Department conducted a regulatory impact analysis, available in the docket, to assess the effects of the rule. Businesses, recipients, and the Department would incur some costs due to increased reporting requirements. At the same time, they would experience overall cost savings because the rule simplifies provisions and would relax requirements—for example, by allowing recipients to conduct virtual on-site visits.

Table 1 summarizes the estimated costs and cost savings of the rule over a ten-year analysis period (non-Federal Government). The rule has annualized net cost savings of $58.7 million at a 3 percent discount rate and $6.74 million at a 7 percent discount rate.

Table 1—Summary of Costs and Cost Savings of the Rule, 10-Year Period

[Rounded to Thousands]

TABLE 1—COSTS AND COST SAVINGS, 10-YEAR PERIOD

[Dollars, rounded to the nearest 1,000]

	Undiscounted	Present value 3%	Annualized 3%	Present value 7%	Annualized 7%
Total cost savings	203,668,000	178,773,000	20,957,000	152,727,000	21,744,000
Total cost	134,030,000	120,073,000	14,075,000	105,400,000	15,005,000
Net cost savings	69,638,000	58,700,000	6,882,000	47,327,000	6,739,000

The Department determined that amending the rules is necessary because many portions of the current rules seem outdated for today's DBE and ACDBE marketplace. They might inhibit firm growth and success, and limit recipient and sponsors' ability to effectively monitor program compliance by all participants in a post-pandemic environment. The rule updates several core provisions of the regulation to maintain optimal program performance, improve operational cohesiveness, and provide contemporary solutions for program deficiencies.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended, (5 U.S.C. 601 *et seq.*) and E.O. 13272 (67 FR 53461 (Aug. 16, 2002)) requires agencies to review regulations to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if issued, would not have a significant economic impact on a substantial number of small entities. The Department prepared an IRFA as part of the Department's regulatory impact analysis (Appendix C of the regulatory impact analysis), available in the docket DOT–OST–2022–0051–008.

DOT invited all interested parties to submit data and information regarding the potential economic impact on small entities that would come from promulgating the NPRM. DOT considered the comments received in the public comment process when preparing the Final Regulatory Flexibility Analysis, and we received no comments on the preliminary finding of non-significance.

C. Executive Order 13132 ("Federalism")

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). It would not include any provision that: (1) has substantial direct effects on the States, the relationship between the National Government and the States, or the distribution of power and the responsibilities among the various levels of government; (2) imposes substantial direct compliance costs on State and local governments; or (3) preempts State law. The DBE and ACDBE programs are governed by Federal regulations 49 CFR parts 26 and 23. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13084 ("Tribal Consultation and Coordination")

This rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments"). Because this rulemaking does not significantly or uniquely affect the communities of the Indian Tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1501, requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditures by State, local or Tribal governments, or by the private sector, of $100 million or more (adjusted annually for inflation with base year of 1995) in any one year. The 2021 threshold after adjustment for inflation is $165 million, using the Implicit Price Deflator for the Gross Domestic Product. The assessment may be included in conjunction with other assessments, as it is here. The final rule is unlikely to result in expenditures by State, local, or Tribal governments of more than $100 million annually.

F. Paperwork Reduction Act

This final rule adds 6 new collections of information and 17 existing collections being revised that require approval by OMB under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3501 *et seq.*). Under the Paperwork Reduction Act, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing notice of the proposed information collection and a 60-day comment period, and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The Department met these requirements when it published a notice of the proposed information in its July 21, 2022, NPRM and accompanying submission to OIRA. Comments to these collections are described above.

G. National Environmental Policy Act

The Department has analyzed the environmental impacts of this 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). The purpose of this rulemaking is to amend the Department's DBE and ACDBE regulations. Paragraph 4(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 Transit Administration's implementing procedures, "[p]lanning and administrative activities that do not involve or lead directly to construction, such as: . . . promulgation of rules, regulations, directives . . ." 23 CFR 771.118(c)(4) and Federal Highway Administration's implementing procedures, "[p]romulgation of rules, regulations, and directives." 23 CFR 771.117(c)(20). 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.

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.

List of Subjects in 49 CFR Part 23 and 26

Administrative practice and procedure, Airports, Civil Rights, Government contracts, Grant programs—transportation; Mass transportation, Minority Businesses, Reporting and recordkeeping requirements.

Issued this 27 day of February, 2024, at Washington, DC.

Peter Paul Montgomery Buttigieg,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department of Transportation amends 49 CFR parts 23 and 26 as follows:

PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

■ 1. The authority citation for part 23 is revised to read as follows:

Authority: 49 U.S.C. 47107; 42 U.S.C. 2000d; 49 U.S.C. 322; E.O. 12138, 44 FR 29637, 3 CFR, 1979 Comp., p. 393.

■ 2. Amend § 23.1 by:
■ a. In paragraph (e), removing the word "and" at the end of the paragraph;
■ b. Redesignating paragraph (f) as paragraph (h); and
■ c. Adding new paragraph (f) and paragraph (g).

The additions read as follows:

§ 23.1 What are the objectives of this part?

* * * * *

(f) To promote the use of ACDBEs in all types of concessions activities at airports receiving DOT financial assistance;

(g) To assist the development of firms that can compete successfully in the marketplace outside the ACDBE program; and

* * * * *

■ 3. Revise § 23.3 to read as follows:

§ 23.3 What do the terms used in this part mean?

Administrator means the Administrator of the Federal Aviation Administration (FAA).

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121, except that the provisions of SBA regulations concerning affiliation in the context of joint ventures (13 CFR 121.103(h)) do not apply to this part.

(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 ACDBE program.

Airport Concession Disadvantaged Business Enterprise (ACDBE) means a firm seeking to operate as a concession that is 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.

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 Metlakatla 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 (43 U.S.C. 1601 *et seq.*)

Assets has the same meaning the term has in 49 CFR part 26.

Car dealership means an establishment primarily engaged in the retail sale of new and/or used automobiles. Car dealerships frequently maintain repair departments and carry stocks of replacement parts, tires, batteries, and automotive accessories. Such establishments also frequently sell pickup trucks and vans at retail. In the standard industrial classification system, car dealerships are categorized in NAICS code 441110.

Concession means one or more of the types of for-profit businesses that serve the traveling public listed in paragraph (1) or (2) of this definition:

(1) A business, located on an airport subject to this part, that is engaged in the sale of consumer goods or services

to the traveling public under an agreement with the recipient, another concessionaire, or the owner or lessee of a terminal, if other than the recipient.

(2) A business conducting one or more of the following covered activities, even if it does not maintain an office, store, or other business location on an airport subject to this part, as long as the activities take place on the airport: Management contracts and subcontracts, a web-based or other electronic business in a terminal or which passengers can access at the terminal, an advertising business that provides advertising displays or messages to the public on the airport, or a business that provides goods and services to concessionaires.

Example 1 to paragraph (2): A supplier of goods or a management contractor maintains its office or primary place of business off the airport. However, the supplier provides goods to a retail establishment in the airport; or the management contractor operates the parking facility on the airport. These businesses are considered concessions for purposes of this part.

(3) For purposes of this subpart, a business is not considered to be "located on the airport" solely because it picks up and/or delivers customers under a permit, license, or other agreement. For example, providers of taxi, limousine, car rental, or hotel services are not considered to be located on the airport just because they send shuttles onto airport grounds to pick up passengers or drop them off. A business is considered to be "located on the airport," however, if it has an on-airport facility. Such facilities include in the case of a taxi operator, a dispatcher; in the case of a limousine, a booth selling tickets to the public; in the case of a car rental company, a counter at which its services are sold to the public or a ready return facility; and in the case of a hotel operator, a hotel located anywhere on airport property.

(4) Any business meeting the definition of concession is covered by this subpart, regardless of the name given to the agreement with the recipient, concessionaire, or airport terminal owner or lessee. A concession may be operated under various types of agreements, including but not limited to the following:

(i) Leases.

(ii) Subleases.

(iii) Permits.

(iv) Contracts or subcontracts.

(v) Other instruments or arrangements.

(5) The conduct of an aeronautical activity is not considered a concession for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators; flight schools; recreational service providers (*e.g.*, skydiving, parachute-jumping, flying guides); and air tour services.

(6) Other examples of entities that do not meet the definition of a concession include flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, telephone and electric service to the airport facility, holding companies, and skycap services under contract with an air carrier or airport.

Concessionaire means a firm that owns and controls a concession or a portion of a concession.

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 firm, legal claims and judgments, and provisions for Federal income tax.

Days means 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.

Direct ownership arrangement means a joint venture, partnership, sublease, licensee, franchise, or other arrangement in which a firm owns and controls a concession.

Good faith efforts means efforts to achieve an ACDBE goal or other requirement of this part that, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to meet the program requirement.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, father-in-law, brother-in-law, sister-in-law, or registered domestic partner.

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 an ACDBE 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 ACDBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest. Joint venture entities are not certified as ACDBEs.

Large hub primary airport means a commercial service airport that has a number of passenger boardings equal to at least one percent of all passenger boardings in the United States.

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.

Management contract or subcontract means an agreement with a recipient or another management contractor under which a firm directs or operates one or more business activities, the assets of which are owned, leased, or otherwise controlled by the recipient. The managing agent generally receives, as compensation, a flat fee or a percentage of the gross receipts or profit from the business activity. For purposes of this subpart, the business activity operated or directed by the managing agent must be other than an aeronautical activity, be located at an airport subject to this subpart, and be engaged in the sale of consumer goods or provision of services to the public.

Material amendment means a significant change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

Medium hub primary airport means a commercial service airport that has a number of passenger boardings equal to at least 0.25 percent of all passenger boardings in the United States but less than one percent of such passenger boardings.

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

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii that is a not-for-profit organization chartered by the State of Hawaii, and is controlled by Native Hawaiians

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

Nonhub primary airport means a commercial service airport that has more than 10,000 passenger boardings each year but less than 0.05 percent of all passenger boardings in the United States.

Operating Administration or *OA* means any of the following: Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an OA includes his or her designee(s).

Part 26 means 49 CFR part 26, DOT's Disadvantaged Business Enterprise Program regulation.

Personal net worth or PNW has the same meaning the term has in 49 CFR part 26.

Primary airport means a commercial service airport that the Secretary determines to have more than 10,000 passengers enplaned annually.

Primary industry classification means the North American Industrial Classification System (NAICS) code designation that best describes the primary business of a firm. The NAICS Manual is available through the U.S. Census Bureau of the U.S. Department of Commerce. The U.S. Census Bureau also makes materials available through its website (*https://www.census.gov/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 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 ACDBE program purposes.

Race-conscious means a measure or program that is focused specifically on assisting only ACDBEs, including women-owned ACDBEs. For the purposes of this part, race-conscious measures include gender-conscious measures.

Race-neutral means a measure or program that is, or can be, used to assist all small businesses, without making distinctions or classifications on the basis of race or gender.

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 ACDBE firms.

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

Small business concern means a for profit business that does not exceed the size standards of § 23.33.

Small hub airport means a publicly owned commercial service airport that has a number of passenger boardings equal to at least 0.05 percent of all passenger boardings in the United States but less than 0.25 percent of such passenger boardings.

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

(1) Any individual determined by a recipient 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 the certifier requires 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), the Commonwealth of the Northern Marianas Islands, 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.

Subconcession means a firm that has a sublease or other agreement with a prime concessionaire rather than with the airport itself, to operate a concession at the airport.

Sublease means a lease by a lessee (tenant) to a sublessee (subtenant). Sublease is an example of a subconcession in which the sublessee is independently responsible for the full financing and operation of the subleased concession location(s) and activities. A sublease passes on to the sublessee all requirements applicable to the concession under the primary lease, including proportionate share of the rent and capital expenditures.

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).

§ 23.13 [Amended]

■ 4. Amend § 23.13 by:

■ a. In paragraph (b) introductory text, in the first sentence, removing the word "of" appearing after the word "interpretations"; and

■ b. In paragraph (d) introductory text, removing the phrase "are for the purpose of authorizing" and adding in its place the word "authorize".

■ 5. Revise § 23.21 to read as follows:

§ 23.21 Who must submit an ACDBE program to FAA, and when?

(a) If you are a primary airport and receive FAA financial assistance, you must submit an ACDBE program plan meeting the requirements of this part to the FAA for approval.

(1) The recipient must submit this program plan on the same schedule as provided for in 23.45(a) of this part.

(2) Timely submission and FAA approval of a recipient's ACDBE program plan is a condition of eligibility for FAA financial assistance.

(b) If you are a primary airport that does not have an ACDBE program, and you apply for a grant of FAA funds for airport planning and development under 49 U.S.C. 47107 *et seq.*, you must submit an ACDBE program plan to the FAA at the time of your application. Timely submission and FAA approval of your ACDBE program are conditions of eligibility for FAA financial assistance.

(c) If you are the owner of more than one airport that is required to have an ACDBE program, you may implement one plan for all your locations. However, you must establish a separate ACDBE goal for each airport.

(d) If a recipient makes any significant changes to their ACDBE program at any time, the recipient must provide the amended program to the FAA for approval before implementing the changes.

(e) If a recipient is a non-primary airport, non-commercial service airport, a general aviation airport, reliever airport, or any other airport that does not have scheduled commercial service, it is not required to have an ACDBE program. However, the recipient must take appropriate outreach steps to encourage available ACDBEs to participate as concessionaires whenever there is a concession opportunity.

■ 6. Amend § 23.23 by adding paragraph (c) to read as follows:

§ 23.23 What administrative provisions must be in a recipient's ACDBE program?

* * * * *

(c) You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in their community and make reasonable efforts to use these institutions. You must also encourage prime concessionaires to use such institutions.

■ 7. Amend § 23.25 by revising paragraphs (d), (e), and (f) to read as follows:

§ 23.25 What measures must recipients include in their ACDBE programs to ensure nondiscriminatory participation of ACDBEs in concessions?

