

Metro Board Approved Policy

Disadvantaged Business Enterprise Program

Adopted: January 28, 1999

Historical Perspective

This policy was amended on November 26, 2015.

The U.S. Department of Transportation's (USDOT) DBE program was created in 1983 during the Reagan administration. Critics of the program challenged its constitutionality on numerous occasions, leading ultimately to a Supreme Court decision in 1995 that held federal racial classifications must serve a compelling governmental interest and must be narrowly tailored to further that interest. Congress redrafted the legislation so that it promoted a level playing field without violating the U.S. Constitution. In January 1999, the Department issued a new final regulation to guide USDOT recipients in the administration of the DBE program. To become certified as a DBE under federal guidelines, a small business must be at least 51% owned, controlled, and managed by one or more socially and economically disadvantaged individuals. Federal regulations presume that the following groups are socially and economically disadvantaged: African Americans, Hispanic Americans, Portuguese Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans, women, and any other individuals found to be socially and economically disadvantaged by the Small Business Administration (SBA).

Based on the requirements set forth in 49 CFR Part 26, Western States and the USDOT's Guidance Memorandum, Los Angeles County Metropolitan Transportation Authority (Metro) is submitting a goal for FFY 2016-2018. The recommended overall DBE goal for the period is 18%. The weighted figure of 18.42% was rounded down to 18%. The Federal Transit Administration (FTA) reporting period for the recommended overall goal will be October 1, 2016, to September 30, 2018.



Metro

Metro's Disadvantaged Business Enterprise

Policy Statement and Program



Page intentionally left blank



**Los Angeles County
Metropolitan Transportation Authority
(Metro)**

**DISADVANTAGED
BUSINESS ENTERPRISE
(DBE) PROGRAM**

Department of Transportation

Federal Transit Administration
Federal Highway Administration



Metro

Disadvantaged Business Enterprise Program

Section 26.1, 26.23

Objectives/Policy Statement


The Los Angeles County Metropolitan Transportation Authority (Metro) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 Code of Federal Regulation (CFR) Part 26. As a recipient of Federal financial assistance from the DOT and as a condition of receiving this assistance, Metro has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of Metro to ensure that DBEs defined in 49 CFR Part 26 have an equal opportunity to receive and participate in DOT-assisted contracts. The objectives of the DBE Program include:

1. To ensure nondiscrimination in the award and administration of DOT – assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To promote the use of DBEs in all types of Federally-assisted contracts and procurement activities conducted by Metro; and
7. To assist the development of firms that can compete successfully in the market place outside the DBE Program.

The Executive Officer (EO) of the Diversity and Economic Opportunity Department (DEOD) has been designated as the DBE Liaison Officer. In that capacity, the EO 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 Metro in its financial assistance agreements with the DOT.

In addition, Metro will distribute this statement to DBE and non-DBE communities and business organizations. Distribution will be accomplished through posting on Metro website and publication and through electronic notification to DBE firms.



Phillip A. Washington
Chief Executive Officer

11/02/2015
Date

TABLE OF CONTENTS

SUBPART A – GENERAL REQUIREMENTS	1
A. Section 26.1 Objectives	1
B. Section 26.3 Applicability	1
C. Section 26.5 Definitions	1
D. Section 26.7 Non-discrimination Requirements	1
E. Section 26.11 Record Keeping Requirements	1
F. Section 26.13 Federal Financial Assistance Agreement	2
SUBPART B- RESPONSIBILITY OF DBE PROGRAM IMPLEMENTATION.....	4
A. Section 26.25 DBE Liaison Officer (DBELO).....	4
B. Shared Responsibility	5
C. Other Support Personnel	6
SUBPART C - ADMINISTRATIVE REQUIREMENTS	7
A. Section 26.21 DBE Program Updates.....	7
B. Section 26.23 Policy Statement	7
C. Section 26.27 DBE Financial Institutions	7
D. Section 26.29 Prompt Payment Mechanisms.....	7
E. Section 26.31 Directory	8
F. Section 26.33 Overconcentration.....	8
G. Section 26.35 Business Development Programs	8
H. Section 26.37 Monitoring and Enforcement Mechanisms.....	10
I. Section 26.39 Fostering Small Business Participation	12
SUBPART D – GOALS, GOOD FAITH EFFORTS, AND COUNTING.....	16
A. Section 26.43 Quotas	16
B. Section 26.45 Overall Goals	16
C. Section 26.47 Goal Setting and Accountability.....	17
D. Section 26.49 Transit Vehicle Manufacturers Goals.....	17
E. Section 26.51(a-c) Breakout of Estimated Race-Neutral and Race-Conscious Participation.....	17
F. Section 26.51(d-g) Contract Goals.....	20
G. Section 26.53 Good Faith Efforts Procedures	21
H. Section 26.55 Counting DBE Participation.....	25
SUBPART E – CERTIFICATION STANDARDS AND PROCEDURES	28
A. Section 26.81 Unified Certification Programs.....	28
B. Certification Process.....	28
C. Certification Standards	30
D. Section 26.83 Procedures for Certification Decisions.....	31
E. Section 26.85 Denials of Initial Requests for Certification	32
F. Section 26.87 Removal of a DBE's Eligibility	32
G. Section 26.88 Suspend Without a Hearing	32
H. Section 26.89 Certification Appeals	33
SUBPART F – COMPLIANCE AND ENFORCEMENT	34
A. Section 26.109 Information, Confidentiality, Cooperation.....	34

TABLE OF CONTENTS (Continued)

ATTACHMENTS

Organizational Charts.....	Attachment 1
Minority-Owned Financial Institutions.....	Attachment 2
Monitoring and Enforcement Mechanisms.....	Attachment 3
DBE Commitment Forms.....	Attachment 4
Goal Setting Methodology.....	Attachment 5
Certification Application Forms.....	Attachment 6
Procedures for Removal of DBE's Eligibility and Certification Appeals.....	Attachment 7
Regulations: 49 CFR Part 26.....	Attachment 8

DBE REGULATORY PROGRAM UPDATES

Federal Register/ Vol. 71, No. 56/ Thursday, March 23, 2006.....	Attachment 9
Federal Register/ Vol. 74, No. 63/ Friday, April 3, 2009.....	Attachment 10
Federal Register/ Vol. 75, No. 22/ Wednesday, February 3, 2010.....	Attachment 11
Federal Register/ Vol. 76, No. 19/ Friday, January 28, 2011.....	Attachment 12
Federal Register/ Vol. 79, No. 191/ Thursday, October 2, 2014.....	Attachment 13

SUBPART A – GENERAL REQUIREMENTS

A. Section 26.1 Objectives

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

B. Section 26.3 Applicability

Federal Transit Administration (FTA)

Metro is the recipient of Federal Transit funds authorized by Titles I, III, V, and VI of the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, Pub. L. 102-240, American Recovery and Reinvestment Act (ARRA) of 2009, or by Federal Transit laws in Title 49, U.S. Code, or Titles I, II, and V of the Transportation Equity Act for the 21st Century (Tea-21), Pub. L. 105-178.

C. Section 26.5 Definitions

Terms used in this DBE Program shall have the meaning set forth in 49 Code of Federal Regulation (CFR) Part 26 of this program (See Attachment 8, "Regulations" 49 CFR Part 26, Section 26.5).

D. Section 26.7 Non-discrimination Requirements

Metro 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, or national origin.

In administering its DBE program, Metro 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.

E. Section 26.11 Record Keeping Requirements

Uniform Report of DBE Awards or Commitments and Payments: 26.11(a)

Metro will report DBE participation to DOT as follows:

Metro will report DBE participation on a semi-annual basis (June 1 and December 1) each year, using the Uniform Report of DBE Awards/Commitments and Payments, Form 4630. These reports will capture DBE participation for DOT-assisted contracts awarded and actual DBE attainments based on payments made to DBEs on DOT-assisted contracts closed within the respective reporting period. The June 1 report includes information from October 1 through March 31. The December 1 report includes information from April 1 through September 30.

Metro will report ARRA funded project DBE participation to DOT as follows:

For ARRA funded projects, Metro will separately identify, verify and report DBE participation on a quarterly basis (January 10, April 10, July 10 and October 10) each year, using the Uniform Report of DBE Awards/Commitments and Payments until all ARRA funds are exhausted. The January 10 report includes information from October 1 through December 31. The April 10 report includes information from January 1 through March 31. The July 10 report includes information from April 1 through June 30. The October 10 report includes information from July 1 through September 30.

Subrecipients will report FTA pass-through grant funded DBE participation to Metro as follows:

Subrecipients who receive FTA pass-through grants will report to Metro DBE participation on a semi-annual basis (June 1 and December 1) each year, using the Uniform Report of DBE Awards/Commitments and Payments, Form 4630. These reports will capture DBE participation for DOT-assisted contracts awarded by subrecipients and actual DBE attainments based on payments made to DBEs on DOT-assisted contracts closed within the respective reporting period. Metro's June 1 report shall include subrecipient information from October 1 through March 31. The December 1 report shall include subrecipient information from April 1 through September 30. Subrecipients shall comply with this section until all contracts awarded with FTA grant funds are completed; grant funds are exhausted and/or returned to Metro.

Bidders List: 26.11(c)

Metro will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The bidders list will include the name, address, DBE or non-DBE status, age, and annual gross receipts of firms. Metro collects this information on the form provided with the solicitations to bidders and offerors. The form directs all respondents and their subcontractors to report bidders list information on the form and submit it with its bid or proposal documents.

F. Section 26.13 Federal Financial Assistance Agreement

Metro has signed the following assurances, applicable to all DOT-assisted contracts and financial agreements with subrecipients:

Assurance: 26.13(a)

The following language will appear in financial assistance agreements with subrecipients:

Metro 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. Metro shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT assisted contracts. Metro'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 Metro 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 is to be used verbatim, as it is stated in 26.13(a).

Contract Assurance: 26.13(b)

Metro will ensure that 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, which may include, but is not limited to:

- (1) Withholding of monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying the contractor from future bidding as non-responsible.

This language is to be used verbatim, as it is stated in 26.13(b).

Enforcement:

If a contractor, subrecipient, or subcontractor fail or refuse to include the 26.13(a) and/or 26.13(b) assurances verbatim in all DOT–assisted contracts, subcontracts or subrecipient agreements, Metro may impose penalties and administrative sanctions for non-compliance as contained in Subpart C, Monitoring and Enforcement Mechanisms, Section 26.37, in the Contract Compliance Manual (Federal), and as applicable the Subrecipient Implementation Agreement.

SUBPART B- RESPONSIBILITY OF DBE PROGRAM IMPLEMENTATION

A. Section 26.25 DBE Liaison Officer (DBELO)

Metro has designated the following individual as Metro's DBE Liaison Officer:

Tashai R. Smith
Interim Executive Officer,
Diversity and Economic Opportunity Department (DEOD)
Los Angeles County Metropolitan Transportation Authority
One Gateway Plaza, M/S 99-8-2
Los Angeles, CA 90012-2952

Telephone: (213) 922-2128
E-mail: smitht@metro.net

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that Metro complies with all provisions of 49 CFR Part 26. The DBELO reports to the Executive Director, Vendor Contract Management who reports to the Deputy Chief Executive Officer.

The DBELO is responsible for developing, implementing, monitoring and enforcing the DBE program requirements, in coordination with other appropriate officials. 65 The Diversity and Economic Opportunity Department (DEOD) has a total of twenty-six (26) positions of which fifteen (15) positions assist in the administration of the DBE program. In addition, five (5) consultants provide certification and subrecipient reporting services. The duties and responsibilities include the following:

1. Develops implements and monitors, with participation by legal counsel, the DBE Program document, keeping it up-to-date with the current business environment and the latest revisions to the applicable federal regulations, ensuring the DBE program is responsive to and in compliance with the regulations, including, but not limited to, 49 CFR Part 26;
2. Establishes overall DBE goal and report DBE and other information as required by DOT;
3. Reviews third party contracts and purchase requisitions for program compliance;
4. Works with all departments to set overall annual goals;
5. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner;
6. Identifies DOT-assisted contracts and procurements and assesses viability for race-neutral or race-conscious contract-specific goal application;
7. Analyzes Metro's progress toward attainment and identifies ways to improve progress;
8. Advises the CEO and Metro Board of Directors on DBE matters and achievement;
9. Supports the Chair of the Transportation Business Advisory Council (TBAC), a DBE Advisory Council;
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 California;
14. Maintains DBE vendor listing organized by predetermined categories and assists in the identification of potential DBE vendors and contractors; and
15. Provides outreach to DBEs and community organizations to advise them of opportunities; and
16. Maintains Metro's updated directory on certified DBEs.

The Chief Executive Officer (CEO)

The CEO designates the DBELO, grants to that DBELO direct, independent access to him or her concerning DBE matters and ensures the DBELO has sufficient resources to implement the DBE program in compliance with the provisions of 49 CFR Part 26.

The General Counsel

1. Addresses small business matters relating to procurement and the implementation of the DBE program;
2. Renders legal opinions regarding the interpretation of DBE solicitation and contract provisions;
3. Advises the DBELO or his/her designees and the CEO regarding imposition of administrative sanctions against contractors that fail to comply with DBE requirements;
4. Represents Metro in all legal actions involving DBE issues; and
5. Provides the DBELO with legal opinions relevant to DBE certification.

B. Shared Responsibility

The following Metro departments have a shared responsibility to achieve Metro's overall goal and ensure compliance with the DBE Program.

Executive Director, Vendor/Contract Management

1. Provides the DBELO with copies of final Invitation for Bids (IFB), Request for Proposals (RFP), Request For Information And Qualifications (RFIQ), Purchase Orders (PO), mailing lists and advanced notices of procurements;
2. Incorporates DBE goals and compliance language into the solicitations;
3. Notifies the DBELO of any changes to IFBs, RFPs, RFIQs and POs;
4. Sends IFBs, RFPs, RFIQs and POs to the DBEs indicated by the DBELO;
5. Places and documents the placement of legal notices in response to 49 CFR Part 26 publication requirements for annual overall goals and places solicitation notices all in general, trade and minority focused newspapers;
6. Notifies the DBELO of pre-bid, pre-proposal and pre-construction conferences;
7. Maintains SBE vendor listing organized by predetermined categories and assists in the identification of potential SBE vendors and contractors;
8. Calls for DBELO or staff member participation on Bid and Proposal Evaluation, and Negotiation Committees or Teams;
9. Forwards copies of Bids and Proposals to the DBELO for evaluation of responsiveness or responsibility to DBE requirements;
10. Participates in outreach programs, including vendor fairs; and
11. All other contract administration that impact DBE participation and implementation of the DBE program.

The Chief Financial Officer (CFO) and Grants Management

1. Contacts the DBELO for the names of DBE financial institutions, uses their services in connection with DOT-assisted projects and periodically reports the level of use of DBE financial institutions to Metro Board of Directors;
2. Assists the DBELO in compiling federal funding data to calculate Metro's overall DBE goal;
3. Promotes a level playing field for DBE financial advisors, investment bankers and bond counsel in the sale of Revenue Anticipation Notes, Equipment Trust Certificates, and other investment instruments; and
4. Assists the DBELO in developing financing, bonding and insurance programs to help increase the number of DBEs participating in DOT-assisted contracts.

C. Other Support Personnel

Metro personnel from other Departments share the responsibility for ensuring the effective implementation of the DBE Program. They are expected to give their full cooperation and active support to the DBELO in this effort. Following are the support personnel and examples of their respective responsibilities.

Project Managers

1. Provides the DBELO with draft scopes of work and engineering estimates to enable the DBELO to actively engage in goal setting, outreach and the development of appropriate DBE language in solicitation documents;
2. Develop a working knowledge of the DBE program's policies, practices and procedures including race neutral and race conscious methods of achieving DBE participation, by reading the DBE program, and/or the project's solicitation documents and/or the contract manual and by attending DBE orientation sessions presented by the DBELO and staff members;
3. Notify the DBELO in a timely manner of their project's Pre-Proposal or Pre-Bid conferences and "Kick-Off" Meetings;
4. Structure individual contracting actions to create a level playing field and participation by DBE firms wherever possible. This includes dividing a contract statement of work, where possible, into portions that will enable DBE firms to compete as prime contractors. Proper use of this structuring for DBE participation shall not result in the avoidance of proper approval authority. This also includes, if not prohibited by state law, waiving or reducing bonding requirements or allowing for incremental bonding;
5. Participate with the DBELO in monitoring that DBE firms are used and DBE records and reports are prepared and submitted in accordance with the terms of the contract; and
6. Identify and refer potential DBE utilization problems promptly to the DBELO.

Client/Vendor Services

1. Provides up-to-date information electronically about Metro contracting opportunities, upcoming events at Metro and current program information via the Metro website (www.metro.net/connect);
2. Provides technical assistance over the telephone to firms requesting to be placed on the mailing list, provides Metro Vendor database information, including detailed step by step instructions on how to register on Metro's Vendor database, and responds to questions about doing business with Metro; and
3. Participates in DBE outreach programs that advertise and disseminate information about Metro seminars, programs, solicitations and contracts.

Risk Management

1. Provides periodic reports on industry insurance and bonding standards and requirements to the DBELO. Provides information about insurance and bonding trends relevant to DBE firms for the coming year, if available, to the DBELO; and
2. Participates with the DBELO and with legal counsel in the structuring of bonding and insurance requirements and standards in individual contracting actions to create a level playing field and participation by DBE firms wherever possible. This includes dividing a contract statement of work, where possible, into portions that will enable DBE firms to compete as prime contractors. Proper use of this structuring for DBE participation shall not result in the avoidance of proper approval authority. This also includes, if not prohibited by state law, waiving or reducing bonding requirements or allowing for incremental bonding.

SUBPART C - ADMINISTRATIVE REQUIREMENTS

A. Section 26.21 DBE Program Updates

Since Metro has received a grant of \$250,000 or more in FTA planning capital, and or operating assistance in a Federal Fiscal year, Metro will continue to carry out this program until all funds from DOT financial assistance have been expended. Metro will provide to DOT updates representing significant changes in the program.

B. Section 26.23 Policy Statement

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

C. Section 26.27 DBE Financial Institutions

It is the policy of Metro 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.

At this time, Metro has not identified DBE-owned financial institutions. However, Metro encourages contractors to use the services of minority and women owned financial institutions. A listing of minority-owned banks can be obtained from the Federal Reserve Bank website: <http://www.federalreserve.gov/releases/mob/current/default.htm>, or the U.S. Department of the Treasury, Minority Bank Deposit Program website: <http://www.fms.treas.gov/mbdp>.

For convenience, Metro has provided the contact information of the minority owned financial institutions in Attachment 2.

D. Section 26.29 Prompt Payment Mechanisms

Metro will include the following Prompt Payment clause in each DOT-assisted prime contract:

The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than seven (7) days from the receipt of each payment the prime contractor receives from Metro. The prime contractor agrees further to return retainage payments to each subcontractor within seven (7) days after the subcontractors 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 Metro. This clause applies to both DBE and non-DBE subcontracts.