* * * * *

(d) Your ACDBE program must include race-neutral measures that you will take. You must maximize the use of race-neutral measures, obtaining as much as possible of the ACDBE participation needed to meet overall goals through such measures. These are responsibilities that you directly undertake as a recipient, in addition to the efforts that concessionaires make, to obtain ACDBE participation. The following are examples of race-neutral measures you can implement:

(1) Locating and identifying ACDBEs and other small businesses who may be interested in participating as concessionaires under this part;

(2) Notifying ACDBEs of concession opportunities and encouraging them to compete, when appropriate;

(3) When practical, structuring concession activities to encourage and facilitate the participation of ACDBEs;

(4) Providing technical assistance to ACDBEs in overcoming limitations, such as inability to obtain bonding or financing;

(5) Ensuring that competitors for concession opportunities are informed during pre-solicitation meetings about how the recipient's ACDBE program will affect the procurement process;

(6) Providing information concerning the availability of ACDBE firms to competitors to assist them in obtaining ACDBE participation; and

(7) Establishing a business development program (*see* § 26.35 of this chapter); technical assistance program; or taking other steps to foster ACDBE participation in concessions.

(e) Your ACDBE program must also provide for the use of race-conscious measures when race-neutral measures, standing alone, are not projected to be sufficient to meet an overall goal. The following are examples of race-conscious measures you can implement:

(1) Establishing concession-specific goals for particular concession opportunities.

(i) In setting concession-specific goals for concession opportunities other than car rental, you are required to explore, to the maximum extent practicable, all available options to set goals that concessionaires can meet through direct ownership arrangements. A concession-specific goal for any concession other than car rental may be based on purchases or leases of goods and services only when the analysis of the relative availability of ACDBEs and all relevant evidence reasonably supports that there is *de minimis* availability for direct ownership arrangement participation for that concession opportunity.

(ii) In setting car rental concession-specific goals, you cannot require a car rental company to change its corporate structure to provide for participation via direct ownership arrangement. When your overall goal for car rental concessions is based on purchases or leases of goods and services, you are not required to explore options for direct ownership arrangements prior to setting a car rental concession-specific goal based on purchases or leases of goods and services.

(iii) If the objective of the concession-specific goal is to obtain ACDBE participation through a direct ownership arrangement with an ACDBE, calculate the goal as a percentage of the total estimated annual gross receipts from the concession.

(iv) If the goal applies to purchases or leases of goods and services from ACDBEs, calculate the goal as a percentage of the total estimated dollar value of all purchases to be made by the concessionaire.

(v) To be eligible to be awarded the concession, competitors must make good faith efforts to meet this goal. A competitor may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so.

(vi) The administrative procedures applicable to contract goals in §§ 26.51 through 26.53 of this chapter apply with respect to concession-specific goals.

(2) Negotiation with a potential concessionaire to include ACDBE participation, through direct ownership arrangements or measures, in the operation of the non-car rental concession.

(3) With the prior approval of FAA, other methods that take a competitor's ability to provide ACDBE participation into account in awarding a concession.

(f) Your ACDBE program must require businesses subject to car rental and non-car rental ACDBE goals at the airport to make good faith efforts to meet goals when set pursuant to paragraph (e) of this section.

* * * * *

■ 8. Add § 23.26 to read as follows:

§ 23.26 Fostering small business participation.

(a) Your ACDBE program must include an element to provide for the structuring of concession opportunities to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of concession opportunities that may preclude small business participation in solicitations.

(b) This element must be submitted to the FAA for approval as a part of your ACDBE program no later than October 7, 2024. As part of this program element

you may include, but are not limited to including, the following strategies:

(1) Establish a race-neutral small business set-aside for certain concession opportunities. Such a strategy would include the rationale for selecting small business set-aside concession opportunities which may include consideration of size and availability of small businesses to operate the concession.

(2) Consider the concession opportunities available through all concession models.

(3) On concession opportunities that do not include ACDBE contract goals, require all concession models to provide subleasing opportunities of a size that small businesses, including ACDBEs, can reasonably operate.

(4) Identify alternative concession contracting approaches to facilitate the ability of small businesses, including ACDBEs, to compete for and obtain direct leasing opportunities.

(c) This element should include an objective, definition of small business, verification process, monitoring plan, and implementation timeline.

(d) Your element must include the following assurances:

(1) Your element is authorized under State law;

(2) Certified ACDBEs that meet the size criteria established under your element are presumptively eligible to participate in your element;

(3) There are no geographic preferences or limitations imposed on any concession opportunities included in your element;

(4) There are no limits on the number of concession opportunities awarded to firms participating in your element but that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses;

(5) You will take aggressive steps to encourage those minority and women owned firms that are eligible for ACDBE certification to become certified; and

(6) Your element is open to small businesses regardless of their location (*i.e.*, that there is no local or other geographic preference).

(e) A State, local, or other program, in which eligibility requires satisfaction of race/gender or other criteria in addition to business size, may not be used to comply with the requirements of this part.

(f) This element must not include local geographic preferences per § 23.79.

(g) You must submit an annual report on small business participation obtained through the use of your small business element. This report must be submitted in a format acceptable to the FAA based on a schedule established and posted to the agency's website, available at *https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program.*

(h) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your ACDBE program.

■ 9. Amend § 23.27 by revising paragraph (b) and adding paragraphs (c) and (d) to read as follows:

§ 23.27 What information does a recipient have to retain and report about implementation of its ACDBE program?

* * * * *

(b) You must submit an annual report on ACDBE participation to the FAA by March 1 following the end of each fiscal year. This report must be submitted in the format acceptable to the FAA and contain all of the information described in the Uniform Report of ACDBE Participation.

(c) You must create and maintain active participants list information as described in paragraph (c)(2) of this section and enter it into a system designated by the FAA.

(1) The purpose of this active participants list is to ensure that you have the most accurate data possible about the universe of ACDBE and non-ACDBEs who seek work in your airport concessions program as a tool to help you set your overall goals, and to provide the Department with data for evaluating the extent to which the objectives of § 23.1 are being achieved.

(2) You must obtain the following active participants list information about ACDBE and non-ACDBEs who seek to work on each of your concession opportunities.

(i) Firm name;

(ii) Firm address including ZIP code;

(iii) Firm status as an ACDBE or non-ACDBE;

(iv) Race and gender information for the firm's majority owner;

(v) NAICS code applicable to the concession contract in which the firm is seeking to perform;

(vi) Age of the firm; and

(vii) 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 $1 million; $1–3 million; $3–6 million; $6–10 million, etc.) rather than requesting an exact figure from the firm.

(3) You must collect the data from all active participants for your concession opportunities by requiring the information in paragraph (c)(2) of this section to be submitted with their proposals or initial responses to negotiated procurements. You must enter this data in FAA's designated system no later than March 1 following the fiscal year in which the relevant concession opportunity was awarded.

(d) The State department of transportation in each Unified Certification Program (UCP) established pursuant to § 26.81 of this chapter must report to DOT's Departmental Office of Civil Rights each year, the following information:

(1) The number and percentage of in-state and out-of-state ACDBE certifications for socially and economically disadvantaged by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);

(2) The number of ACDBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;

(3) The number of decertified firms:

(i) Total in-state and out-of-state firms decertified;

(ii) Names of in-state and out-of-state firms decertified because SEDO exceeded the personal net worth cap;

(iii) Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard.

(4) Number of in-state and out-of-state ACDBEs summarily suspended;

(5) Number of in-state and out-of-state ACDBE applications received for an individualized determination of social and economic disadvantage status; and

(6) Number of in-state and out-of-state ACDBEs whose owner(s) made an individualized showing of social and economic disadvantaged status.

§ 23.31 [Amended]

■ 10. Amend § 23.31 by removing paragraph (c).

■ 11. Revise § 23.33 to read as follows:

§ 23.33 What size standards do recipients use to determine the eligibility of applicants and ACDBEs?

(a) Except as provided in paragraph (b) of this section, recipients must treat a firm as a small business eligible to be certified as an ACDBE if the gross receipts of the applicant firm and its affiliates, calculated in accordance with 13 CFR 121.104 averaged over the firm's previous five fiscal years, do not exceed $56.42 million.

(b) The following types of businesses have size standards that differ from the standard set forth in paragraph (a) of this section:

(1) *Banks and financial institutions.* $1 billion in assets;

(2) *Passenger car rental companies.* $75.23 million average annual gross receipts over the firm's previous five fiscal years;

(3) *Pay telephones.* 1,500 employees; and

(4) *New car dealers.* 350 employees.

(c) For size purposes, gross receipts (as defined in 13 CFR 121.104(a)), of affiliates should be included in a manner consistent with 13 CFR 121.104(d), except in the context of joint ventures. For gross receipts attributable to joint venture partners, a firm must include in its gross receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the firm and its joint ventures (*e.g.*, subcontracts from a joint venture entity to joint venture partners).

■ 12 Revise § 23.35 to read as follows:

§ 23.35 What is the personal net worth (PNW) limit for disadvantaged owners of ACDBEs?

(a) The Department will adjust the PNW cap by May 9, 2024 by multiplying $1,600,000 by the growth in total household net worth since 2019 as described by "Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h)" produced by the Board of Governors of the Federal Reserve (*https://www.federalreserve.gov/releases/z1/*), and normalized by the total number of households as collected by the Census in "Families and Living Arrangements" (*https://www.census.gov/topics/families/families-and-households.html*) to account for population growth. The Department will adjust the PNW cap every 3 years on the anniversary of the initial adjustment date described in this section. The Department will post the adjustments on the Departmental Office of Civil Rights' web page, available at *https://www.Transportation.gov/DBEPNW*. Each such adjustment will become the currently applicable PNW limit for purposes of this regulation.

(b) The Department will use the following formula to adjust the PNW limit:

$$\text{Future Year PNW Cap} = [\$1{,}600{,}000] * \frac{\text{Q1-Q4 Average Household Net Worth of Future Year / Total Households of Future Year}}{\text{Q1-Q4 Average Household Net worth of 2019 (\$106,722,704 million / Total Households of 2019 (128,579)}}$$

§ 23.37 [Amended]

■ 13. Amend § 23.37 in the second sentence of paragraph (b) by removing the phrase "does not do work relevant to the airport's concessions program" and adding the phrase "does not perform work or provide services relevant to the airport's concessions program" in its place.

■ 14. Revise § 23.39 to read as follows:

§ 23.39 What are other ACDBE certification requirements?

(a) The provisions of § 26.83(c)(1) of this chapter do not apply to certifications for purposes of this part. Instead, in determining whether a firm is an eligible ACDBE, you must take the following steps:

(1) Visit the firm's principal place of business, virtually or in person, and interview the SEDO, officers, and key personnel. You must review those persons' résumés and/or work histories. You must maintain a complete audio recording of the interviews. The certifier must also visit one or more active job sites (if there is one). These activities comprise the "on-site review" (OSR), a written report of which the certifier must keep in its files.

(2) 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;

(3) Analyze the bonding and financial capacity of the firm; lease and loan agreements; and bank account signature cards;

(4) Determine the work history of the firm, including any concession contracts or other contracts it may have received; and payroll records;

(5) Obtain or compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive;

(6) Obtain a statement from the firm of the type(s) of concession(s) it prefers to operate or the type(s) of other contract(s) it prefers to perform;

(7) 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 5 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service; and

(8) Require applicants for ACDBE certification to complete and submit an appropriate application form, except as otherwise provided in § 26.85 of this chapter.

(b) In reviewing the Declaration of Eligibility required by § 26.83(j) of this chapter, you must ensure that the ACDBE applicant provides documentation that it meets the applicable size standard in § 23.33.

(c) For purposes of this part, the term *prime contractor* in § 26.87(j) of this chapter includes a firm holding a contract with an airport concessionaire to provide goods or services to the concessionaire or a firm holding a prime concession agreement with a recipient.

(d) With respect to firms owned by Alaska Native Corporations (ANCs), the provisions of § 26.63(c)(2) of this chapter do not apply. The eligibility of ANC-owned firms for purposes of this part is governed by § 26.63(c)(1) of this chapter.

(e) You must use the Uniform Certification Application found in part 26 of this chapter without change. However, you may provide in your ACDBE program, with the written approval of the concerned Operating Administration, for supplementing the form by requesting specified additional information consistent with this part. The applicant must state that it is applying for certification as an ACDBE and complete all of section 5.

(f) Car rental companies and private terminal owners or lessees are not authorized to certify firms as ACDBEs. As a car rental company or private terminal owner or lessee, you must obtain ACDBE participation from firms which a recipient or UCPs have certified as ACDBEs.

■ 15. Amend § 23.43 by adding paragraph (c) as to read follows:

§ 23.43 What are the consultation requirements in the development of recipients' overall goals?

* * * * *

(c) The requirements of this section do not apply if no new concession opportunities will become available during the goal period. However, recipients must take appropriate outreach steps to encourage available ACDBEs to participate as concessionaires whenever there is a concession opportunity.

■ 16. Amend § 23.45 by revising paragraphs (a), (b), and (h) to read as follows:

§ 23.45 What are the requirements for submitting overall goal information to the FAA?

(a) You must submit your overall goals to the appropriate FAA Regional Civil Rights Office for approval. Your overall goals meeting the requirements of this subpart are due based on a schedule established by the FAA and posted on the FAA's website.

(b) You must then submit goals every three years based on the published schedule.

* * * * *

(h) If the FAA determines that your goals have not been correctly calculated or the justification is inadequate, the FAA may, after consulting with you, adjust your overall goal or race-conscious/race-neutral "split." The adjusted goal represents the FAA's determination of an appropriate overall goal for ACDBE participation in the recipient's concession program, based on relevant data and analysis. The adjusted goal is binding.

* * * * *

§ 23.51 [Amended]

■ 17. Amend § 23.51 in paragraph (c)(1) by removing "*www.census.gov/epcd/cbp/view/cbpview.html*" and adding in its place *https://www.census.gov/programs-surveys/cbp.html*."