Enforcement:

If Metro determines that the prime contractor has failed to comply with the prompt payment provisions set forth above, Metro shall give written notice to the Contractor and the Contractor's Surety that, if the default is not remedied within a specified period of time (at least 5 days), the contract may be terminated. The Contract may be terminated for cause in accordance with the Contract Article entitled TERMINATION FOR DEFAULT. Metro shall also impose penalties and sanctions for non-compliance with the prompt payment clause contained in 49 CFR Part 26, Section 26.37, Monitoring and Enforcement Mechanisms, and as contained in the Contract Compliance Manual (Federal) and other requirements of State law.

The prime contractor shall include the Dispute Resolution language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms contained in Attachment 3, Monitoring and Enforcement Mechanisms and the Contract Compliance Manual (Federal) to resolve payment disputes in their subcontract agreements.

E. Section 26.31 Directory

Metro is a member of the California Unified Certification Program (CUCP), which maintains the DBE directory pursuant to 49 CFR Part 26, Section 26.81 that identifies all firms that are eligible to participate as DBEs in this Program. Metro uses the DBE directory as a resource in developing overall and contract-specific DBE participation goals and conducting outreach and other programs for DBEs.

A complete listing of eligible DBE firms is reported and captured in the CUCP website. The CUCP DBE directory can be found at www.californiaucp.org or via www.dot.ca.gov/hq/bep. The CUCP directory lists the firm's name, address, phone number, fax number, on-site visit date, North American Industry Classification System (NAICS) code, ethnicity and gender of ownership, and the type of work the firm has been certified to perform as a DBE under which the firm has been certified to perform as a DBE. A listing in the DBE directory does in any way pre-qualify the identified DBE firms with respect to licensing, bondability, competence or financial responsibility.

F. Section 26.33 Overconcentration

If Metro determines that DBE firms are overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, Metro must devise appropriate measures to address this overconcentration.

Metro completed an Overconcentration Analysis in June 2013. The analysis conducted identified that DBEs were overconcentrated in two NAICS codes – 541380 - Testing Laboratories and 541611 - Administrative Management and General Management Consulting Services. To address the overconcentration, Metro will vary the use of the NAICS codes 541380 and 541611 when identified as potential subcontracting tasks as part of the contract-specific DBE goal analysis, to ensure that non-DBEs are not unfairly prevented from competing for subcontract opportunities in these aforementioned NAICS codes. Metro will conduct an overconcentration analysis every three years in accordance with Metro's triennial overall DBE goal schedule.

G. Section 26.35 Business Development Programs

Mentor Protégé 26.35 (b)

On FTA-funded contracts >\$25 million, Metro will require Bidders/Proposers to include in its bid/proposal submittal a Contract, Outreach and Mentoring Plan (COMP). The COMP shall set forth the Bidder/Proposer's overall plan and approach of how it will successfully meet or exceed the DBE goal through creative strategies and innovative non-traditional approaches to utilize DBE's in all phases of subcontracting. The COMP will be reviewed and approved by Metro and after award the Contractor will be required to submit updates to the COMP annually during the term of contract. As part of the COMP, the Bidder/Proposer shall provide its approach to provide business development assistance to DBE firms through a mentor protégé program. The mentor protégé program shall be designed to enhance the capabilities and technical development of the protégé, improve its ability to successfully grow and compete, and assist to build relationships with small and/or large firms for teaming. Contractual requirements for the mentor protégé program will be set forth in the Metro General Conditions, Special Provisions and/or in the Contract Compliance Manual (Federal).

At a minimum, the Bidder/Proposer's mentor protégé program shall:

1. Define the mentor protégé approach and general requirements and how the Contractor will carry out this component;
2. Definitions and roles for the protégé, mentor and Contractor;
3. Define and identify how protégé and DBE mentors will be selected for Design and Construction at each tier in technical areas of the DCW, including eligibility requirements, the percentage of the work that a protégé will perform on the project, ensure protégé and mentor arrangements comply with commercial useful function;
4. Include and submit the mentor protégé agreement to be used for Design and Construction.

The mentor protégé agreement shall include, but not limited to, the following:

- a. Names of the mentor and DBE protégé agreeing to the arrangement;
 - b. Description of mentoring activities and associated level of effort, including estimate of hours;
 - c. Deliverables associated with mentoring work;
 - d. Duties and responsibilities of Mentor and Protégé, including list of key personnel
 - e. Benchmarks to measures mentoring progress;
 - f. Process for evaluating Mentor/Protégé relationship;
 - g. Termination provisions.
5. Require protégés to also mentor a protégé and comply with the mentor protégé program including reporting requirements;
 6. Include the types of business developmental assistance a mentor will provide to the protégé for inclusion in the mentor protégé agreement, how the assistance will be beneficial, description of the subcontract work, and the duration of the mentor protégé arrangement.

Examples of business development assistance may include:

- a. Training in technical aspects of operating the business, such as invoicing, accounts receivable, marketing, business forecasting and associated budgeting, human resource and information technology development, selection techniques for insurance and banking relationships.
 - b. Assistance in preparation of change orders, claim filing, resolution of dispute scheduling and other aspects of performance.
 - c. Assistance in the preparation of contract documents, proposals and Statements of Interest.
 - d. Guidance regarding the protégé's procedures in accounting for daily actual cost of labor, production and overhead.
 - e. Identify protégé's unique challenges and provide a plan to address each challenge
 - f. Other areas appropriate for protégé needs.
7. The name and address of the mentor and protégé point of contact;
 8. Define how the Contractor will track mentor protégé arrangements, measure and evaluate

successes and lessons learned, schedules and milestones; submittal of quarterly updates to Metro on the mentor protégé arrangements and overall component;

9. Define guidelines concerning the withdraw or termination of a mentor protégé agreement will be reviewed and approved by Metro; and
10. Ensure that DBEs involved in a mentor protégé agreement must be an independent business entity. A protégé must be DBE certified before it begins in a mentor protégé arrangement.

H. Section 26.37 Monitoring and Enforcement Mechanisms

Metro certifies that it will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26.

1. Metro will bring to the attention of the DOT any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 49 CFR Part 26, Section 26.109.
2. Metro will consider similar action under its legal authorities, including responsibility determinations in future contracts. Attachment 3 lists the regulation, provisions, and contract remedies available to Metro in the events of non-compliance with the DBE regulations by a participant in Metro's procurement activities.
3. Metro will also provide a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. This will be accomplished by:

Notification of Reporting Requirements:

Prior to execution of all contracts containing DBE goals the prime contractor shall be verbally directed to Metro's *Compliance Manual (Federal)* for specific requirements of the DBE Program. Contractors shall be specifically advised of DOT requirements for prompt payment and retention covering all DBE and Non-DBE subcontracts.

Pre-Construction (Kick-off) Meeting:

Both the Contractor and the DBE Subcontractor(s) or a representative of each firm shall attend the kick-off meeting to be informed of DBE requirements and other matters, prior to or immediately after Notice to Proceed is issued. If a kick-off meeting is not scheduled, the prime contractor will be notified in writing of DBE requirements. The Contractor shall be responsible for informing the Subcontractors of all DBE requirements as specified by Metro herein.

Monthly Expenditure Plan:

A monthly expenditure plan in calendar form for each of its approved DBE Subcontractors/Suppliers shall be submitted within 30 days of Notice to Proceed. The planned expenditures shall equal the dollars committed to each DBE Subcontractor/Supplier and shall be developed according to the approved project schedule. The plan shall be updated to incorporate any schedule changes and executed Changed Notices and Work Authorization Change Notices affecting the DBE's work. A revised plan shall be submitted within 30 days from the incorporation of the change.

Executed Subcontract Agreements:

The Contractor shall submit to Metro copies of all executed DBE and non-DBE subcontract agreement, supplier agreement, and/or purchase orders (PO) within fourteen (14) working days after the Contractor executes their contract or PO with Metro. The contractor is required to incorporate the prompt payment and dispute resolution provisions in all executed subcontract agreements. Further, the Contractor shall report its failure to execute subcontractor agreements for any of the listed DBE subcontractors within 14 working days of signing the contract with Metro.

On-Site Performance Monitoring

During the course of the contract, Metro will conduct on-site monitoring to ensure that work committed to DBEs are actually being performed by the DBEs. This observed work will be reconciled against DBE subcontractor agreement(s) and “*Summary of Disadvantaged Business Enterprise (DBE) Subcontractors Paid Report*” (Form 103) or with the Small Business Programs Compliance Reporting System (SBCRS). .

Written Certification:

Worksite monitoring, review of contracting records and written certification of DBE performance will be conducted on all Metro contracts, within the state, in which a DBE firm(s) is performing. This review will be in accordance with Metro’s DBE Compliance Close-Out and/or Commercial Useful Function report process.

4. Metro will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award using Metro’s Form 103. The Form 103 or reporting in the SBCRS shall be prepared for the Contractor and each subcontractor (at every tier level) for which DBE participation is to be credited toward the DBE contract commitment: Name, address, phone, SBE status, contact person, contractor(s), name, date contract agreement signed, scope of work, anticipated first date of performance and anticipated last date of performance.

All prime contractors shall submit the Form 103 or SBCRS on a monthly basis through contract completion and final payment by Metro. Failure to submit the FORM 103 reports may result in the imposition of a penalty of \$1,000 per day for each report overdue.