§ 23.53 [Amended]

■ 18. Amend § 23.53 in paragraph (d)(2) by removing "a ACDBE" and adding "an ACDBE" in its place.

■ 19. Amend § 23.55 by:

■ a. Revising paragraph (e);

■ b. In paragraph (g), removing "a ACDBE" and adding "an ACDBE" in its place; and

■ c. Revising paragraphs (h)(1) and (2) and (j).

The revisions read as follows:

§ 23.55 How do recipients count ACDBE participation toward goals for items other than car rentals?

* * * * *

(e) Count 100 percent of fees or commissions charged by an ACDBE firm for a bona fide service, provided that, as the recipient, you determine this amount to be reasonable and not excessive as compared with fees customarily allowed for similar services. Such services may include, but are not limited to, professional, technical, consultant, legal, security systems, advertising, building cleaning and maintenance, computer programming, or managerial.

* * * * *

(h) * * *

(1) Count 100 percent of fees or commissions charged for assistance in the procurement of the goods, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the goods themselves.

(2) Count 100 percent of fees or transportation charges for the delivery of goods required for a concession, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of goods themselves.

* * * * *

(j) When an ACDBE is decertified because one or more of its disadvantaged owners exceed the PNW cap or the firm exceeds the business size standards of this part during the performance of a contract or other agreement, the firm's participation may continue to be counted toward ACDBE goals for the remainder of the term of the contract or other agreement. However, you must verify that the firm in all other respects remains an eligible ACDBE and you must not count the concessionaire's participation toward ACDBE goals beyond the termination date for the concession agreement in effect at the time of the decertification (*e.g.*, in a case where the agreement is renewed or extended, or an option for continued participation beyond the current term of the agreement is exercised).

(1) The firm must inform the recipient in writing of any change in circumstances affecting its ability to meet ownership or control requirements of subpart C of this part or any material change. Reporting must be made as provided in § 26.83(i) of this chapter.

(2) The firm must provide to the recipient, annually on December 1, a Declaration of Eligibility, affirming that there have been no changes in the firm's circumstances affecting its ability to meet ownership or control requirements of subpart C of this part or any other material changes, other than changes regarding the firm's business size or the owner's personal net worth.

* * * * *

■ 20. Amend § 23.57 by revising paragraph (b)(3)(i) to read as follows:

§ 23.57 What happens if a recipient falls short of meeting its overall goals?

* * * * *

(b) * * *

(3) * * *

(i) If you are a CORE 30 airport or other airport designated by the FAA, you must submit, by April 1, the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval.

* * * * *

§ 23.59 [Amended]

■ 21. Amend § 23.59 in paragraph (b) by removing "DBEs' " and adding "ACDBEs' " in its place.

§ 23.71 [Amended]

■ 22. Amend § 23.71 by removing the first sentence.

■ 23. Revise § 23.75 to read as follows:

§ 23.75 Can recipients enter into long-term, exclusive agreements with concessionaires?

(a) Except as provided in paragraph (b) of this section, you must not enter into long-term, exclusive agreements for concessions.

(1) For purposes of this section, a long-term agreement is one having a term of more than ten years, including any combination of base term and options or holdovers to extend the term of the agreement, if the effect is a term of more than ten years.

(2) For purposes of this section, an exclusive agreement is one having a type of business activity that is conducted solely by a single business entity on the entire airport, irrespective of ACDBE participation.

(b) You may enter into a long-term, exclusive concession agreement only under the following conditions:

(1) Special local circumstances exist that make it important to enter such agreement; and

(2) The responsible FAA regional office approves your plan for meeting the standards of paragraph (c) of this section.

(c) In order to obtain FAA approval of a long-term exclusive concession agreement, you must submit the following information to the FAA regional office, the items in paragraphs (c)(1) through (3) of this section must be submitted at least 60 days before the solicitation is released and items in paragraphs (c)(4) through (7) of this section must be submitted at least 45 days before contract award:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement.

(2) A copy of the solicitation.

(3) ACDBE contract goal analysis developed in accordance with this part.

(4) Documentation that ACDBE participants are certified in the appropriate NAICS code in order for the participation to count towards ACDBE goals.

(5) A general description of the type of business or businesses to be operated by the ACDBE, including location and concept of the ACDBE operation.

(6) Information on the investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and ACDBE, if applicable.

(7) Final long-term exclusive concession agreement, subleasing or other agreements.

(d) In order to obtain FAA approval of a long-term exclusive concession agreement that has been awarded through direct negotiations, you must submit the items in paragraphs (c)(1) and (3) through (7) of this section at least 45 days before contract award.

(e) In order to obtain FAA approval of an exclusive concession agreement that becomes long-term as a result of a holdover tenancy, you must submit to the responsible FAA regional office a holdover plan for FAA approval at least 60 days prior to the expiration of the current lease term. The holdover plan shall include the following information:

(1) A description of the special local circumstances that warrant the holdover.

(2) Anticipated date for renewal or re-bidding of the agreement.

(3) The method to be applied for renewal or re-bidding of the agreement.

(4) Submission of all items required under paragraphs (c)(3), (4), (6), and (7) of this section for the agreement in holdover status or an explanation as to why the item is not available or cannot be submitted.

§ 23.77 [Amended]

■ 24. Amend § 23.77 in paragraph (b) by removing the term "disadvantaged business enterprise" and adding in its place "Disadvantaged Business Enterprise".

■ 25. Revise § 23.79 to read as follows:

§ 23.79 Does this part permit recipients to use local geographic preferences?

No. As a recipient you must not use a local geographic preference. For purposes of this section, a local geographic preference is any requirement that gives a concessionaire located in one place (*e.g.*, your local area) an advantage over concessionaires from other places in obtaining business as, or with, a concession at your airport.

Appendix A to Part 23 [Removed]

■ 26. Remove appendix A to part 23.

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

■ 28. The authority citation for part 26 is revised to read as follows:

Authority: 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, *et seq.;* 49 U.S.C. 47113, 47123; Sec. 1101(b), Pub. L. 114–94, 129 Stat. 1312, 1324 (23 U.S.C. 101 note); Sec. 150, Pub. L. 115–254, 132 Stat. 3215 (23 U.S.C. 101 note); Pub. L. 117–58, 135 Stat. 429 (23 U.S.C. 101 note).

§ 26.1 [Amended]

■ 29. Amend § 26.1 in paragraph (f) by removing "federally-assisted" and add in its place "federally assisted".

■ 30. Revise § 26.3 to read as follows:

§ 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), Public Law 102–240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA–21), Public Law 105–178, 112 Stat. 107. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP–21), Pub. L. 112–141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114–94;, and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Public Law 102–240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA–21, Public Law 105–178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114–94; and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117–58), Public Law 117–58.

(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 Mariana 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.

■ 31. Amend § 26.5 by:

■ a. Revising the definitions of *Alaska Native* and *Department* or *DOT;*

■ b. Removing the definition *Disadvantaged business enterprise* or *DBE* and adding the definition *Disadvantaged Business Enterprise* or *DBE* in its place;

■ c. Adding the definitions for *FTA Tier I recipient* and *FTA Tier II recipient* in alphabetical order;

■ d. Removing the definition of *Home state;*

■ e. Removing the definition of *Indian tribe* and adding the definition of *Indian Tribe* or *Native American Tribe* in its place;

■ f. Adding the definitions for *Notice of decision* and *Notice of intent* in alphabetical order;

■ g. Removing the definition *Personal net worth* and adding the definition *Personal net worth* or *PNW* in its place;

■ h. Revising the definitions of *Primary industry classification, Principal place of business, Recipient,* and *Secretary;*

■ i. In the definition of *Socially and economically disadvantaged individual:*

■ i. In the introductory text, removing the phrase "as a members of groups" and adding in its place the phrase "as a member of a group";

■ ii. In paragraph (2)(iv), removing the locations "Republic of the Northern Marianas Islands" and "Kirbati" and adding in their place the locations "Republic of the Northern Mariana Islands" and "Kiribati", respectively;

■ iii. In paragraph (2)(v), removing the location "the Maldives Islands" and adding in its place the location "Maldives";

■ j. Removing the definition of *Transit vehicle manufacturer* and adding in its place the definition *Transit vehicle manufacturer (TVM);* and

■ k. Adding the definition of *Unsworn declaration* in alphabetical order.

The revisions and additions read as follows:

§ 26.5 Definitions

* * * * *

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 Metlakatla 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.

* * * * *

Department or *DOT* means the U.S. Department of Transportation, including the Office of the Secretary, the Departmental Office of Civil Rights, 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; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

* * * * *

FTA Tier I recipient means an FTA recipient to whom this part applies that will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds $670,000 in FTA funds in a Federal fiscal year.

FTA Tier II recipient means an FTA recipient to whom this part applies who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which does not exceed $670,000 in FTA funds in a Federal fiscal year.

* * * * *

Indian Tribe or *Native American Tribe* means any federally or State-recognized Tribe, band, nation, or other organized group of Indians (Native Americans), or an ANC.

* * * * *

Notice of intent or NOI means recipients letter informing a DBE of a suspension or proposed decertification.

Notice of decision or NOD means determination that denies a firm's application or decertifies a DBE.

* * * * *

Personal net worth or *PNW* means the net value of an individual's reportable assets and liabilities, per the calculation rules in § 26.68.

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 online on the U.S. Census Bureau website: *www.census.gov/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. The term does not include construction trailers or other temporary construction sites.

* * * * *

Recipient means 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 that has applied for such assistance.

Secretary means DOT's Secretary of Transportation or the Secretary's designee.

* * * * *

Transit vehicle manufacturer (TVM) means any manufacturer whose primary business purpose is to manufacture vehicles built for mass transportation. Such vehicles include, but are not limited to buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Businesses that perform retrofitting or post-production alterations to vehicles so that such vehicles may be used for public transportation purposes are also considered TVMs. Businesses that manufacture, mass-produce, or distribute vehicles primarily for personal use are not considered TVMs.

* * * * *

Unsworn declaration means an unsworn statement, dated and in writing, subscribed as true under penalty of perjury.

* * * * *

■ 32. Revise § 26.11 to read as follows:

§ 26.11 What records do recipients keep and report?

(a) You must submit a report on DBE participation to the concerned Operating Administration containing all the information described in the Uniform Report to this part. This report must be submitted at the intervals required by, and in the format acceptable to, the concerned Operating Administration.

(b) You must continue to provide data about your DBE program to the Department as directed by DOT Operating Administrations.

(c) You must obtain bidders list information as described in paragraph (c)(2) of this section and enter it into a system designated by the Department.

(1) The purpose of this bidders list information is to compile 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, and to provide the Department with data for evaluating the extent to which the objectives of § 26.1 are being achieved.

(2) You must obtain the following bidders list information about all DBE and non-DBEs who bid as prime contractors and subcontractors on each of your federally assisted contracts:

(i) Firm name;

(ii) Firm address including ZIP code;

(iii) Firm's status as a DBE or non-DBE;

(iv) Race and gender information for the firm's majority owner;

(v) NAICS code applicable to each scope of work the firm sought to perform in its bid;

(vi) Age of the firm; and

(vii) 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 $1 million; $1–3 million; $3–6 million; $6–10 million; etc.) rather than requesting an exact figure from the firm.

(3) You must collect the data from all bidders for your federally assisted contracts by requiring the information in paragraph (c)(2) of this section to be submitted with their bids or initial responses to negotiated procurements. You must enter this data in the Department's designated system no later than December 1 following the fiscal year in which the relevant contract was awarded. In the case of a "design-build" contracting situation where subcontracts will be solicited throughout the contract period as defined in a DBE Performance Plan pursuant to § 26.53(e), the data must be entered no later than December 1 following the fiscal year in which the design-build contractor awards the relevant subcontract(s).

(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 Declarations of Eligibility, change notices, and on-site visit reports. 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 Unified Certification Program (UCP) established pursuant to § 26.81 must report to DOT's Departmental Office of Civil Rights each year, the following information:

(1) The number and percentage of in-state and out-of-state DBE certifications by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);

(2) The number of DBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;

(3) The number of decertified firms:

(i) Total in-state and out-of-state firms decertified;

(ii) Names of in-state and out-of-state firms decertified because SEDO exceeded the personal net worth cap;

(iii) Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard.

(4) The number of in-state and out-of-state firms summarily suspended;

(5) The number of in-state and out-of-state applications received for an individualized determination of social and economic disadvantage status;

(6) The number of in-state and out-of-state firms certified whose owner(s) made an individualized showing of social and economic disadvantaged status.

■ 33. Revise the heading for subpart B to read as follows:

Subpart B—Administrative Requirements for DBE Programs for Federally Assisted Contracting

■ 34. Revise § 26.21 to read as follows:

§ 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 primary recipients receiving funds authorized by a statute to which this part applies;

(2) All FTA recipients receiving planning, capital and/or operating assistance must maintain a DBE program.

(i) FTA Tier I recipients must have a DBE program meeting all the requirements of this part.

(ii) Beginning 180 days after the publication of the final rule, FTA Tier II recipients must maintain a program locally meeting the following requirements of this part:

(A) Reporting and recordkeeping under § 26.11;

(B) Contract assurances under § 26.13;

(C) Policy statement under § 26.23;

(D) Fostering small business participation under § 26.39; and

(E) Transit vehicle procurements under § 26.49.

(3) FAA recipients receiving grants for airport planning or development that will award prime contracts the cumulative total value of which exceeds $250,000 in FAA funds in a Federal fiscal year.

(b)(1) You must submit a conforming DBE program to the concerned Operating Administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except goals that are reviewed by the relevant OA).

(2) You do not have to submit regular updates of your DBE program plan if you remain in compliance with this part. However, you must submit significant changes to the relevant OA 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 DBE program until all funds from DOT financial assistance have been expended.