The FORM 103 or reporting payments electronically in the SBCRS (required for contracts awarded after August 1, 2015), includes the following information:

- a) Name of each DBE Subcontractor
- b) General work assignment of each DBE Subcontractor
- c) The specific portion of work executed by each DBE Subcontractor during the reporting period
- d) The dollars committed to each DBE Subcontractor
- e) The dollars paid to each DBE Subcontractor during the reporting period
- f) The dollars paid to date for each DBE Subcontractor
- g) The dollars paid to the DBE as a result of a change order or other cost modification
- h) The dollars paid to date as a percentage of the total commitment to each DBE
- i) Date of last progress payment
- j) Invoice amount and Invoice Date
- k) Invoice number corresponding to last payment to subcontractor
- l) Prime Contractor Signature under penalty of perjury that it has complied with all requirements of 49 CFR Part 26 and prompt payment requirements of the California Public Contract Code.

5. Supplemental Reports (Design/Build Only)

Prime contractors shall submit, each month (unless otherwise instructed by Metro). Contractor may develop their own reporting format (subject to Metro's approval) to meet the following supplemental report requirements:

- a) SBE Attainment and Commitment Report: A monthly listing of DBE and non-DBE subcontractors with current and anticipated participation: This report shall include a current SBE attainment and commitment tallies from each subcontractor (at any tier) listing of all its subcontractors.
- b) Prompt Payment Report: This report shall prompt payment activity from each subcontractor subcontracting at each tier, listing their immediate subcontractors, documenting the status of each subcontractor's retainage account with the Prime Contractor engaged in subcontracting and their compliance with the return of the retainage regulations.
- c) The Prime Contractor's Prompt Payment and Retainage: This report shall report for the month (or the period of time designated by DEOD), listing its immediate subcontractors and the prompt payment and retainage activity from each subcontractor (at any tier).
- d) Metro may require additional reports for Design/Build contracts to ensure adequate reporting of DBE participation for Design, Construction, and Operate and Maintain components of a Design/Build contract.

I. Section 26.39 Fostering Small Business Participation

The Metro Board of Directors adopted a breakthrough initiative on January 13, 2014 to reserve certain types of contracts for Small Business Enterprises (SBEs) qualified under the appropriate NAICS codes. The program, in response to a mandate by the FTA, covers competitively negotiated contracts, sealed bids and public works that meet eligibility criteria. Applicable procurements are set aside for competition among SBEs when and if there is a competitive pool of SBE firms available to perform the work.

In addition to FTA funded procurements, Metro also expanded the program to include non-federally funded procurements under its SBE Program, creating opportunities for certified SBEs.

Metro's SBE Program for contracts without federal funds is designed to comply with California's Proposition 209 that prohibits explicit consideration of race or gender in the award of contracts without federal funds.¹ Metro uses the CUCP DBE application for the SBE Program. As with the DBE Program, there is no geographical location requirement. A firm that receives certification as a DBE is also certified as a SBE, as the requirements is coterminous, except for the necessity to establish the owner's social disadvantage for DBE Program eligibility. Unlike the DBE Program, a firm must seek SBE "recertification" every five years.

1. Statement of Policy

Metro has adopted the following statement of the policy objectives of the Small Business Enterprise (SBE) elements:

Metro's SBE elements are an integral part of the DBE Program for federally-assisted contracts. These elements seek to facilitate the participation of small business concerns in Metro's contracting activities; to meet the maximum feasible portion of Metro's annual DBE goal through race-neutral means; and to comply with the requirements of 49 CFR Part 26, Section 26.39. The elements are

¹ Cal. Const., art. I, § 31.

active, effective steps to increase race-neutral DBE participation, by fostering competition for Metro's contracts by increasing the capacities of small businesses and DBEs to perform as prime vendors and to increase opportunities for small businesses and DBEs to perform as subcontractors. It is also Metro's objective to establish DBE contract goals to meet any portion of the overall goal it is unable to meet using race-neutral means alone.

2. SBE Eligibility

Metro will utilize its existing SBE certification process that applies the eligibility criteria of the CUCP DBE standards, application and process to certify SBEs, including the size standards and personal net worth limit but without the social disadvantage element. There is no geographic or location requirement or limit on the number of contracts awarded to firms participating as SBEs. Metro will continue its practice of conferring SBE certification on certified DBEs during a conjoined application process.

3. SBE Set-Aside Element

Metro Board adopted the SBE set-aside program in January, 2014.

a) **Policy**

49 CFR Part 26, Section 26.39, "Fostering Small Business Participation," requires that the DBE Program include an element to structure contracting requirements to facilitate competition by small businesses on Federal Transit funded contracts. The purpose of the SBE set-aside is to award certain acquisitions exclusively to SBE firms by limiting competition to small businesses. This element allows Metro to meet the maximum feasible portion of Metro's race-neutral portion of its overall DBE goal.

b) **General**

1. Small business set-asides may be conducted by using any acquisition process authorized in Metro's Acquisition Policy and Procedures.
2. A contract may not be awarded as a result of a small business set-aside if the cost to Metro exceeds the fair and reasonable price.
3. Offers received from businesses for a set-aside acquisition that are not eligible as certified SBEs will be rejected.

c) **SBE Certification Eligibility Requirements**

The Metro SBE program certification requirements are adopted for the DBE program SBE set-aside. To be eligible to participate in the set-aside program a business must be certified by Metro as a SBE in the applicable NAICS codes for the solicited work, by the bid or proposal due date.

1. Each applicant for SBE certification must prove to Metro's Certification Unit, by a preponderance of the evidence, that the applicant meets the criteria of economic disadvantage, business size, ownership and control.
2. An eligible SBE firm, including its affiliates, must be an existing small business, defined by the Metro SBE Program as appropriate to the type of work that the firm seeks to perform on each non-federally funded contract.
3. Certifications with respect to economic disadvantage, including a signed Personal Net Worth (PNW) Statement and supporting documentation are required. If an individual's PNW Statement shows that the individual's personal net worth exceeds \$1.32 million or demonstrates the ability to accumulate substantial wealth the individual's presumption of economic disadvantage is rebutted and the person is not qualified to be a SBE owner.

4. The applicant firm can only be an eligible SBE, if the firm, including its affiliates, has had average gross receipts over the previous three years of less than \$23.98 million or as adjusted for inflation by the U.S. Secretary of Transportation.
5. A firm's ownership by economically disadvantaged individuals must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in merely the ownership documents.
6. The firm must be independent and not depend on its relationship with another firm or firms to be viable.
7. SBE Certification is granted for a period of five years. The certification expiration date is included in the SBE certification letter issued by Metro. An SBE could become inactive or ineligible during its certification. Only SBEs with a valid certification status are eligible to participate in the SBE Set-Aside.

d) Commercially Useful Function

An SBE firm performs a commercially useful function (CUF) when it is responsible for the execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. An SBE 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 SBE participation. An SBE is presumed to be performing a CUF when it performs or exercise responsibility for at least 30 percent (30%) of the total cost of its contract with its own work force in accordance with 49 CFR Part 26, Section 26.55.

e) Setting Aside Acquisitions

The following acquisitions are eligible for use of the set-aside element for FTA funded contracts:

Action Type	Micro Purchase	Informal Acquisitions	Formal Acquisitions
	PCard Purchase >\$0 ≤ \$3,000	Requires Three Quotes	Competitive Bid or Proposal
Negotiated awards ² for Supplies, Equipment, Materials and Services including Architecture and Engineering	N/A	>\$3,000 ≤ \$100,000	>\$100,000 ≤ \$3.0 Million
Awards under Sealed Bid ³ Procedures - except Public Works	N/A	>\$3,000 ≤ \$100,000	>\$100,000 ≤ \$2.0 Million
Public Works ⁴	N/A	>\$3,000 ≤ \$100,000	>\$100,000 ≤ \$5.0 Million

f) Partial Set-Aside

If it is determined that an acquisition is not suitable for a total set-aside, Metro may consider a partial set-aside before soliciting for full and open competition.

² Negotiated awards involve the evaluation of submitted proposals based on evaluation factors in addition to price. Award can be made with or without negotiation.

³ Awards are made to the lowest priced, responsive/responsible bidder. No negotiations can take place.

⁴ Awards for public works contracts may, depending on the enabling statute, be awarded either as a negotiated award or as a sealed bid. Public Works are generally defined as, "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds.

g) Cause for Not Setting Aside an Acquisition

The set-aside will not be applicable if it is determined that there are an insufficient number of qualified small businesses capable of meeting Metro's requirements resulting in inadequate competition. Adequate competition is defined as two or more qualified firms.

h) Advertisement

Advertisement for set-aside acquisitions will follow existing Metro advertising policies including notifying small and disadvantaged businesses.

i) Misrepresentation

Suspension or debarment proceedings may be initiated against any firm that:

1. attempts to participate in the SBE set-aside for FTA funded contracts under the 49 CFR Part 26 DBE Program regulation and does not meet the eligibility criteria stated in the Certification Standards for SBE firms for the set-aside program; or on the basis of false, fraudulent or deceitful statements; or under circumstances indicating a serious lack of business integrity or honesty; or
2. attempts to use false, fraudulent or deceitful statements or representations in order to meet eligibility for the SBE set-aside requirements; or uses another firm that does not meet the SBE eligibility criteria.

j) Implementation

The CEO shall develop agency-wide policies and procedures necessary to implement this policy.

SUBPART D – GOALS, GOOD FAITH EFFORTS, AND COUNTING

A. Section 26.43 Quotas

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

B. Section 26.45 Overall Goals

A description of the methodology to calculate the overall goal and the goal calculations can be found in Metro's website and will be updated, as applicable.

In accordance with 49 CFR Part 26, Section 26.45, Metro will submit its triennial overall DBE goal to the FTA on August 1 of the year specified by the FTA Group C schedule posted on FTA Civil Rights website. Metro may also request use of project-specific DBE goals as appropriate, and/or will establish project-specific DBE goals as directed by FTA when applicable.