■ 35. Amend § 26.29 by:

■ a. Revising paragraph (d);

■ b. Redesignating paragraph (e) as paragraph (g); and

■ c. Adding new paragraph (e) and paragraph (f).

The revision and additions read as follows:

§ 26.29 What prompt payment mechanisms must recipients have?

* * * * *

(d) Your DBE program must include the mechanisms you will use for proactive monitoring and oversight of a prime contractor's compliance with subcontractor prompt payment and return of retainage requirements in this part. Reliance on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is not a sufficient monitoring and oversight mechanism.

(e) Your DBE program must provide appropriate means to enforce the requirements of this section. These means must be described in your DBE program and should 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.

(f) Prompt payment and return of retainage requirements in this part also apply to lower-tier subcontractors.

* * * * *

■ 36. Revise § 26.31 to read as follows:

§ 26.31 What information must a UCP include in its DBE/ACDBE directory?

(a) In the directory required under § 26.81(g), you must list all firms eligible to participate as a DBE and/or ACDBE in your program. In the listing for each firm, you must include its business address, business phone number, firm website(s), and the types of work the firm has been certified to perform as a DBE and/or ACDBE.

(b) You must list each type of work a DBE and/or ACDBE is eligible to perform by using the most specific NAICS code available to describe each type of work the firm performs. Pursuant to § 26.81(n)(1) and (3), your directory must allow for NAICS codes to be supplemented with specific descriptions of the type(s) of work the firm performs.

(c) Your directory may include additional data fields of other items readily verifiable in State or locally maintained databases, such as State licenses held, Prequalifications, and Bonding capacity.

(d) Your directory must be an online system that permits the public to search and/or filter for DBEs by:

(1) Physical location;

(2) NAICS code(s);

(3) Work descriptions; and

(4) All optional information added pursuant to paragraph (c) of this section. The directory must include a prominently displayed disclaimer (*e.g.*, large type, bold font) that states the information within the directory is not a guarantee of the DBE's capacity and ability to perform work.

(e) You must make any changes to your current directory entries by November 5, 2024.

■ 37. Amend § 26.35 by revising paragraph (b)(2) introductory text to read as follows:

§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?

* * * * *

(b) * * *

(2) In the mentor-protégé relationship, you must:

* * * * *

■ 38. Revise § 26.37 to read as follows:

§ 26.37 What are a recipient's responsibilities for monitoring?

(a) A recipient must implement appropriate mechanisms to ensure compliance with the requirements in this part by all program participants (*e.g.*, applying legal and contract remedies available under Federal, State, and local law). The recipient must set forth these mechanisms in its DBE program.

(b) A recipient's DBE program must also include a monitoring and enforcement mechanism to ensure that work committed, or in the case of race-neutral participation, the work subcontracted, to all DBEs at contract award or subsequently is performed by the DBEs to which the work was committed or subcontracted to, and such work is counted according to the requirements of § 26.55. This mechanism must include a written verification that you have reviewed contracting records and monitored the work site to ensure the counting of each DBE's participation is consistent with its function on the contract. The monitoring to which this paragraph (b) refers may be conducted in conjunction with monitoring of contract performance for other purposes such as a commercially useful function review.

(c) You must effectively implement the following running tally mechanisms:

(1) With respect to achieving your overall goal, you must use a running tally that provides for a frequent comparison of cumulative DBE awards/commitments to DOT-assisted prime contract awards to determine whether your current implementation of contract goals is projected to be sufficient to meet your annual goal. This mechanism should inform your decisions to implement goals on contracts to be advertised according to your established contract goal-setting process.

(2) With respect to each DBE commitment, you must use a running tally that provides for a frequent comparison of payments made to each listed DBE relative to the progress of work, including payments for such work to the prime contractor to determine whether the contractor is on track with meeting its DBE commitment and whether any projected shortfall exists that requires the prime contractor's good faith efforts to address to meet the contract goal pursuant to § 26.53(g).

§ 26.39 [Amended]

■ 39. Amend § 26.39 in paragraph (b) introductory text by removing the phrase "by February 28, 2012".

■ 40. Amend § 26.45 by:

■ a. Revising paragraph (a);

■ b. Removing in paragraph (c)(1) "*www.census.gov/epcd/cbp/view/cbpview.html*" and adding in its place *https://www.census.gov/programs-surveys/cbp.html;*

■ c. Removing in paragraph (f)(1)(i) the words "Website" and adding in their place the word "website"; and

■ d. Removing in paragraph (f)(3) the text "incuding", "race-conscioous", and "26.51(c)" and adding in their places the text "including", "race-conscious", and "§ 26.51(c)", respectively.

The revision reads as follows:

§ 26.45 How do recipients set overall goals?

(a) *General rule.* (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 an FTA Tier II recipient or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) $670,000 or less in FTA or $250,000 or less in 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.

* * * * *

§ 26.47 [Amended]

■ 41. Amend § 26.47 in paragraph (c)(3)(i) by removing the words "Operational Evolution Partnership Plan" and adding in their place the term "CORE 30".

■ 42. Revise § 26.49 to read as follows:

§ 26.49 What are the requirements for transit vehicle manufactures (TVMs) and for awarding DOT-assisted contracts to TVMs?

(a) If you are an FTA recipient, you must require in your DBE program that each TVM, 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 TVMs listed on FTA's list of eligible TVMs, 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 that fails to follow the requirements of this section and this part will be deemed as non-compliant, which will result in removal from FTA's eligible TVMs list and ineligibility to bid.

(3) An 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) Within 30 days of becoming contractually required to procure a transit vehicle, an FTA recipient must report to FTA:

(i) The name of the TVM that was the successful bidder; and

(ii) The Federal share of the contractual commitment at that time.

(b) If you are a TVM, you must establish and submit to FTA an annual overall percentage goal for DBE participation.

(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 on which you will bid on during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by your own forces.

(i) You must consider and include in your base figure all domestic contracting opportunities made available to non-DBEs.

(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, you 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, except that TVMs set and submit their goals annually and not on a triennial basis.

(c) TVMs must comply with the reporting requirements of § 26.11, including the requirement to submit the Uniform Report of DBE Awards or Commitments and Payments, in order to remain eligible to bid on FTA assisted transit vehicle procurements.

(d) TVMs must implement all other 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 the equipment must meet the same requirements (including goal approval by FHWA or FAA) that TVMs must meet in FTA assisted procurements.

(f) Recipients may establish project-specific goals for DBE participation in the procurement of transit vehicles from specialized manufacturers when a TVM cannot be identified.

(1) Project-specific goals established pursuant to this section are subject to the same review and approval and must be established as prescribed in the project goal provisions of § 26.45.

(2) FTA must approve the decision to use a project goal before the recipient issues a public solicitation for the vehicles in question.

(3) To support the request to develop a project goal, recipients must demonstrate that no TVMs are available to manufacture the vehicle.

§ 26.51 [Amended]

■ 43. Amend § 26.51 in paragraph (f)(4) introductory text by removing the words "through the use of" and adding in their place the word "using".

■ 44. Amend § 26.53 by:

■ a. Revising paragraphs (b)(2)(v) and (b)(3)(ii);

■ b. Adding paragraph (c)(1) and a reserved paragraph (c)(2); and

■ c. Revising paragraphs (e), (f), and (g).

The revisions and addition read as follows:

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

* * * * *

(b) * * *

(2) * * *

(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. Each DBE listed to perform work as a regular dealer or distributor must confirm its participation according to the requirements of paragraph (c)(1) of this section.

(3) * * *

(ii) Provided that, in a negotiated procurement, such as a procurement for professional services, 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. This paragraph (b)(3)(ii) does not apply to a design-build procurement, which must follow the provisions in paragraph (e) of this section.

* * * * *

(c) * * *

(1) For each DBE listed as a regular dealer or distributor you must make a preliminary counting determination to assess its eligibility for 60 or 40 percent credit, respectively, of the cost of materials and supplies based on its demonstrated capacity and intent to perform as a regular dealer or distributor, as defined in § 26.55(e)(2)(iv)(A), (B), and (C) and (e)(3) under the contract at issue. Your preliminary determination shall be made based on the DBE's written responses to relevant questions and its affirmation that its subsequent performance of a commercially useful function will be consistent with the preliminary counting of such participation. Where the DBE supplier does not affirm that its participation will meet the specific requirements of either a regular dealer or distributor, you are required to make appropriate adjustments in counting such participation toward the bidder's good faith efforts to meet the contract goal. The bidder is responsible for verifying that the information provided by the DBE supplier is consistent with the counting of such participation toward the contract goal.

(2) [Reserved]

* * * * *

(e) In a design-build contracting situation, in which the recipient solicits proposals to design and build a project with minimal-project details at time of letting, the recipient may set a DBE goal that proposers must meet by submitting a DBE Open-Ended DBE Performance Plan (OEPP) with the proposal. The OEPP replaces the requirement to provide the information required in paragraph (b) of this section that applies to design-bid-build contracts. To be considered responsive, the OEPP must include a commitment to meet the goal and provide details of the types of subcontracting work or services (with projected dollar amount) that the proposer will solicit DBEs to perform. The OEPP must include an estimated time frame in which actual DBE subcontracts would be executed. Once the design-build contract is awarded, the recipient must provide ongoing monitoring and oversight to evaluate whether the design-builder is using good faith efforts to comply with the OEPP and schedule. The recipient and the design-builder may agree to make written revisions of the OEPP throughout the life of the project, *e.g.*, replacing the type of work items the design-builder will solicit DBEs to perform and/or adjusting the proposed schedule, as long as the design-builder continues to use good faith efforts to meet the goal.

(f)(1)(i) You must require that a prime contractor not terminate a DBE or any portion of its work listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm per paragraph (g) of this section) without your prior written consent, unless you cause the termination or reduction. A termination includes any reduction or underrun in work listed for a DBE not caused by a material change to the prime contract by the recipient. This requirement applies to instances that include, but are not limited to, when 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.

(ii) You must include in each prime contract a provision stating that:

(A) The contractor must 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) Unless your consent is provided under this paragraph (f), the prime contractor must not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

(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 listed DBE or any portion of its work.

(3) Good cause does not exist if the prime contractor seeks to terminate a DBE or any portion of its work that 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. For purposes of this paragraph (f)(3), 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 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 to 2 CFR parts 180, 215, and 1200 or applicable State law;

(vi) You have determined that the listed DBE subcontractor is not a responsible contractor;

(vii) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;

(viii) The listed DBE is ineligible to receive DBE credit for the type of work required;

(ix) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract; and

(x) Other documented good cause that you determine compels the termination of the DBE subcontractor.

(4) Before transmitting to you its request to terminate a DBE subcontractor or any portion of its work, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you sent concurrently, of its intent to request to terminate and the reason for the proposed request.

(5) The prime contractor's written notice must give the DBE 5 days to respond, advising you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract/or portion thereof and why you should not approve the prime contractor's request. If required in a particular case as a matter of public necessity (*e.g.*, safety), you may provide a response period shorter than 5 days.

(6) In addition to post-award terminations, the provisions of this section apply to pre-award deletions or changes to DBEs or their listed work put forward by offerors in negotiated procurements.

(g) When a DBE subcontractor or any portion of its work is terminated by the prime contractor as provided in paragraph (f) of this section, or if work committed to a DBE is reduced due to overestimations made prior to award, the prime contractor must use good faith efforts to include additional DBE participation to the extent needed to meet the contract goal. 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.

* * * * *

■ 45. Amend § 26.55 by:

■ a. Removing the word "actually" in paragraph (a) introductory text and twice in paragraph (c)(1);

■ b. In paragraph (c)(2), removing the words "in order";

■ c. In paragraph (c)(3), removing the words "on the basis of" and adding in their place the word "within";

■ d. Revising paragraph (e);

■ e. In paragraph (f), removing the cross-reference "§ 26.87(i)" and adding in its place the cross-reference "§ 26.87(j)"; and

■ f. Revising paragraph (h).

The revisions read as follows:

§ 26.55 How is DBE participation counted toward goals?

* * * * *

(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.

(ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that owns (or leases) and operates 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. Manufacturing includes blending or modifying raw materials or assembling components to create the product to meet contract specifications. When a DBE makes minor modifications to the materials, supplies, articles, or equipment, the DBE is not a manufacturer. Minor modifications are additional changes to a manufactured product that are small in scope and add minimal value to the final product.

(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 (including transportation costs).

(ii) For purposes of this section, a regular dealer is a firm that owns (or leases) and-operates, 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 sufficient quantities, and regularly sold or leased to the public in the usual course of business.

(iii) Items kept and regularly sold by the DBE are of the "general character" when they share the same material characteristics and application as the items specified by the contract.

(iv) You must establish a system to determine that a DBE regular dealer per paragraph (e)(2)(iv)(A) of this section, over a reasonable period of time, keeps sufficient quantities and regularly sells the items in question. This system must also ensure that a regular dealer of bulk items per (e)(2)(iv)(B) of this section owns/leases and operates distribution equipment for the products it sells. This requirement may be administered through questionnaires, inventory records reviews, or other methods to determine whether each DBE supplier has the demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer prior to its participation. The system you implement must be maintained and used to identify all DBE suppliers with capacity to be eligible for 60 percent credit, contingent upon the performance of a CUF. This requirement is a programmatic safeguard apart from that described in § 26.53(c)(1).

(A) To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A DBE supplier performs a CUF as a regular dealer and receives credit for 60 percent of the cost of materials or supplies (including transportation cost) when all, or at least 51 percent of, the items under a purchase order or subcontract are provided from the DBE's inventory, and when necessary, any minor quantities delivered from and by other sources are of the general character as those provided from the DBE's inventory.

(B) A DBE may be a regular dealer in such bulk items as petroleum products, steel, concrete or concrete products, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in paragraph (e)(2)(ii) of this section if the firm both owns and operates distribution equipment used to deliver the products. Any supplementing of regular dealers' own distribution equipment must be by a long-term operating lease and not on an ad hoc or contract-by-contract basis.

(C) A DBE supplier of items that are not typically stocked due to their unique characteristics (*e.g.*, limited shelf life or items ordered to specification) should be considered in the same manner as a regular dealer of bulk items per paragraph (e)(2)(iv)(B) of this section. If the DBE supplier of these items does not own or lease distribution equipment, as descried above, it is not a regular dealer.

(D) Packagers, brokers, manufacturers' representatives, or other persons who arrange, facilitate, or expedite transactions are not regular dealers within the meaning of paragraph (e)(2) of this section.

(3) If the materials or supplies are purchased from a DBE distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question, count 40 percent of the cost of materials or supplies (including transportation costs). A DBE distributor is an established business that engages in the regular sale or lease of the items specified by the contract. A DBE distributor assumes responsibility for the items it purchases once they leave the point of origin (*e.g.*, a manufacturer's facility), making it liable for any loss or damage not covered by the carrier's insurance. A DBE distributor performs a CUF when it demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the DBE distributor. If these conditions are met, DBE distributors may receive 40 percent for drop-shipped items. Terms that transfer liability to the distributor at the delivery destination (*e.g.*, FOB destination), or deliveries made or arranged by the manufacturer or another seller do not satisfy this requirement.

(4) With respect to materials or supplies purchased from a DBE that is neither a manufacturer, a regular dealer, nor a distributor, count the entire amount of fees or commissions charged that you deem to be reasonable, including transportation charges for the delivery of materials or supplies. Do not count any portion of the cost of the materials and supplies themselves.

(5) 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, distributor, or a transaction facilitator) on a contract-by-contract basis.

* * * * *

(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 contractor has paid the DBE the amount being counted.

■ 46. Revise § 26.61 to read as follows:

§ 26.61 Burden of proof

(a) In determining whether to certify a firm, the certifier must apply the standards of this subpart. Unless the context indicates otherwise, singular terms include their plural forms and vice versa.

(b) The firm has the burden of demonstrating, by a preponderance of the evidence, *i.e.*, more likely than not, that it satisfies all of the requirements in this subpart. In determining whether the firm has met its burden, the certifier must consider all the information in the record, viewed as a whole.

(1) *Exception 1.* In a decertification proceeding the certifier bears the burden of proving, by a preponderance of the evidence, that the firm is no longer eligible for certification under the rules of this part.

(2) *Exception 2.* If a certifier has a reasonable basis to believe that an individual who is a member of a group in § 26.67(a) of this section is not, in fact, socially and/or economically disadvantaged, the certifier bears the burden of proving, by a preponderance of the evidence, that the individual is not socially and/or economically disadvantaged.

■ 47. Revise § 26.63 to read as follows:

§ 26.63 General certification rules.

(a) *General rules.* Except as otherwise provided:

(1) The firm must be for-profit and engaged in business activities.

(2) In making eligibility determinations, a certifier may not consider whether a firm performs a commercially useful function (CUF), or the potential effect on goals or counting.

(3) A certifier cannot condition eligibility on State prequalification requirements for bidding on contracts.

(4) Certification is not a warranty of competence or suitability.

(5) A certifier determines eligibility based on the evidence it has at the time of its decision, not on the basis of historical or outdated information, giving full effect to the "curative measures" provisions of this part.

(6) Entering into a fraudulent transaction or presenting false information to obtain or maintain DBE certification is disqualifying.

(b) *Indirect ownership.* A subsidiary (*i.e.*, S) that SEDOs own and control indirectly is eligible, if it satisfies the other requirements of this part and only under the following circumstances.

(1) *Look-through.* SEDOs own at least 51 percent of S through their ownership of P (*i.e.*, the parent firm) as shown in the examples following.

(2) *Control.* SEDOs control P, and P controls S.

(3) *One tier of separation.* The SEDOs indirectly own S through P and no other intermediary. That is, no applicant or DBE may be more than one entity (P) removed from its individual SEDOs.

(4) *Examples.* The following examples assume that S and its SEDOs satisfy all other requirements in this part.

(i) *Example 1 to paragraph (b)(4).* SEDOs own 100 percent of P, and P owns 100 percent of S. S is eligible for certification.

(ii) *Example 2 to paragraph (b)(4).* Same facts as Example 1, except P owns 51 percent of S. S is eligible.

(iii) *Example 3 to paragraph (b)(4).* SEDOs own 80 percent of P, and P owns 70 percent of S. S is eligible because SEDOs indirectly own 56 percent of S. The calculation is 80 percent of 70 percent or $.8 \times .7 = .56$.

(iv) *Example 4 to paragraph (b)(4).* SEDOs own and control P, and they own 52 percent of S by operation of this paragraph (b). However, a non-SEDO controls S. S is ineligible.

(v) *Example 5 to paragraph (b)(4).* SEDOs own 60 percent of P, and P owns 51 percent of S. S is ineligible because SEDOs own just 31 percent of S.

(vi) *Example 6 to paragraph (b)(4).* P indirectly owns and controls S and has other affiliates. S is eligible only if its gross receipts, plus those of all of its affiliates, do not exceed the applicable small business size cap of § 26.65. Note that all of P's affiliates are affiliates of S by virtue of P's ownership and/or control of S.

(c) *Indian Tribes, NHOs, and ANCs—*(1) *Indian Tribes and NHOs.* A firm that is owned by an Indian Tribe or Native Hawaiian organization (NHO), rather than by Indians or Native Hawaiians as individuals, is eligible if it meets all other certification requirements in this part.

(2) *Alaska Native Corporations (ANCs).* (i) Notwithstanding any other provisions of this subpart, a subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification if it meets all the following requirements:

(A) 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;

(B) 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

(C) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.

(ii) As a certifier to whom an ANC-related entity applies for certification, a certifier must not use the Uniform Certified Application. The certifier must obtain from the firm documentation sufficient to demonstrate that the entity meets the requirements of paragraph (c)(2)(i) of this section. The certifier must also obtain sufficient information about the firm to allow the certifier to administer its program (*e.g.*, information that would appear in a UCP directory).

(iii) If an ANC-related firm does not meet all the conditions of paragraph (c)(2)(i) of this section, then it must meet the requirements of paragraph (c)(1) of this section in order to be certified.

■ 48. Revise § 26.65 to read as follows:

§ 26.65 Business Size Determinations.

(a) *By NAICS Code.* A firm (including its affiliates) must be a small business, as defined by the Small Business Administration (SBA). The certifier must apply the SBA business size limit in 13 CFR part 121 which corresponds to the applicable primary industry classifications (NAICS codes). The firm is ineligible when its affiliated "receipts" (computed on a cash basis), as defined in 13 CFR 121.104(a) and averaged over the firm's preceding five fiscal years, exceed the applicable SBA size cap(s).

(b) *Statutory Cap.* Even if a firm is a small business under paragraph (a) of this section, it is ineligible to perform DBE work on FHWA or FTA assisted contracts if its affiliated annual gross receipts, as defined in 13 CFR 121.104, over the firm's previous three fiscal years exceed $30.40 million (as of March 1, 2023). The Department will adjust this amount annually and post the adjusted amount on its website available at *https://www.transportation.gov/DBEsizestandards.* 50.

■ 49. Revise § 26.67 to read as follows:

§ 26.67 Social and economic disadvantage.

(a) *Group membership*—(1) *General rule.* Citizens of the United States (or lawfully admitted permanent residents) who are women, Black American, Hispanic American, Native American, Asian Pacific American, Subcontinent Asian American, or other minorities found to be disadvantaged by the Small Business Administration (SBA), are rebuttably presumed to be socially and economically disadvantaged. A firm owner claiming the presumption must specify of which groups in this paragraph (a)(1) she or he is a member on the Declaration of Eligibility (DOE).

(2) *Native American group membership.* An owner claiming Native American group membership must submit a signed DOE as well as proof of enrollment in a federally or State-recognized Indian Tribe. An owner claiming Native Hawaiian or Alaska Native group membership must submit documentation legally recognized under State or Federal law attesting to the individual's status as a member of that group.

(3) *Questioning group membership.* (i) Certifiers may not question claims of group membership as a matter of course. Certifiers must not impose a disproportionate burden on members of any particular group. Imposing a disproportionate burden on members of a particular group could violate Title VI of the Civil Rights Act of 1964, paragraph (b) of this section, and/or 49 CFR part 21.

(i) If a certifier has a well-founded reason(s) to question an owner's claim of membership in a group in paragraph (a)(1) of this section, it must provide the individual a written explanation of its reason(s), using the most recent email address provided. The firm bears the burden of proving, by a preponderance of the evidence, that the owner is a member of the group in question.

(ii) A certifier's written explanation must instruct the individual to submit evidence demonstrating that the individual has held herself/himself/themself out publicly as a member of the group for a long period of time prior to applying for DBE certification, and that the relevant community considers the individual a member. The certifier may not require the individual to provide evidence beyond that related to group membership.

(iii) The owner must email the certifier evidence described in paragraph (a)(3)(ii) of this section no later than 20 days after the written explanation. The certifier must email the owner a decision no later than 30 days after receiving timely submitted evidence.

(iv) If a certifier determines that an individual has not demonstrated group membership, the certifier's decision must specifically reference the evidence in the record that formed the basis for the conclusion and give a detailed explanation of why the evidence submitted was insufficient. It must also inform the individual of the right to appeal, as provided in § 26.89(a), and of the right to reapply at any time under paragraph (e) of this section.

(b) *Rebuttal of social disadvantage.* (1) If a certifier has a reasonable basis to believe that an individual who is a member of a group in paragraph (a)(1) of this section is not, in fact, socially disadvantaged, the certifier must initiate a § 26.87 proceeding, regardless of the firm's DBE status. As is the case in all section § 26.87 proceedings, the certifier must prove ineligibility.

(2) If the certifier finds that the owner is not socially disadvantaged, its decision letter must inform the firm of its appeal rights.

(c) *Rebuttal of economic disadvantage*—(1) *Personal net worth.* If a certifier has a reasonable basis to believe that an individual who submits a PNW Statement that is below the currently applicable PNW cap is not economically disadvantaged, the certifier may rebut the individual's presumption of economic disadvantage.

(i) The certifier must not attempt to rebut presumed economic disadvantage as a matter of course and it must avoid imposing unnecessary burdens on individual owners or disproportionately impose them on members of a particular group.

(ii) The certifier must proceed as provided in § 26.87.

(2) *Economic disadvantage in fact.* (i) To rebut the presumption, the certifier must prove that a reasonable person would not consider the individual economically disadvantaged. The certifier may consider assets and income, free use of them or ready access to their benefits, and any other trappings of wealth that the certifier considers relevant. There are no assets (including retirement assets), income, equity, or other exclusions and no limitations on inclusions. A broad and general analysis suffices in most cases: the owner has, or enjoys the benefits of, income of X; two homes worth approximately Y; substantial interests in outside businesses Q, R, and S; four rental properties of aggregate value Z; etc. The certifier need only demonstrate "ballpark" values based on available evidence. The reasonable person is not

party to detailed financial information. S/he considers the owner's overall circumstances and lifestyle.

(ii) The certifier must proceed as provided in § 26.87.

(d) *Non-presumptive disadvantage.* An owner who is not presumed to be SED under paragraph (a) of this section may demonstrate that he is SED based on his own experiences and circumstances that occurred within American society.

(1) To attempt to prove individual SED, the owner provides the certifier a Personal Narrative (PN) that describes in detail specific acts or omissions by others, which impeded his progress or success in education, employment, and/or business, including obtaining financing on terms available to similarly situated, non-disadvantaged persons.

(2) The PN must identify at least one objective basis for the detrimental discrimination. The basis may be any identifiable status or condition. The PN must describe this objective distinguishing feature(s) (ODF) in sufficient detail to justify the owner's conclusion that it prompted the prejudicial acts or omissions.

(3) The PN must state how and to what extent the discrimination caused the owner harm, including a full description of type and magnitude.

(4) The owner must establish that he is economically disadvantaged in fact and that he is economically disadvantaged relative to similarly situated non-disadvantaged individuals.

(5) The owner must attach to the PN a current PNW statement and any other financial information he considers relevant.

(6) This rule does not prescribe how the owner must satisfy his burden of proving disadvantage. He need not, for example, have filed any formal complaint, or prove discrimination under a particular statute.

Example 1 to paragraph (d). A White male claiming to have experienced employment discrimination must provide evidence that his employment status and/or limited opportunities to earn income result from specific prejudicial acts directed at him personally because of an ODF, and not, *e.g.*, an economic recession that caused widespread unemployment.

■ 50. Add § 26.68 to read as follows:

§ 26.68 Personal net worth.

(a) *General.* An owner whose PNW exceeds the regulation's currently applicable PNW limit is not presumed economically disadvantaged.

(b) *Required documents.* Each owner on whom the firm relies for certification must submit a DOE and a corroborating personal net worth (PNW) statement, including required attachments. The owner must report PNW on the form, available at *https://www.Transportation.gov/DBEFORMS.* A certifier may require an owner to provide additional information on a case-by-case basis to verify the accuracy and completeness of the PNW statement. The certifier must have a legitimate and demonstrable need for the additional information.

(c) *Reporting.* The following rules apply without regard to State community property, equitable distribution, or similar rules. The owner reports assets and liabilities that she owns or is deemed to own. Ownership tracks title to the asset or obligor status on the liability except where otherwise provided or when the transaction results in evasion or abuse.

(1) The owner excludes her ownership interest in the applicant or DBE.

(2) The owner excludes her share of the equity in her primary residence. There is no exclusion when the SEDO does not own the home.

Example 1 to paragraph (c)(2). The owner and her spouse hold joint title to their primary residence, for which they paid $300,000 and are coequal debtors on a bank mortgage and a home equity line of credit with current combined balances of $150,000. The owner may exclude her $75,000 share of the $150,000 of total equity.