The process generally used by Metro to establish overall DBE goals is as follows:

The overall DBE goal represents the amount of FTA-assisted funds Metro anticipates expending over three Federal Fiscal years. The two-step goal setting process required by the 49 CFR Part 26, Section 26.45 will be used to determine Metro's base figure. The two steps for setting an overall goal are:

1. Establish a base figure for the relative availability of DBEs
2. Determine the base figure adjustment, if necessary

The base figure is intended to be a measurement of the current ready, willing, and able DBEs as a percentage of all ready, willing and able businesses to perform the recipient's anticipated FTA-assisted contracts Metro's market area. The disparity study methodology is the most comprehensive method for identifying ready, willing, and able DBEs that provide goods and services for Metro's anticipated FTA-assisted projects. A disparity study identifies businesses that made bids to the agency as either a prime or subcontractor, and those that are interested in bidding. It also enumerates DBEs among bidders, and willing and able businesses which have not yet bid. This method is also recommended by the *USDOT Guidance Memorandum* for recipients in the Ninth Circuit. The availability data derived from Metro's most current DBE Program Disparity Study will be utilized in the goal setting process.

In the Step Two base figure adjustment, Metro will examine relevant and reliable data in the Metro market area to determine if an adjustment to the base figure is warranted. The consideration of an adjustment is intended to account for any impact the relevant factors may have on DBEs' contracting opportunities with Metro. The following factors will be considered for the Step Two adjustment:

- Past DBE participation
- Certified DBEs compared to non-certified DBEs
- Documented private-sector discrimination
- Anecdotal evidence from current Metro Disparity Study

Public Participation:

Metro will conduct a consultation with the Transportation Business Advisory Council (TBAC) and other small business resource organizations for review of draft overall DBE goal, comment and to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses,

the effects of discrimination on opportunities for DBEs, and Metro's efforts to establish a level playing field for the participation of DBEs. Based on consultation, Metro will complete the consultation process prior to submitting the methodology report to FTA, by the August 1 deadline of the overall goal submittal year.

Metro will publish a notice of the proposed overall DBE goal, by no later than July 1st on the Metro website announcing Metro's proposed overall goal before submission to FTA on August 1st. It is at Metro's discretion to inform the public that the proposed goal and its rationale are available for inspection during normal business hours at its principal office for 30 days following the date of the notice, and informing the public that Metro and FTA will accept comments on the goals for 30 days from the date of the notice. The notice shall include address to which comments may be sent and business location where the proposed goal may be reviewed. The public notice shall be published in general circulated newspapers, available minority- focus media, trade publications, through electronic notifications and will be posted on the Metro website.

Metro will submit its overall goal submission to FTA by August 1. Metro will begin using the established overall goal on October 1, unless Metro has received other instructions from DOT. If Metro establishes a goal on a project basis, Metro will begin using that goal by the time of the first solicitation for a DOT-assisted contract for the project. The goal will remain effective for the duration of the three-year period established and approved by FTA.

C. Section 26.47 Goal Setting and Accountability

Metro will annually review its DBE attainments in contrast to its overall DBE goal to determine if any measures would need to be instituted to effectively meet its established overall DBE goal. Metro will further follow accountability mechanisms in instances where Metro has failed to meet its overall goal for a given fiscal year. Metro will thoroughly analyze why it fell short of meeting its overall goal for a given goal period and establish specific steps and milestones for correcting identified problems so that Metro will meet its overall goal in subsequent years. Metro will submit its proposed plan to DOT within 90 days of the end of the fiscal year, as applicable to ensure compliance. Metro will additionally maintain strong outreach efforts to encourage minority- and women-owned firms to become certified as DBEs, to afford Metro the ability to set and meet realistic goals.

D. Section 26.49 Transit Vehicle Manufacturers Goals

All Transit Vehicle Manufacturers (TVM), as a condition of being authorized to bid or propose on Metro FTA-assisted transit vehicle procurements, shall certify that it is on the FTA's certified TVMs list and has complied with the requirements of 49 CFR Section 26.49, including the establishment of an annual overall DBE participation goal that has been submitted to the FTA and either approved, or not disapproved. Each TVM shall complete and submit in its bid or proposal to Metro a TVM DBE Certification form acknowledging it has complied with this section and has an approved overall DBE goal on file with FTA. Metro shall not include the amount of FTA assistance used in transit vehicle procurements in the base amount from which Metro's overall goal is established. Alternatively, Metro may establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying with the remaining sections of 49 CFR Part 26, Section 26.49, subject to approval from the FTA.

E. Section 26.51(a-c) Breakout of Estimated Race-Neutral and Race-Conscious Participation

Metro will meet the maximum feasible portion of its overall goal using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract, or is awarded a subcontract on a prime contract that does not carry a DBE goal. In order to do so, Metro will implement the following race-neutral measures which are aimed at increasing DBE and other small business participation:

1. Small Business Prime

Launched in June of 2014, this set-aside initiative reserves certain types of contracts for Small Business Enterprises (SBEs) qualified under the appropriate North American Industry Classification System codes. The program covers competitively negotiated contracts, sealed bids and public works that meet threshold criteria from \$3,000 up to \$5 million. Applicable procurements are set aside for competition among SBEs when and if there is a competitive pool of three or more SBE firms available to perform the work.

2. Metro Connect

This site is designed to give small businesses a direct route to working and growing with Metro. The site gives access to tools and resources that are designed to support small business growth, such as networking events, an online Tool Kit, and certification information. Small business can also view current contracting opportunities, or visit the 12-Month Look Ahead page to see future opportunities. Metro Connect aims to increase the opportunity for small businesses through various efforts that provide greater access and transparency around the agency's procurement process and a direct route to Metro's small business programs.

3. Vendor Portal (Beta)

Metro's Vendor Portal is a "one-stop shop" with all the information and resources that make doing business with Metro easier and more efficient than ever.

The site includes online tools to:

- Access current & future metro business opportunities
- Learn about guidelines & qualification programs
- Complete online programs
- Complete online forms
- Access small business tools
- Learn about the latest procurement news & tips

4. Twelve Month Look-Ahead

The information listed on the twelve month look-ahead in the vendor portal is a preview of Metro's planned solicitations for the next twelve months. Newly designed in response to feedback from the business community, this web-based, single source of upcoming agency-wide procurement opportunities will enable businesses to better plan for pursuing bids. (The information is subject to change at any time without notice.)

5. Meet the Project Managers Networking/Relationship Building Event

Metro and the Transportation Business Advisory Council (see below) introduced this new networking opportunity in May of 2015. The event provides small businesses the opportunity to meet face-to-face with Project Managers (PMs) who oversee large and small Metro projects, a vital link to working with Metro, given the vast number of projects that are in the works or being considered for future development. A listing of PMs and their areas of expertise is sent to all who register for this event.

6. Meet the Primes Network/Relationship Building Event

These events provide opportunities for small businesses to build relationships with large contractors that do business with Metro, and other agencies in the Southern California region. At these events, small businesses can share their products, services and professional expertise with approximately 20 large businesses, and with Metro personnel.

7. Meet the Buyers Network/Relationship Building Event

This event, conducted at least twice per year, provides an opportunity to meet in person with Metro's Contract Administrators and Buyers. DBEs and other small businesses can share their products and services with pertinent Metro staff. They can also receive information and assistance on registering as a vendor, certification as a DBE, completing prequalification requirements, enrolling in the Small Business Orientation sessions, and meeting key Metro personnel.

8. Monthly "How to Do Business with MTA" Workshops

The Small Business Orientation helps small and disadvantaged businesses understand how to do business with Metro. The orientation covers the requirements a business must meet in order to do business with Metro, the certifications that are required for certain programs or types of projects, the types of contracts Metro typically performs, where to find project solicitations, and how to obtain other information about Metro. Small business owners also meet procurement staff in their area of expertise to ask questions, as staff is available.

9. Small Business Enterprise Program

The Small Business Enterprise (SBE) Program was first adopted in 1997 and was designed to comply with California's Proposition 209, which prohibits explicit consideration of race or gender in the award of state and locally funded contracts. The 15 percent SBE utilization in federally assisted contracts was increased to 30 percent for fiscal years 2012 and 2013. The SBE Program applies a SBE subcontracting goal to competitively bid and negotiated contracts, and is identical in practice and scope to Metro's DBE program. Metro uses the California Unified Certification Program (CUCP) DBE application for the SBE program, as the requirements are similar, except for the necessity to establish the owner's social disadvantage for DBE Program eligibility. All businesses which received DBE certification are also certified as a SBE.⁵

10. Shared Responsibility Program

In 2011, Metro launched a new Chief Executive Officer initiative agency-wide in order to engage departments at the highest level in increasing DBE participation. Metro has established an internal 20 percent small and disadvantaged business target for each department. This shared responsibility requires department executives to identify contracting opportunities within their respective departments for small business participation. Department year-end performance is tracked and reported to the Chief Executive Officer, and is included in executive performance reviews.

⁵ Los Angeles County Metropolitan Transportation Authority, Small Business Enterprise (SBE), <http://www.metro.net/about/deod/sbe/>
Los Angeles County Metropolitan Transportation Authority, Transportation Business Advisory Council (TBAC), <http://www.metro.net/about/deod/tbac/>

11. Transportation Business Advisory Council

Small Business owners and interested parties are welcomed and encouraged to attend the monthly Transportation Business Advisory Council (TBAC) meeting. TBAC meetings provide small businesses a forum to discuss topics and issues impacting business owners throughout the contracting community. Particularly, TBAC advocates for small business owners to have increased access to Metro's procurement process. TBAC meetings are beneficial for all business interests. The meetings feature: a monthly speaker series, Metro current and future contract opportunities, legislation updates, and current trends in transportation. TBAC is comprised of professional business associations representing an array of industries and trades. TBAC has been instrumental in working with the Diversity & Economic Opportunity Department to develop a successful path toward bridging relationships between small businesses and Metro.