(3) The owner includes the full value of the contents of her primary residence unless she cohabits with a spouse or domestic partner, in which case she excludes only 50 percent of those assets.

(4) The owner includes the value of all motor vehicles, including watercraft and ATVs, titled in her name or of which she is the principal operator.

(5) The owner excludes the liabilities of any other party and those contingent on a future event or of undetermined value as of the date of the PNW Statement.

(6) The owner includes her proportional share of the balance of a debt on which she shares joint and severable liability with other primary debtors.

Example 2 to paragraph (c)(6). When the owner co-signs a debt instrument with two other individuals, the rule considers her liable for one-third of the current loan balance.

(7) The owner includes assets transferred to relatives or related entities within the two years preceding any UCA or DOE, when the assets so transferred during the period have an aggregate value of more than $20,000. Relatives include the owner's spouse or domestic partner, children (whether biological, adopted or stepchildren), siblings (including stepsiblings and those of the spouse or domestic partner), and parents (including stepparents and those of the spouse or domestic partner). Related entities include for-profit privately held companies of which any relative is an owner, officer, director, or equivalent; and family or other trusts of which the owner or any relative is grantor, trustee, or beneficiary, except when the transfer is irrevocable.

(8) The owner excludes direct payments, on behalf of immediate family members or their children, to unrelated providers of healthcare, education, or legal services.

(9) The owner excludes direct payments to providers of goods and services directly related to a celebration of an immediate family member's or that family member's child's significant, normally non-recurring life event.

(10) The owner excludes from net worth all assets in qualified retirement accounts but must report those accounts, the value of assets in them, and any significant terms and restrictions concerning the assets' use, to the certifier.

(d) *Regulatory adjustments.* (1) The Department will adjust the PNW cap by May 9, 2024 by multiplying $1,600,000 by the growth in total household net worth since 2019 as described by "Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h)" produced by the Board of Governors of the Federal Reserve (*https://www.federalreserve.gov/releases/z1/*), and normalized by the total number of households as collected by the Census in "Families and Living Arrangements" (*https://www.census.gov/topics/families/families-and-households.html*) to account for population growth. The Department will adjust the PNW cap every 3 years on the anniversary of the initial adjustment date described in this section. The Department will post the adjustments on the Departmental Office of Civil Rights' web page, available at *https://www.Transportation.gov/DBEPNW.* Each such adjustment will become the currently applicable PNW limit for purposes of this regulation.

(2) The Department will use the following formula to adjust the PNW limit:

$$\text{Future Year PNW Cap} = [\$1{,}600{,}000] * \frac{\text{Q1-Q4 Average Household Net Worth of Future Year / Total Households of Future Year}}{\text{Q1-Q4 Average Household Net worth of 2019 (\$106,722,704 million / Total Households of 2019 (128,579)}}$$

(e) *Confidentiality.* Notwithstanding any provision of Federal or State law, a certifier must not release an individual's PNW 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 or to any other State to which the individual's firm has applied for certification under § 26.85.

■ 51. Revise § 26.69 to read as follows:

§ 26.69 Ownership.

(a) *General rule.* A SEDO must own at least 51 percent of each class of ownership of the firm. Each SEDO whose ownership is necessary to the firm's eligibility must demonstrate that her ownership satisfies the requirements of this section. If not, the firm is ineligible.

(b) *Overall Requirements.* A SEDO's acquisition and maintenance of an ownership interest meets the requirements of this section only if the SEDO demonstrates the following:

(1) *Acquisition.* The SEDO acquires ownership at fair value and by one or more "investments," as defined in paragraph (c) of this section.

(2) *Proportion.* No owner derives benefits or bears burdens that are clearly disproportionate to their ownership shares.

(3) *Maintenance.* This section's requirements continue to apply after the SEDO's acquisition and the firm's certification. That is, the SEDO must maintain her investment and its proportion relative to those of other owners.

(i) The SEDO may not withdraw or revoke her investment.

(ii) When an existing co-owner contributes significant, additional, post-acquisition cash or property to the firm, the SEDO must increase her own investment to a level not clearly disproportionate to the non-SEDO's investment.

(A) *Example 1 to paragraph (b)(3)(ii).* SEDO and non-SEDO own DBE 60/40. Their respective investments are approximately $600,000 and $400,000. The DBE has operated its business under this ownership and with this capitalization for 2 years. In Year 3, the non-SEDO contributes a $2 million asset to the business. The SEDO, as a result, owns 60 percent of a $2 million asset without any additional outlay. Her ownership interest, assuming no other pertinent facts, is worth $1.2 million more than it was before. Unless the SEDO increases her investment significantly, it is clearly disproportionate to the non-SEDO's investment and to her nominal 60 percent ownership. She has not maintained her investment.

(B) *Example 2 to paragraph (b)(3)(ii).* Same facts except that the DBE purchases the asset with a combination of 30 percent operating income and 70 percent proceeds of a bank loan. The SEDO maintains her investment because it remains in proportion to the non-SEDO's investment and to the value of her 60 percent ownership interest.

(C) *Example 3 to paragraph (b)(3)(ii).* Same facts except that the non-SEDO, not a bank, is the DBE's creditor. The SEDO has not maintained her investment because the benefits and burdens of her ownership are clearly disproportionate to those of the non-SEDO. The transaction may also raise § 26.71 concerns.

(iii) An organic increase in the value of the business does not affect maintenance because the value of the owners' investments remains proportional. In Example 2 above, the SEDO and the non-SEDO own the new asset at 60 percent and 40 percent of its net value of $60,000.

(c) *Investments.* A SEDO may acquire ownership by purchase, capital contribution, or gift. Subject to the other requirements of this section, each is considered an "investment" in the firm, as are additional purchases, contributions, and qualifying gifts.

(1) Investments are unconditional and at full risk of loss.

(2) Investments include a significant outlay of the SEDO's own money.

(3) For purposes of this part, title determines ownership of assets used for investments and of ownership interests themselves. This rule applies regardless of contrary community property, equitable distribution, banking, contract, or similar laws, rules, or principles.

(i) The person who has title to the asset owns it in proportion to her share of title.

(ii) However, the title rule is deemed not to apply when it produces a certification result that is manifestly unjust.

(4) If the SEDO jointly (50/50) owns an investment of cash or property, the SEDO may claim at least a 51 percent ownership interest only if the other joint owner formally transfers to the SEDO enough of his ownership in the invested asset(s) to bring the SEDO's investment to at least 51 percent of all investments in the firm. Such transfers may be gifts described in paragraph (e) of this section.

(d) *Purchases and capital contributions.* (1) A purchase of an ownership interest is an investment when the consideration is entirely monetary and not a trade of property or services.

(2) Capital that the SEDO contributes directly to the company is an investment when the contribution is all cash or a combination of cash and tangible property and/or realty.

(3) Contributions of time, labor, services, and the like are not investments or components of investments.

(4) Loans are not investments. The proceeds of loans may be investments to the extent that they finance the SEDO's qualifying purchase or capital contribution.

(5) Debt-financed purchases or capital contributions are investments when they comply with the rules in this section and in § 26.70.

(6) Guarantees are not investments.

(7) The firm's purchases or sales of proporty, including ownership in itself or other companies, are not the SEDO's investments.

(8) Other persons' or entities' purchases or capital contributions are not the SEDO's investments.

(e) *Gifts.* A gift to the SEDO is an investment when it meets the requirements of this section. The gift rules apply to partial gifts, bequests, inheritances, trust distributions, and transfers for inadequate consideration. They apply to gifts of ownership interests and to gifts of cash or property that the SEDO invests. The following requirements apply to gifts on which the SEDO relies for her investment.

(1) The transferor/donor is or immediately becomes uninvolved with the firm in any capacity and in any other business that contracts with the

firm other than as a lessor or provider of standard support services;

(2) The transferor does not derive undue benefit; and

(3) A writing documents the gift. When the SEDO cannot reasonably produce better evidence, a receipt, cancelled check, or transfer confirmation suffices, if the writing identifies transferor, transferee, amount or value, and date.

(f) *Curative measures.* The rules of this section do not prohibit transactions that further the objectives of, and compliance with, the provisions of this part. A SEDO or firm may enter into legitimate transactions, alter the terms of ownership, make additional investments, or bolster underlying documentation in a good faith effort to remove, surmount, or correct defects in eligibility, as long as the actions are consistent with this part.

(1) The certifier may notify the firm of eligibility concerns and give the firm time, if the firm wishes, to attempt to remedy impediments to certification.

(2) The firm may, of its own volition, take curative action up to the time of the certifier's decision. However, it must present evidence of curation before the certifier's decision.

(3) The certifier may provide general assistance and guidance but not professional (legal, accounting, valuation, etc.) advice or opinions.

(4) While the certifier may not affirmatively impede attempts to cure, it may maintain its decision timeline and make its decision based on available evidence.

(5) The certifier must deny or remove certification when the firm's efforts or submissions violate the rules in paragraph (g) of this section.

(g) *Anti-abuse rules.* (1) The substance and not the form of transactions drives the eligibility determination.

(2) The certifier must deny applications based on sham transactions or false representations, and it must decertify DBEs that engage in or make them. Transactions or representations designed to evade or materially mislead subject the firm to the same consequences.

(3) Fraud renders the firm ineligible and subjects it to sanctions, suspension, debarment, criminal prosecution, civil litigation, and any other consequence or recourse not proscribed in this part.

Example 1 to paragraph (g)(3). SEDO claims an investment consisting of a contribution of equipment and a significant amount of her own cash. She shows that she transferred title to the equipment and wrote a check from an account she alone owns. She does not disclose that her brother-in-law lent her the money and she must repay him. The firm is ineligible under paragraphs (g)(1) and (2) of this section.

■ 52. Add § 26.70 to read as follows:

§ 26.70 Debt-financed investments.

(a) Subject to the other provisions of this subpart, a SEDO may borrow money to *finance* a § 26.69(c) investment entirely or partially if the SEDO has paid, on a net basis, at least 15 percent of the total value of the investment by the time the firm applies for certification.

Example 1 to paragraph (a) introductory text. A SEDO who borrows $9,000 of her $10,000 cash investment in Applicant, Inc., must have repaid, from her own funds, at least $500 of the loan's principal by the time Applicant, Inc. applies for certification.

Example 2 to paragraph (a) introductory text. A SEDO who finances $8,000 of a $10,000 investment in Applicant may apply for Applicant's certification at any time.

Example 3 to paragraph (a) introductory text. A SEDO who contributes to the Applicant equipment worth $40,000, which she purchased with $10,000 of her own money and $30,000 of seller financing may apply for Applicant's certification at any time.

(1) The SEDO pays the net 15 percent portion of the investment to Seller or Applicant (as the case may be) from her own, not borrowed, money.

(2) Money that the SEDO receives as a § 26.69(e) gift is her own money.

(3) The firm, whether Applicant or DBE, does not finance any part of the investment, directly or indirectly.

(b) The loan is real, enforceable, not in default, not offset by another agreement, and on standard commercial, arm's length terms. The following conditions also apply.

(1) The SEDO is the sole debtor.

(2) The firm is not party to the loan in any capacity, including as a guarantor.

(3) The SEDO does not rely on the company's credit or other resources to repay any part of the debt or otherwise to finance any part of her investment.

(4) The loan agreement requires level, regularly recurring payments of principal and interest, according to a standard amortization schedule, at least until the SEDO satisfies requirements in paragraph (a) of this section.

(5) The loan agreement permits prepayments, including by refinancing.

(c) If the creditor forgives or cancels all or part of the debt, or the SEDO defaults, the entire debt-financed portion of the SEDO's purchase or capital contribution is no longer an investment.

Example 4 to paragraph (c). SEDO finances $40,000 of a $50,000 investment, and the firm becomes certified. When the SEDO has repaid half of the loan's principal and associated interest, the creditor forgives the remaining $20,000 debt. The SEDO's investment is now $10,000.

(d) Paragraph (c) of the section does not prohibit refinancing with debt that meets the requirements of this section or preclude prompt curation under § 26.69(f).

■ 53. Revise § 26.71 to read as follows:

§ 26.71 Control.

(a) *General rules.* (1) One or more SEDOs of the firm must control it.

(2) Control determinations must consider all pertinent facts, viewed together and in context.

(3) A firm must have operations in the business for which it seeks certification at the time it applies. Certifiers do not certify plans or intentions, or issue contingent or conditional certifications.

(b) *SEDO as final decision maker.* A SEDO must be the ultimate decision maker in fact, regardless of operational, policy, or delegation arrangements.

(c) *Governance.* Governance provisions may not require that any SEDO obtain concurrence or consent from a non-SEDO to transact business on behalf of the firm.

(1) *Highest officer position.* A SEDO must hold the highest officer position in the company (*e.g.*, chief executive officer or president).

(2) *Board of directors.* Except as detailed in paragraph (c)(4) of this section, a SEDO must have present control of the firm's board of directors, or other governing body, through the number of eligible votes.

(i) *Quorum requirements.* Provisions for the establishment of a quorum must not block the SEDO from calling a meeting to vote and transact business on behalf of the firm.

(ii) *Shareholder actions.* A SEDO's authority to change the firm's composition via shareholder action does not prove control within the meaning of paragraph (c) of this section.

(3) *Partnerships.* In a partnership, at least one SEDO must serve as a general partner, with control over all partnership decisions.

(4) *Exception.* Bylaws or other governing provisions that require non-SEDO consent for extraordinary actions generally do not contravene the rules in paragraph (c) of this section. Non-exclusive examples are a sale of the company or substantially all of its assets, mergers, and a sudden, wholesale change of type of business.

(d) *Expertise.* At least one SEDO must have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature. The requirements of this paragraph (d) vary with type of business, degree of technological complexity, and scale.

(e) *SEDO decisions.* The firm must show that the SEDO critically analyzes information provided by non-SEDOs and uses that analysis to make independent decisions.

(f) *Delegation.* A SEDO may delegate administrative activities or operational oversight to a non-SED individual as long as at least one SEDO retains unilateral power to fire the delegate(s), and the chain of command is evident to all participants in the company and to all persons and entities with whom the firm conducts business.

(1) No non-SED participant may have power equal to or greater than that of a SEDO, considering all the circumstances. Aggregate magnitude and significance govern; a numerical tally does not.

(2) Non-SED participants may not make non-routine purchases or disbursements, enter into substantial contracts, or make decisions that affect company viability without the SEDO's consent.

(3) Written provisions or policies that specify the terms under which non-SED participants may sign or act on the SEDO's behalf with respect to recurring matters generally do not violate this paragraph (f), as long as they are consistent with the SEDO having ultimate responsibility for the action.

(g) *Independent business.* (1) If the firm receives from or shares personnel, facilities, equipment, financial support, or other essential resources, with another business (whether a DBE or non-DBE firm) or individual on other than commercially reasonable terms, the firm must prove that it would be viable as a going concern without the arrangement.

(2) The firm must not regularly use another firm's business-critical vehicles, equipment, machinery, or facilities to provide a product or service under contract to the same firm or one in a substantially similar business.

(i) *Exception 1.* Paragraphs (g)(1) and (2) of this section do not preclude the firm from providing services to a single customer or to a small number of them, provided that the firm is not merely a conduit, captive, or unnecessary third party acting on behalf of another firm or individual. Similarly, providing a volume discount to such a customer does not impair viability unless the firm repeatedly provides the service at a significant and unsustainable loss.

(ii) *Exception 2.* A firm may share essential resources and deal exclusively with another firm that a SEDO controls and of which the SEDO owns at least 51 percent ownership.

(h) *Franchise and license agreements.* A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licenser is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the certifier 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, if 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.

■ 54. Revise § 26.73 to read as follows:

§ 26.73 NAICS Codes.

(a) A certifier must grant certification to a firm only for specific types of work that the SEDO controls. To become certified in an additional type of work, the firm must demonstrate to the certifier only that its SEDO controls the firm with respect to that type of work. The certifier must not require that the firm be recertified or submit a new application for certification but must verify the SEDO's control of the firm in the additional type of work.

(1) A correct NAICS code is the 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.

(2) If there is not a NAICS code that fully, clearly, or sufficiently narrowly describes the type(s) of work for which the firm seeks certification, the certifier must supplement or limit the assigned NAICS code(s) with a clear, specific, and concise narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is insufficient.

(3) Firms and certifiers 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.

(4) A certifier may change a certification classification or description if there is a factual basis in the record, in which case it must notify the firm 30 days before making the change. Certifiers may not apply such changes retroactively.

(5) In addition to applying the appropriate NAICS code, the certifier may apply a descriptor from a classification scheme of equivalent detail and specificity. Such a descriptor (*e.g.*, a "work code") does not supersede or limit the types of work for which a DBE is eligible under an appropriate NAICS code.

(b) [Reserved]

■ 55. Amend § 26.81 by:
■ a. Revising paragraph (a)(1);
■ b. Removing paragraph (a)(5);
■ b. In paragraph (e), removing the word "the" from the first sentence; and
■ c. Revising paragraph (g).

The revisions read as follows:

§ 26.81 Unified Certification Programs.

(a) * * *

(1) All recipients in the same jurisdiction (normally a State) must sign an agreement establishing a UCP and submit the agreement to the Secretary for approval.

* * * * *

(g) Each UCP must maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other States certified under the provisions of this part), the information required by § 26.31. The UCP must make the directory available to the public electronically, on the internet. The UCP must update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

* * * * *

■ 56. Amend § 26.83 by revising the section heading and paragraphs (c)(1)(i), (c)(3), (h), (i)(3), (j), (k), (l), and (m) and adding paragraph (n) to read as follows:

§ 26.83 What procedures do certifiers follow in making certification decisions?

* * * * *

(c)(1) * * *

(i) A certifier must visit the firm's principal place of business, virtually or in person, and interview the SEDO,

officers, and key personnel. The certifier must review those persons' résumés and/or work histories. The certifier must maintain a complete audio recording of the interview. The certifier must also visit one or more active job sites (if there is one). These activities comprise the "on-site review" (OSR), a written report of which the certifier must keep in its files.

* * * * *

(3) The certifier must ensure that the SEDO signs the Declaration of Eligibility (DOE) at the end of the Uniform Certification Application (UCA), subscribed to as true under penalty of perjury that all information provided is current, accurate, and complete.

* * * * *

(h)(1) Once a certifier has certified a firm, the firm remains certified unless and/or until the certifier removes certification, in whole or in part (*i.e.*, NAICS code removal), through the procedures of § 26.87.

(2) The certifier may not require a DBE to reapply for certification, renew its certification, undergo a recertification, or impose any functionally equivalent requirement. The certifier may, however, conduct a certification review at any reasonable time and/or at regular intervals of at least two years. The certification review may, at the certifier's discretion, include a new OSR. The certifier may also make an unannounced visit to the DBE's offices and/or job site. The certifier may also rely on another certifier's report of its OSR of the DBE.

(i) * * *

(3) The DBE must notify the certifier of a material change in its circumstances that affects its continued eligibility within 30 days of its occurrence, explain the change fully, and include a duly executed DOE with the notice. The DBE's non-compliance is a § 26.109(c) failure to cooperate.

(j) A DBE must provide its certifier(s), every year on the anniversary of its original certification, a new DOE along with the specified documentation in § 26.65(a), including gross receipts for its most recently completed fiscal year, calculated on a cash basis regardless of the DBE's overall accounting method. The sufficiency of documentation (and its probative value) may vary by business type, size, history, resources, and overall circumstances. However, the following documents may generally be considered "safe harbors," provided that they include all reportable receipts, properly calculated, for the full reporting period: audited financial statements, a CPA's signed attestation of correctness and completeness, or all income-related portions of one or more (when there are affiliates) signed Federal income tax returns as filed. Non-compliance, whether full or partial, is a § 26.109(c) failure to cooperate.

(k) The certifier must advise each applicant within 30 days of filing whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

(l) The certifier must render a final eligibility decision within 90 days of receiving all information required from the applicant under this part. The certifier may extend this time period once, for no more than an additional 30 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. On a case-by-case basis, the concerned OA may give the certifier one deadline extension if it approves a written request explaining why the certifier needs more time. The certifier's failure to issue a compliant decision by the applicable deadline is a constructive denial of the application, appealable to DOT under § 26.89. In this case, the certifier may be subject to enforcement actions described in §§ 26.103 and 26.105.

(2) The certifier must make an entry in DOCR's Online Portal within 5 days of a denial. The certifier must enter the name of the firm, names(s) of the firm's owner(s), date of decision, and the reason(s) for its decision.

(m)(1) A certifier may notify the applicant about ineligibility concerns and allow the firm to rectify deficiencies within the period in paragraph (l) of this section.

(2) If a firm takes curative measures before the certifier renders a decision, the certifier must consider any evidence it submits of having taken such measures. The certifier must not automatically construe curative measures as successful or abusive.

(i) *Example 1 to paragraph (m)(2).* The firm may obtain proof of an investment, transaction, or other fact on which its eligibility depends.

(ii) *Example 2 to paragraph (m)(2).* An owner or related party may create a legally enforceable document of irrevocable transfer to the SEDO.

(iii) *Example 3 to paragraph (m)(2).* The firm may amend an operating agreement, bylaw provision, or other governance document, provided that the amendment accurately reflects the parties' relationships, powers, responsibilities, and other pertinent circumstances.

(n) Except as otherwise provided in this paragraph (n), if an applicant for DBE certification withdraws its application before the certifier issues a decision, the applicant can resubmit the application at any time. However, the certifier 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. The certifier may apply the § 26.86(c) waiting period to a firm that has established a pattern of withdrawing applications before its decision.

■ 57. Revise § 26.85 to read as follows:

§ 26.85 Interstate certification.

(a) *Applicability.* This section applies to a DBE certified in any UCP.

(b) *General rule.* When a DBE applies to another UCP for certification, the new UCP must accept the DBE's certification from its jurisdiction of original certification (JOC). The JOC is the State in which the firm maintains its principal place of business at the time of application unless and until the firm loses certification in that jurisdiction.

(c) *Application procedure.* To obtain certification by an additional UCP, the DBE must provide:

(1) A cover letter with its application that specifies that the DBE is applying for interstate certification, identifies all UCPs in which the DBE is certified (including the UCP that originally certified it)

(2) An electronic image of the UCP directory of the original UCP that shows the DBE certification; and

(3) A new DOE.

(d) *Confirmation of eligibility.* Within 10 business days of receiving the documents required under paragraph (c) of this section, the additional UCP must confirm the certification of the DBE preferably by reference to the UCP directory of the JOC.

(e) *Certification.* If the DBE fulfills the requirements of paragraph (c) of this section and the UCP confirms the DBE's certification per paragraph (d) of this section, the UCP must certify the DBE immediately without undergoing further procedures and provide the DBE with a letter documenting its certification.

(f) *Noncompliance.* Failure of the additional UCP to comply with paragraphs (d) and (e) of this section is considered non-compliance with this part.

(g) *Post-interstate certification proceedings.* (1) After the additional UCP certifies the DBE, the UCP may request a fully unredacted copy of all, or a portion of, the DBE's certification file from any other UCP in which the DBE is certified.

(2) A UCP must provide a complete unredacted copy of the DBE's certification materials to the additional UCP within 30 days of receiving the

request. Confidentiality requirements of §§ 26.83(d) and 26.109(b) do not apply.

(3) Once the new UCP certifies, then it must treat the DBE as it treats other DBEs, for all purposes.

(4) The DBE must provide an annual DOE with documentation of gross receipts, under § 26.83(j), to certifying UCPs on the anniversary date of the DBE's original certification by its JOC.

(h) *Decertifications.* (1) If any UCP has reasonable cause to remove a DBE's certification, in whole or in part (*i.e.,* NAICS code removal), it must notify the other UCPs in which the DBE is certified ("other jurisdictions") via email. The notice must explain the UCP's reasons for believing the DBE's certification should be removed.

(2) Within 30 days of receiving the notice, the other jurisdictions must email the UCP contemplating decertification a concurrence or non-concurrence with the proposed action. The other jurisdictions' responses may provide written arguments and evidence and may propose additional reasons to remove certification. A jurisdiction's failure to timely respond to the reasonable cause notice will be deemed to be a concurrence.

(3) After a UCP receives all timely responses, it must make an independent decision whether to issue a NOI and what grounds to include.

(4) Other UCPs may, before the hearing, submit written arguments and evidence concerning whether the firms should remain certified, but may not participate in the hearing.

(5) If the UCP finds the firm ineligible the firm immediately loses certification in all jurisdictions in which it is certified. The NOD must include appeal instructions provided on the Departmental Office of Civil Rights' web page, available at *https://www.transportation.gov/dbeappeal.* The UCP must email a copy of its decision to the other jurisdictions within 3 business days.

(6) The rules of this paragraph (h)(6) do not apply to attempts to decertify based upon a DBE's actions or inactions pertaining to §§ 26.83(j) (Declaration of Eligibility) and 26.87(e)(6) (failure to cooperate).

(7) Decertifications under this paragraph (h) must provide due process to DBEs.

(i) If a UCP decides not to issue a NOD removing the DBE's certification, no jurisdiction may initiate decertification proceedings, within one year, on the same or similar grounds and underlying facts.

(ii) If a DBE believes a UCP unfairly targets it with repeated decertification attempts, the DBE may file a complaint to the appropriate OA.

(8) The Department's appeal decisions are binding on all UCPs unless stated otherwise.

■ 58. Revise § 26.86 to read as follows:

§ 26.86 Decision letters.

(a) When a certifier denies a firm's request for certification or decertifies the firm, the certifier must provide the firm a NOD explaining the reasons for the adverse decision, specifically referencing the evidence in the record that supports each reason. A certifier must also include, verbatim, the instructions found on the Departmental Office of Civil Rights' web page, available at *https://www.transportation.gov/dbeappeal.*

(b) The certifier must promptly provide the applicant copies of all documents and other information on which it based the denial if the applicant requests them.

(c) The certifier must establish a waiting period for reapplication of no more than 12 months. That period begins to run the day after the date of the decision letter is emailed. After the waiting period expires, the denied firm may reapply to any member of the UCP that denied the application. The certifier must inform the applicant of that right, and specify the date the waiting period ends, in its decision letter.

(d) An appeal does not extend the waiting period.

■ 59. Revise § 26.87 to read as follows:

§ 26.87 Decertification.

(a) *Burden of proof.* To decertify a DBE, the certifier bears the burden of proving, by a preponderance of the evidence, that the DBE does not meet the certification standards of this part.

(b) *Initiation of decertification proceedings.* (1) A certifier may determine on its own that it has reasonable cause to decertify a DBE.

(2) If an OA determines that there is reasonable cause to believe that a DBE does not meet the eligibility criteria of this part, the OA may direct the certifier to initiate a proceeding to remove the DBE's certification.

(i) The OA must provide the certifier and the DBE written notice describing the reasons for the directive, including any relevant documentation or other information.

(ii) The certifier must immediately commence a proceeding to decertify as provided by paragraph (e) of this section.

(3) Any person may file a complaint explaining, with specificity, why the certifier should decertify a DBE. The certifier need not act on a general allegation or an anonymous complaint. The certifier must keep complainants' identities confidential as provided in § 26.109(b).

(i) The certifier must review its records concerning the DBE, any material the DBE and/or complainant provides, and any other available information. The certifier may request additional information from the DBE or conduct any other investigation that it deems necessary.

(ii) If the certifier determines that there is reasonable cause to decertify the DBE, it initiates a decertification proceeding. If it determines that there is not such reasonable cause, it notifies the complainant and the DBE in writing of its decisions and the reasons for it.