12. Unbundling Prime Contracts

Metro currently unbundles large contracts in order to facilitate the participation of DBE businesses. In addition to ongoing efforts, Metro will take additional affirmative steps to break up large contracts, when feasible, in order to increase small business contracting opportunities and participation.

13. Insurance Broker Panel

Metro has established a panel of commercial insurance brokers to assist businesses that lack required insurance coverage. The panel provides proposals and insurance placement for contractors in order to assist them in meeting Metro's risk management requirements. The broker panel is disseminated to small businesses through the Transportation Business Advisory Council (TBAC), small business outreach events, Metro's small business orientation classes and published on Metro's website.

14. Attendance at Vendor Fairs/Business Networking Events

Metro representatives attend vendor fairs of other agencies to provide information on how to do business with Metro, and to provide information on upcoming contracting opportunities.

15. Memberships in Contracting Organizations

Metro is a member of various contracting organizations, and attends membership meetings and membership events to provide information on how to register as a Metro vendor and become SBE or DBE certified.

F. Section 26.51(d-g) Contract Goals

Federal Transit Administration (FTA) Funds:

Recipients in the United States Court of Appeals for the Ninth Circuit cannot consider the use of a race and gender-conscious contract goal unless a finding of significant statistical disparity has been made for the ethnic and gender groups to be included in the application.

Recipients in the Ninth Circuit cannot consider the use of a race-conscious goal unless a finding of disparity has been made for the ethnic groups to be included in the application. The disparity findings in Metro's 2012 DBE Program Disparity Study documented a disparity for African

Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and Hispanic Americans.⁶ Caucasian females were over utilized.

An updated analysis was conducted to determine the current utilization of Caucasian females since the race-conscious program was implemented in 2013 without Caucasian females. Unlike racial discrimination which is subject to strict scrutiny, gender discrimination is only subject to an intermediate scrutiny standard of review. Therefore, Caucasian females need only to be underutilized to be included in a gender-conscious remedy. Since not including Caucasian females in the DBE goal, utilization is now considerably lower than in the 2012 DBE Program Disparity Study. Given the fact that Caucasian females are currently underutilized, this gender group will be included in the FFY 2016-2018 overall DBE goal. The current overall goal and goal methodology report is provided in Attachment 5.

Metro will use contract goals to meet any portion of the overall goal Metro does not project being able to meet using race-neutral means. DBE contract goals are a condition of award. Contract goals are established so that, over the period to which the overall goal applies, contract goals will cumulatively result in meeting any portion of Metro's overall goal that is not projected to be met through the use of race-neutral means.

Metro will establish contract goals only on those FTA-assisted contracts that have subcontracting possibilities. Metro 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.)

Metro will express its contract goals as a percentage of the total amount of a DOT-assisted contract. DEOD will review all procurements over \$100,000 for construction, professional services and goods and commodities to determine the extent of subcontracting opportunities and DBE availability.

Federal Highway Administration (FHWA) Funds:

Recipients in the United States Court of Appeals for the Ninth Circuit cannot consider the use of a race and gender-conscious contract goal unless a finding of significant statistical disparity has been made for the ethnic and gender groups to be included in the application. Metro will use contract goals based on guidance from the Caltrans and as a result of findings from the Caltrans Disparity Study.

G. Section 26.53 Good Faith Efforts Procedures

Demonstration of Good Faith Efforts: 26.53(a) and (c)

In those instances where a contract-specific DBE goal is included in a procurement/solicitation, Metro will not award the contract to a bidder who does not either: (1) meet the contract goal with verified, countable DBE participation; or (2) documents it has made adequate good faith efforts to meet the DBE contract goal, even though it was unable to do so. It is the obligation of the bidder to demonstrate it has made sufficient Good Faith Efforts (GFE) prior to submission of its bid.

⁶ For the complete disparity analysis findings, see *Chapter 9: Disparity Analysis* in the 2012 Disadvantaged Business Enterprise (DBE) Program Disparity Study Final Report.

Evaluation of Good Faith Efforts: 26.53(a) and (c)

Metro treats bidder/offers' compliance with GFE requirements as a matter of responsiveness. The DEOD Contract Compliance Officer shall determine whether a bidder/offers who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive.

To determine whether a bidder/offers who failed to meet the DBE contract goal may be further considered for contract award, Metro must determine whether the efforts taken to obtain DBE participation satisfies the GFE requirement. Metro's GFE requirements are as follows:

1. If the Bidders/Proposer has not met the stated DBE goal, documentation of its GFE shall be submitted with its bid/proposal in the proper form and content prescribed in the solicitation document.
2. Bidders/Proposers who do not meet the DBE goal must, at a minimum, undertake all of the efforts prescribed in the solicitation document, to satisfy the requirement that the Bidder/Proposer made good faith efforts to comply with the DBE goal.
3. Passing GFE requires a minimum of 90 of 100 points. Each GFE item is evaluated on a pass/fail basis. Offerors will receive either full or zero (0) points for each GFE item. The bidder/offers will be required to undertake following efforts:
 - a) Advertisement
 - b) Notification to small business organizations / community groups
 - c) Select portion of the work to be subcontracted
 - d) Request for bid/proposal, specification information
 - e) Solicitation follow-up
 - f) Assistance in obtaining bonds and insurance
 - g) Attend pre-bid/proposal conference
 - h) List of subcontractors submitting bids/proposals
 - i) Commitments of other bidders/proposers

Information to be submitted: 26.53(b)

Each solicitation for which a contract goal has been established will require the bidders/offers 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. To count toward meeting goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract; The dollar amount of the participation of each DBE firm participating;
3. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
4. Written and signed confirmation from each listed DBE firm that it is participating in the contract noting the kind and amount of work as provided in the prime contractors commitment; and
5. If the contract goal is not met, evidence of good faith efforts must include copies of each subcontractor quote submitted when a non-DBE subcontractor was selected over a DBE for work on the contract.

Administrative reconsideration: 26.53(d)

Within two (2) working days of being informed by Metro that it is not responsive because it has not documented sufficient GFE, a bidder/offers may request administrative reconsideration. Bidder/offers should make this request in writing to the following Reconsideration Official:

Karen Gorman, Chief Ethics Officer
Certification Reconsideration Officer
Los Angeles County Metropolitan Transportation Authority
One Gateway Plaza, M/S 99-4-1
Los Angeles, CA 90012-2952

Telephone: (213) 922-2975
E-mail: gormank@metro.net

The Reconsideration Official will not have played any role in the original determination that the bidder/offeror did not document sufficient GFE.

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 GFE to do so. The bidder/offeror will have the opportunity to meet in person with Metro's Reconsideration Official to discuss the issue of whether it met the goal or made adequate GFE to do. Metro 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 GFE to do so.

The reconsideration decision is final and not administratively appealable to any other person with LACMTA, the Department of Transportation or any other authority.

Good Faith Efforts when a DBE is replaced on a contract: 26.53(f)

Metro requires that a prime contractor not terminate a DBE subcontractor without Metro's prior written consent. Metro will require a contractor to make GFE to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. The prime contractor is required to notify the DEOD immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

In such a situation, prior approval by Metro is required of any contractor acting as the substitute for the DBE. Metro requires the prime contractor provide copies of the new or amended subcontracts. If the candidate contractor to be substituted is not a DBE, Metro requires the prime contractor submit documentation of their GFE. Contractual guidelines concerning termination of a DBE firm is included in the Contract Compliance Manual (Federal).

Failure to Secure Prior Approval:

If the prime contractor fails or refuses to comply in the time specified, Metro may take appropriate actions, including but not limited to those set forth in the Attachment 3, Monitoring and Enforcement Mechanisms. The Metro's contracting office may issue an order stopping all or part of payment or work until satisfactory action has been taken. If the prime contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Bid Specification:

When a contract goal is established pursuant to Metro's DBE program, the sample bid specification can be used to notify bidders/offerors of the requirements to make GFE. The forms found at Attachment 6 can be used to collect information necessary to determine whether the bidder/offeror has satisfied these requirements. The sample specification is intended for use in both non-construction and construction contracts for which a contract goal has been established. Thus, it can be included in invitations for bid for construction, in requests for proposals for architectural/engineering and other professional services, and in other covered solicitation documents. A bid specification is required only when a contract goal is established.

The requirements of 49 CFR Part 26, Regulations of the U.S. Department of Transportation, apply to this contract. It is the policy of the Metro to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this contract will be conditioned upon satisfying the requirements of this bid specification. These requirements apply to all bidders/offerors, including those who qualify as a DBE. A DBE contract goal of ____ percent has been established for this contract. The bidder/offeror shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26, to meet the contract goal for DBE participation in the performance of this contract.

The bidder/offeror will be required 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 firm will perform; (3) the dollar amount of the participation of each DBE firm participating; (4) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet the contract goal; (5) Written confirmation from the DBE that it is participating in the contract as provided in the commitment made under (4); and (6) if the contract goal is not met, evidence of good faith efforts.

Termination of a DBE on a contract for Good Cause: 26.53(f)

Metro requires that a prime contractor not terminate a DBE subcontractor without Metro's prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm. The prime contractor must give notice in writing to Metro of its intent to request to terminate and/or substitute, and the reason for the request. Metro will notify the prime contractor and affected DBE firm of the termination requirements.

The DBE firm will have an opportunity to provide written objectives, and may request an informal hearing, to the proposed termination of its subcontract and why Metro should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), Metro may provide a response period shorter than five days. Termination and replacement procedures are further outlined in the Contract Compliance Manual (Federal).

Metro will provide such written consent only if it agrees, for reasons stated in the concurrence document, that the prime contractor has good cause to terminate the DBE firm. For purposes of this section, good cause includes the following circumstances:

- The listed DBE, after having had a reasonable opportunity, fails or refuses to execute a written contract.
- 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.
- The listed DBE subcontractor, , fails or refuses to meet the contractor's non-discriminatory bond requirements.
- The listed DBE becomes bankrupt , insolvent, or exhibits credit unworthiness;
- The listed DBE subcontractor is ineligible to work on public works projects because of suspension or debarment proceedings pursuant to 2 CFR Parts 180, 215 and 1,200 or applicable state law;
- Metro has determined that the listed DBE subcontractor is not a responsible contractor;

- The listed DBE voluntarily withdraws from the project and provides DEOD written notice of its withdrawal;
- The listed DBE is ineligible to receive credit for the type of work required;
- A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract; Other documented good cause that Metro determines to be compelling reasons to terminate the DBE. Provided that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contract can substitute another DBE or non-DBE contractor after contract award; and
- The prime contractor demonstrates to LACMTA, pursuant to Public Contract Code, Section 4107.5, that the name of the subcontractor was listed as the result of an inadvertent clerical error.

In addition to post-award terminations, the provisions of this section apply to pre award deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.

Good Faith Efforts when a DBE is replaced on a contract for Good Cause: 26.53(g)

Metro will require a contractor to make GFE to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the same extent needed to meet the contract goal established. Metro will require the prime contractor to notify the Contract Compliance Officer immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

The prime contractor must first obtain the written consent of Metro before any contractor can act as the substitute for the original DBE. Metro requires the prime contractor provide copies of the new or amended subcontracts. If the candidate contractor to be substituted is not a DBE, Metro requires the prime contractor to submit documentation of their GFE to find another DBE subcontractor to substitute for the original DBE.

Failure to Secure Prior Approval:

Enforcement: Failure by the contractor to comply with the "request to add, terminate or substitute requirements," shall constitute a material breach of the contract and may result in termination of contract or imposition of administrative sanctions for non-compliance as set forth in the Contract Compliance Manual (Federal), General Conditions and/or Special Provisions.

H. Section 26.55 Counting DBE Participation

Metro will count DBE participation toward overall and contract goals as provided in 49 CFR Part 26, Section 26.55.

Commercially Useful Function:

DBE primes and subcontractors, at any tier, must perform a Commercially Useful Function (CUF). 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, Metro 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.

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. If a DBE does not perform or exercise responsibility for at least 30 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, Metro must presume that the DBE is not performing a commercially useful function.

When a DBE is presumed not to be performing a commercially useful function, the DBE may present evidence in writing to rebut this presumption. Metro may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices. Metro decisions on commercially useful function are not administratively appealable.

Counting DBE Participation:

Metro and prime contractors shall follow counting guidelines as provided in 49 CFR Part 26, Section 26.55 for DBE participation to count toward the achievement of the DBE commitment percentage the value of actual dollar paid for work actually performed by DBE firms. There will be no credit for work performed by a non-DBE prime and/or subcontractor. DBE participation listed in the bid or proposal must comply with the provisions of this section.

Counting guidelines are provided as follows:

1. **DBE as the Prime Contractor:** 100% DBE credit for that portion of the work performed by the DBE's own forces, including the cost of materials and supplies. Work that a DBE prime subcontracts to a non-DBE firm does not count toward the DBE.
2. **DBE as a Joint Venture Contractor:** 100% DBE credit for that portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work performed by the DBE's own forces.
3. **DBE as a Subcontractor:** 100% DBE credit for the work of the subcontract performed by the DBE's own forces, including the cost of materials and supplies, excluding the purchase of materials and supplies or the lease of equipment by the DBE subcontractor from the prime contractor or its affiliates. Work that a DBE subcontractor in turn subcontracts to a non-DBE firm does not count toward the DBE.
4. **DBE as a Material Supplier or Broker:**
 - a) 60% DBE credit for the cost of the materials or supplies purchased from a DBE regular dealer.
 - b) 100% DBE credit for the cost of materials or supplies obtained from a DBE manufacturer.
 - c) 100% DBE credit for the value of reasonable fees and commissions for the procurement of materials and supplies if not a regular dealer or manufacturer.
5. **DBE as a Trucker:** 100% DBE credit for trucking participation provided the DBE is responsible for the management and supervision of the entire trucking operation for which it is responsible. At least one truck owned, operated, licensed and insured by the DBE must be used on the contract. Credit will be given for the full value of all such DBE trucks operated using DBE employed drivers.

DBE credit will be limited to the value of the reasonable fee or commission received by the DBE if trucks are leased from a non-DBE company. Metro uses the following six (6) factors in determining whether to count expenditures to a DBE trucking firm, to determine if it is performing a commercially useful function:

- a) 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.
- b) The DBE must itself own and operate at least one fully licensed, insured and operational truck used on the contract.
- c) 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.
- d) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases the trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
- e) The DBE may also lease trucks from a non-DBE, including an owner-operator. The DBE who leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of the transportation services on the contract provided by the DBE-owned trucks or leased trucks with DBE drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. .

The DBE may lease trucks without drivers from a non-DBE truck leasing company and if the DBE uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

- f) For the purposes of determining whether a DBE trucking company is performing a commercially useful function, 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.

SUBPART E – CERTIFICATION STANDARDS AND PROCEDURES

A. Section 26.81 Unified Certification Programs

Metro is a member of the California Unified Certification Program (CUCP) administered by the California Department of Transportation (Caltrans). The CUCP will meet all of the requirements of 49 CFR Part 26.

All California based U.S. Department of Transportation (DOT) recipient agencies, including Metro, participate in the California Unified Certification Program (CUCP). This U.S. DOT approved program provides “one-stop shopping” for eligible businesses seeking DBE certification. Under the CUCP, a firm certified by just one of California’s 140 plus U.S. DOT recipient agencies is eligible to participate as a DBE statewide. The CUCP went into effect January 1, 2002.

The CUCP is organized into two (2) geographic regions called “Clusters.” Each Cluster consists of a small group of DOT recipient agencies that process DBE certification applications submitted by applicant businesses located within a Cluster. These agencies are known as CUCP “Certifying Members.” The Certifying Member processing a certification application for a firm is identified as that firm’s “Home Agency.” The remaining California DOT recipient agencies are identified as “Non-Certifying Members” of the CUCP.

The decision whether to grant DBE certification is made by the concurrence of the other Certifying Members at regularly scheduled monthly Cluster meetings. If Metro elects to handle the certification process of a non-California based firm Metro will follow the Interstate certification procedures of 49 CFR Part 26, Section 26.85.

Attachment 6 Certification Application Forms lists the two constituent clusters of the CUCP, and Attachment 7 Procedures for Removal of DBE’s Eligibility and Certification Appeals lists the Part 26 (DBE) and Part 23 (ACDBE) Cluster Certifying Members. Please note that California Department of Transportation and City of Los Angeles participate in both clusters.

B. Certification Process

The DBE certification process undertaken by Metro’s Small Business Certification Unit in DEOD consists of a desk audit performed on the information contained in the applicant’s completed CUCP DBE application and supporting documentation submitted with the completed application. Metro will send an, “Acknowledgment of Receipt,” letter to the applicant firm within 30 days. This information is reviewed against the certification eligibility criteria spelled out above. After the desk audit is completed, an on-site interview shall be conducted with the qualifying owners and key personnel from the applicant firm to further evidence satisfaction of the certification eligibility criteria. Metro will conduct job-site interviews whenever those job-sites are located within 10 miles of the offices of that certification applicant.

When it is determined the applicants have demonstrated, by a preponderance of the evidence, that eligibility requirements for DBE certification have been satisfied, Metro will recommend to the CUCP Part 26 Cluster Certifying Members that DBE certification status be granted to the applicant firm.

Certifying Members of the “CUCP Part 26 Cluster,” include and is subject to change. The CUCP website (www.californiaucp.org/) will provide the latest update on certifying members:

1. California Department of Transportation (Caltrans Southern CA)
2. City of Los Angeles,
3. Los Angeles County Metropolitan Transportation Authority (Metro),
4. Central Contra Costa Transit Authority (CCCTA),

5. City of Fresno,
6. S.F. Bay Area Rapid Transit District (BART),
7. San Francisco Municipal Transportation Agency (SFMTA),
8. The San Mateo County Transit District (SAMTRANS),
9. Santa Clara Valley Transportation Authority (VTA),
10. California Department of Transportation (Caltrans Northern CA) and

To be certified as a DBE, a firm must demonstrate to Metro, by a preponderance of the evidence, that it meets the DBE eligibility requirements of 49 CFR Part 26 concerning group membership or individual disadvantage, business size, ownership, and control. In determining whether socially and economically disadvantaged owners control a firm, Metro will consider all the facts in the record, viewed as a whole including the origin of all assets and how and when they were used in obtaining the firm when making Certification eligibility recommendations to the "CUCP Part 26 Cluster".

An applicant firm is granted DBE status under the CUCP if the certifying agency determines the firm meets all the certification requirements specified in 49 CFR Part 26.

A firm that Metro determines does not demonstrate that it satisfies all DBE certification eligibility requirements is presented to the "CUCP Part 26 Cluster" with a recommendation that the firm's application be denied. The CUCP determination must be by unanimous vote of the members attending that monthly meeting of the, "CUCP Part 26 Cluster." Denied firms may Appeal the "CUCP Part 26 Cluster" determination to the DOT as stated in each letter announcing determinations to deny the applicant's request for DBE Certification. Certification denials will be reported to applicants within 90 days of the initial eligibility determination date stated on Metro's Certification Summary Report. This date will be used on a separate report monitoring and tracking completion of denials within the required timeframe.