(c) *Notice of intent (NOI).* A certifier's first step in any decertification proceeding must be to email a notice of intent (NOI) to the DBE.

(1) The NOI must clearly and succinctly state each reason for the proposed action, and specifically identify the supporting evidence for each reason.

(2) The NOI must notify the DBE of its right to respond in writing, at an informal hearing, or both.

(3) The NOI must inform the DBE of the hearing scheduled on a date no fewer than 30 days and no more than 45 days from the date of the NOI.

(4) If the ground for decertification is that the DBE has been suspended or debarred for conduct related to the DBE program, the certifier issues a NOD decertifying the DBE. In this case, there is no NOI or opportunity for a hearing or written response.

(d) *Response to NOI.* (1) If the DBE wants a hearing, it must email the certifier saying so within 10 days of the NOI. If the DBE does not do so, it loses its opportunity for a hearing.

(2) The certifier and DBE may negotiate a different hearing date from that stated in the NOI. Parties must not engage in dilatory tactics.

(3) If the DBE does not want a hearing, or does not give timely notice to the certifier that it wants one, the DBE may still provide written information and arguments to the certifier rebutting the reasons for decertification stated in the NOI.

(e) *Hearings.* (1) The purpose of the hearing is for the certifier to present its case and for the DBE to rebut the certifier's allegations.

(2) The hearing is an informal proceeding with rules set by the hearing officer. The SEDO's attorney, a non-SEDO, or other individuals involved with the DBE may attend the hearing and answer questions related to their own experience or more generally about

the DBE's ownership, structure and operations.

(3) The certifier must maintain a complete record of the hearing, either in writing, video or audio. If the DBE appeals to DOT under § 26.89, the certifier must provide that record to DOT and to the DBE.

(f) *Separation of functions.* The certifier must ensure that the decision in a decertification case is made by an individual who did not take part in actions leading to or seeking to implement the proposal to decertify the DBE and is not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) The certifier's method of implementing this requirement must be made part of its DBE program and approved by the appropriate OA.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of this part.

(g) *Notice of decision.* The certifier must send the firm a NOD no later than 30 days of the informal hearing and/or receiving written arguments/evidence from the firm in response to the NOI.

(1) The NOD must describe with particularity the reason(s) for the certifier's decision, including specific references to the evidence in the record that supports each reason. The NOD must also inform the firm of the consequences of the decision under paragraph (i) of this section and of its appeal rights under § 26.89.

(2) The certifier must send copies of the NOD to the complainant in an ineligibility complaint or to the OA that directed the certifier to initiate the proceeding.

(3) When sending a copy of an NOD to a complainant other than an OA, the certifier must not include information reasonably construed as confidential business information, unless the certifier has the written consent of the firm that submitted the information.

(4) The certifier must make an entry in DOCR's Online Portal within 5 days of the action. The certifier must enter the name of the firm, names(s) of the firm's owner(s), date of decision, and the reason(s) for its decision.

(h) *Status of firm during proceeding.* (1) A DBE remains certified until the certifier issues a NOD.

(i) [Reserved]

(j) *Consequences.* Decertification has the following effects on contract and overall goals and DBE participation:

(1) When a prime contractor has made a commitment to use the decertified firm, but a subcontract has not been executed before the certifier issues the NOD, the certified firm does not count toward the contract goal. The recipient must direct the prime contractor to meet the contract goal with an eligible DBE or demonstrate the certifier that it has made good faith efforts to do so.

(2) When the recipient has made a commitment to using a DBE prime contractor, but a contract has not been executed before a decertification notice provided for in paragraph (g) of this section is issued, the decertified firm does not count toward the recipient's overall DBE goal.

(3) If a prime contractor has executed a subcontract with the firm before the certifier has notified the firm of its decertification, the prime contractor may continue to use the firm and may continue to receive credit toward the DBE goal for the firm's work. In this case, however, the prime contractor may not extend or add work to the contract after the firm was notified of its decertification without prior written consent from the recipient.

(4) If a prime contractor has executed a subcontract with the firm before the certifier has notified the firm of its decertification, the prime contractor may continue to use the firm as set forth in paragraph (j)(3) of this section; however, the portion of the decertified firm's continued performance of the contract must not count toward the recipient's overall goal.

(5) If the recipient executed a prime contract with a DBE that was later decertified, the portion of the decertified firm's performance of the contract remaining after the certifier issued the notice of its decertification must not count toward an overall goal, but the DBE's performance of the contract may continue to count toward satisfying the contract goal.

(6) The following exceptions apply to this paragraph (j):

(i) If a certifier decertifies a firm solely because it exceeds the business size standard during the performance of the contract, the recipient may continue to count the portion of the decertified firm's performance of the contract remaining after it issued the notice of its decertification toward the recipient's overall goal as well as toward the contract goals.

(ii) If the certifier decertifies the DBE because it was acquired by or merged with a non-DBE, the recipient may not continue to count the portion of the decertified firm's performance on the contract remaining after the certifier decertified it toward either the contract goal or the overall goal, even if a prime contractor has executed a subcontract with the firm or the recipient has executed a prime contract with the DBE that was later decertified. In this case, if eliminating the credit of the decertified firm will affect the prime contractor's ability to meet the contract goal, the recipient must direct the prime contractor to subcontract to an eligible DBE to the extent needed to meet the contract goal or demonstrate to the recipient that it has made good faith efforts to do so.

■ 60. Revise § 26.88 to read as follows:

§ 26.88 Summary suspension of certification.

(a) *Definition.* Summary suspension is an extraordinary remedy for lapses in compliance that cannot reasonably or adequately be resolved in a timely manner by other means.

(1) A firm's certification is suspended under this part as soon as the certifier transmits electronic notice to its owner at the last known email address.

(2) During the suspension period, the DBE may not be considered to meet a contract or participation goal on contracts executed during the suspension period.

(b) *Mandatory and elective suspensions*—(1) *Mandatory.* The certifier must summarily suspend a DBE's certification when:

(i) The certifier has clear and credible evidence of the DBE's or its SEDO's involvement in fraud or other serious criminal activity.

(ii) The OA with oversight so directs.

(2) *Elective.* (i) The certifier has discretion to suspend summarily if it has clear and credible evidence that the DBE's continued certification poses a substantial threat to program integrity.

(ii) An owner upon whom the firm relies for eligibility does not timely file the declaration and gross receipts documentation that § 26.83(j) requires.

(c) *Coordination with other remedies.* In most cases, a simple information request or a § 26.87 NOI is a sufficient response to events described in paragraphs (b)(1) and (2) of this section. The certifier should consider the burden to the DBE and to itself in determining whether summary suspension is a more prudent and proportionate, effective response. The certifier may *elect* to suspend the same DBE just once in any 12-month period.

(d) *Procedures*—(1) *Notice.* The certifier must notify the firm, by email, of its summary suspension notice (SSN) on a business day during regular business hours. The SSN must explain the action, the reason for it, the consequences, and the evidence on which the certifier relies.

(i) Elective SSNs may not cite more than one reason for the action.

(ii) Mandatory SSNs may state multiple reasons.

(iii) The SSN, regardless of type, must demand that the DBE show cause why it should remain certified and provide the time and date of a virtual show-cause hearing at which the firm may present information and arguments concerning why the certifier should lift the suspension. The SSN must also advise that the DBE may provide written information and arguments lieu of or in addition to attending the hearing.

(2) *Hearing.* The hearing date must be a business day that is at least 15 but not more than 25 days after the date of the notice. The DBE may respond in writing in lieu of or in addition to attending the hearing; however, it will have waived its right to a hearing if it does not confirm its attendance within 10 days of the notice and will have forfeited its certification if it does not acknowledge the notice within 15 days. The show-cause hearing must be conducted as a video conference on a standard commercial platform that the DBE may readily access at no cost.

(3) *Response.* The DBE may provide information and arguments concerning its continuing eligibility until the 15th day following the suspension notice or the day of the hearing, if any, whichever is later. The DBE must email any written response it provides. Email submissions correctly addressed are effective when sent. The certifier may permit additional submissions after the hearing, as long as the extension ends on a business day that is not more than 30 days after the notice.

(4) *Scope and burdens.* (i) Suspension proceedings are limited to the suspension ground specified in the notice.

(ii) The certifier may not amend its reason(s) for summarily suspending certification, nor may it electively suspend the firm again during the 12-month period following the notice.

(iii) The DBE has the burden of producing information and/or making arguments concerning its continued eligibility, but it need only contest the reason cited.

(iv) The certifier has the burden of proving its case by a preponderance of the evidence. It must issue an NOD within 30 days of the suspension notice or lift the suspension. Any NOD must rely only on the reason given in the summary suspension notice.

(v) The DBE's failure to provide information contesting the suspension does not impair the certifier's ability to prove its case. That is, the uncontested evidence upon which the certifier relies in its notice, if substantial, will constitute a preponderance of the evidence for purposes of the NOD.

(6) *Duration.* The DBE remains suspended during the proceedings described in this section but in no case for more than 30 days. If the certifier has not lifted the suspension or provided a rule-compliant NOD by 4:30 p.m. on the 30th day, then it must lift the suspension and amend applicable DBE lists and databases by 12 p.m. the following business day.

(e) *Recourse*—(1) *Appeal.* The DBE may appeal a final decision under paragraph (c)(5)(iv) of this section, as provided in § 26.89(a), but may *not* appeal the suspension itself, unless paragraph (d)(2) of this section applies.

(2) *Enforcement.* (i) The DBE may immediately petition the Department for an order to vacate a certifier's action if:

(A) The certifier sends a second elective SSN within 12 months, or

(B) Cites multiple reasons in an elective SSN contrary to paragraph (d)(1)(i) of this section.

(ii) The DBE may also petition to the Department for an order to compel if the certifier fails to act within the time specified in paragraph (c)(6) of this section.

(3) In either case, the DBE must:

(i) Email the request under the subject line, "REQUEST FOR ENFORCEMENT ORDER" in all caps;

(ii) Limit the request to a one-page explanation that includes:

(A) The certifier's name and the suspension dates;

(B) Contact information for the certifier, the DBE, and the DBE's SEDO(s); and

(C) The general nature and date of the firm's response, if any, to the second suspension notice; and

(D) The suspension notice(s).

■ 61. Revise § 26.89 to read as follows:

§ 26.89 Appeals to the Department.

(a)(1) Applicants and decertified firms may appeal adverse NODs to the Department.

(2) An ineligibility complainant or applicable Operating Administration (the latter by the terms of § 26.87(c)) may appeal to the Department if the certifier does not find reasonable cause to issue an NOI to decertify or affirmatively determines that the DBE remains eligible.

(3) Appellants must email appeals as directed in the certifier's decision letter within 45 days of the date of the letter. The appeal must at a minimum include a narrative that explains fully and specifically why the firm believes the decision is in error, what outcome-determinative facts the certifier did not consider, and/or what part 26 provisions the certifier misapplied.

(4) The certifier's decision remains in effect until the Department resolves the appeal or the certifier reverses itself.

(b) When it receives an appeal, the Department requests a copy of the certifier's complete administrative record including a video, audio, or transcript of any hearing, which the certifier must provide within 20 days of the Department's request. The Department may extend this time period when the certifier demonstrates good cause. The certifier must ensure that the administrative record is well organized, indexed, and paginated and the certifier must provide the appellant a copy of any supplemental information it provides to DOT.

(c)(1) The Department may accept an untimely or incomplete appeal if it determines, in its sole discretion, that doing so is in the interest of justice.

(2) The Department may dismiss non-compliant or frivolous appeals without further proceedings.

(d) The Department will avail itself of whatever remedies for noncompliance it considers appropriate.

(e) The Department decides only the issue(s) presented on appeal. It does not conduct a *de novo* review of the matter, assess all eligibility requirements, or hold hearings. It considers the administrative record and any additional information that it considers relevant.

(f)(1) The Department affirms the certifier's decision if it determines that the decision is consistent with applicable rules and supported by substantial evidence.

(2) The Department reverses decisions that do not meet the standard in paragraph (f)(1) of this section.

(3) The Department need not reverse if an error or omission did not result in fundamental unfairness or undue prejudice.

(4) The Department may remand the case with instructions for further action. When the Department specifies further actions, the certifier must take them without delay.

(5) The Department generally does not uphold the certifier's decision based on grounds not specified in its decision.

(6) The Department resolves appeals on the basis of facts demonstrated, and evidence presented, at the time of the certifier's decision.

(7) The Department may summarily dismiss an appeal. Reasons for doing so include, but are not limited to, non-compliance, abuse of process, appellant or certifier request, and failure to state a claim upon which relief can be granted.

(g) The Department does not issue advisory opinions.

(h) All decisions described in paragraph (f) of this section are administratively final unless they say otherwise.

(i) DOCR posts final decisions to its website, available at *https://www.transportation.gov/DBEDecisions.*

§ 26.91 [Amended]

■ 62. Amend § 26.91 by:

■ a. Removing the words "recipients" and "recipient" wherever they appear and adding in their places the words "certifiers" and "certifier", respectively; and

■ b. In paragraph (b)(1), removing the cross-reference "§ 26.87(i)" and adding in its place the cross-reference "§ 26.87(j)".

§ 26.103 [Amended]

■ 63. Amend § 26.103 in paragraph (d)(2) by removing the words "being in compliance" and adding in their place the word "complying".

Appendix A to Part 26 [Amended]

■ 64. Amend appendix A by:

■ a. Removing the word "Conducing" in paragraph IV.A.(1) and adding in its place the word "Conducting"; and

■ b. Adding at the end of paragraph VI after the word "efforts" the phrase "except in design-build procurement".

Appendix B to Part 26 [Removed and Reserved]

■ 66. Remove and reserve appendix B to part 26.

Appendices E Through G to Part 26 [Removed]

■ 67. Remove appendices E through G to part 26.

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