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

- | | |
|-------------------------------|---|
| By U.S. Mail: | Small Business Certification Unit
Diversity and Economic Opportunity Department
Los Angeles County Metropolitan Transportation Authority
One Gateway Plaza, M/S 99-8-4
Los Angeles, CA 90012-2952 |
| Certification Hotline: | (213) 922-2600 |
| Fax: | (213) 922-7660 |
| E-mail: | <u>CertificationUnit@metro.net</u> |
| Internet: | <u>www.metro.net</u> |

The CUCP has distributed copies of the DBE Certification Application Package. The DBE Certification Application Package, found at Attachment 6 of this DBE Program consists of:

1. The CUCP Cover Letter directed to the business owner
2. A "ROADMAP FOR APPLICANTS"
3. A Uniform Certification Application Form
4. A Personal Net Worth (PNW) Statement
5. A Supplementary Questionnaire
6. A Roster of Certifying Agencies

C. Certification Standards

Under the CUCP, Metro and the other CUCP Certifying Members follow the certification standards and procedures of subparts D and E of 49 CFR 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 under 49 CFR Part 26, subpart D.

A DBE is a for profit business that has demonstrated, by a preponderance of the evidence, that it meets certification eligibility standards of 49 CFR Part 26 subpart D with respect to:

Business Size Determinations:

1. A Small Business is initially defined by Small Business Administration size standards, 13 CFR Part 121.
2. Applicant DBE firms must demonstrate that their business has average over three-years annualized gross receipts of less than \$23.98 million per year.
3. Other technical aspects of business size standards may be relevant and considered on a case-by-case basis.

Individual Social and Economic Disadvantage:

1. Women, Black Americans, Hispanic Americans, Asian/Pacific Americans, Subcontinent Asian Americans and Native Americans are rebuttably presumed to meet the requirement of individual social and economic disadvantage. 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 these groups.
2. Individuals who are not members of the presumptive group may be determined to be Socially and Economically Disadvantaged if they, on a case-by-case basis, so demonstrate by a preponderance of the evidence.
3. Applicants must also submit a Personal Net Worth (PNW) Statement. This Statement, in the case of an applicant for DBE status, must show that the individual business owner's/owners' PNW is less than \$1.32 Million excluding equity in their primary residence and the applicant business.
4. Other technical aspects of individual social and economic disadvantage may be relevant and considered on a case-by-case basis.

Ownership Determinations:

1. The business must be at least 51% owned by socially and economically disadvantaged individuals (qualifying owners).
2. The ownership by these individuals must be real, substantial and continuing, going beyond pro forma ownership, as presented merely in ownership documents.
3. Qualifying owner(s) contributions of capital or expertise to acquire their ownership interests must be real, substantial and continuing.
4. Qualifying owner(s) must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interest.
5. Other technical aspects of ownership may be relevant and considered on a case-by-case basis.

Control Determinations:

1. The business must be independent, its viability must not depend on a relationship with another firm or firms.
2. The business must not be subject to any formal or informal restrictions that limit the customary discretion of the socially and economically disadvantaged owners.

3. The qualifying owners must possess the power to direct or change 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.
4. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm, but must not possess or exercise the power to control the firm or not be disproportionately responsible for operating the firm.
5. The qualifying owners may delegate authority, but such delegations must be revocable and the owners must retain a managerial role and the power to hire and fire the person to whom they delegate.
6. The qualifying owners must have an overall understanding of and managerial, technical competence and experience directly related to the type of work in which the business is engaged and the firm's operations.
7. Qualifying owners must possess all state or locally required licenses or credentials.
8. Differences in remuneration between the qualifying owners and other participants in the firm may be considered in determining the owners' level of control.
9. Qualifying owner(s) must work in the business in order to be considered as controlling the firm. They cannot engage in outside employment or other business interests that conflict with managing the firm, unless the firm is itself a part-time business.
10. Other technical aspects of control may be relevant and considered on a case-by-case basis.

D. Section 26.83 Procedures for Certification Decisions

Certification Reviews: 26.83(h)

Metro will review the eligibility of firms that are DBE certified through Metro every five years. Metro may require the submission of an updated application. Metro may conduct a certification review of a certified DBE firm, its owners and key employees, including a new on-site review, five years from the date of the firm's most recent certification, or sooner if appropriate in light of changed circumstances (e.g., of the kind requiring notice under 49 CFR Part 26, Section 26.83(i)), a complaint, or other information concerning the firm's eligibility. If as a result of receiving information, Metro has grounds to question the firm's eligibility; an unannounced on-site review may be conducted at the firm's offices and jobsites.

"No Change" Affidavits and Notices of Change: 26.83(j)

The CUCP requires all DBEs to inform their Home Agency, in a written affidavit, of any change in its circumstances affecting its ability to meet size, disadvantaged status, ownership or control criteria of 49 CFR Part 26 or of any material changes in the information provided with their application for certification.

The CUCP also requires all owners of DBEs certified under the CUCP to submit to their Home Agency, on the anniversary date of their certification, an Annual Update Affidavit that meets the requirements of 49 CFR Part 26, Section 26.83(j). The Annual Update Affidavit is included in Attachment 6 Certification Application Forms. Metro requires DBEs submit with this affidavit, documentation of the firm's size and gross receipts (e.g. submission of Federal tax returns). If a firm fails to submit this affidavit in a timely manner, it will be deemed to have failed to cooperate under 49 CFR Part 26, Section 26.109(c).

Likewise, the obligation to submit a notice of change applies if a firm's owner knows or should know that he or she, or the firm, fails to meet a 49 CFR Part 26 eligibility requirement (e.g., personal net worth).

When Metro becomes aware of a change in circumstances or concerns are raised that a firm may be ineligible or engaging in misconduct (e.g., from notifications of changes by the firm itself, complaints,

information in the media, etc.), Metro will review the firm's eligibility, including that it may perform an On-site visit, interview and/or a review of its certification eligibility documents.

Metro will notify all of its currently certified DBE firms of these obligations via U.S. Mail each year two months in advance of their certification anniversary.

Personal Net Worth:

When a firm applies for DBE certification or re-certification Metro requires a signed and notarized Personal Net Worth (PNW) Statement from the "Qualifying Owners," those person who, together or individually, claim to hold more than or equal to 51% of the shares of the corporation or more than or equal to a 51% interest in the partnership or LLC and control the firm in the firm's primary business activities or in the NAICS Code industries for which certification is requested and on whose ownership and control Metro will rely on to make a determinations with respect to eligibility to participate as a DBE. The PNW Statement must include appropriate supporting documentation (i.e. tax returns or other relevant documents).

The purpose of this PNW Statement requirement is to determine whether the presumption of economic disadvantage really applies to individual applicants. It is particularly important, in the context of a narrowly tailored program, to ensure that the benefits are focused on genuinely disadvantaged people (not just anyone who is a member of a designated group).

E. Section 26.86 Denials of Initial Requests for Certification

When Metro determines that a new applicant firm is ineligible for certification, Metro's Small Business Certification unit will send a letter to the firm advising it is not eligible for certification and stating the reasons for denial. The notice will advise the firm of its right to appeal to DOT for reconsideration. The firm may not reapply for DBE certification at Metro or any other Certifying Member of the CUCP until twelve months have passed from the denial action. An applicant's appeal of this decision to the DOT pursuant to 49 CFR Part 26, Section 26.89 does not extend this period. A withdrawal of a certification application on the request of the applicant is not the equivalent of a denial by Metro of that application. It does not carry the same 12 month waiting period before a firm can reapply.

F. Section 26.87 Removal of a DBE's Eligibility

In the event Metro proposes to remove a DBE's certification, Metro will follow procedures consistent with 49 CFR Part 26, Section 26.87. Attachment 7 Procedures for Removal of DBE's Eligibility and Certification Appeals outlines these procedures in detail. To ensure separation of functions in a Removal, the Executive Officer of the DEOD or a delegate will serve as the decision-maker in de-certification proceedings. Metro has established an administrative "firewall" to ensure that the Reconsideration Official will not have participated in any way in the de-certification proceeding against the firm (including in the decision to initiate such a proceeding). Metro will update the CUCP database upon the removal of DBE.

G. Section 26.88 Suspend Without a Hearing

Metro shall suspend a firm's DBE certification in the event an owner, whose ownership and control are necessary for the form's certification, dies or is incarcerated. Metro may suspend without a hearing when there is adequate evidence to believe a material change has occurred that may affect eligibility, or the DBE fails to notify Metro of any material changes in circumstances, or fails to timely file an affidavit of not change. In the event Metro suspends a DBE's certification, Metro will follow procedures consistent with 49 CFR Part 26, Section 26.83.

H. Section 26.89 Certification Appeals

Any firm or complainant may appeal Metro's decision in a certification matter to DOT. Such appeals may be sent to:

Department of Transportation
Office of Civil Rights Certification Appeals Branch
1200 New Jersey Avenue, SE
Washington, D.C. 20590
Internet: <http://www.dotcr.ost.dot.gov/asp/dbe.asp>
Phone: (202) 366-4754
Fax: (202) 366-5575

Metro will promptly implement any DOT certification appeal decisions affecting the eligibility of DBEs for Metro's DOT-assisted contracting (e.g., certify a firm if DOT has determined that Metro's denial of its application was erroneous).

Metro's system for administrative appeals of certification decision can be found in Attachment 7. This system is not a remedy a firm need exhaust before making a certification appeal to DOT under 49 CFR Part 26, Section 26.89.

SUBPART F – COMPLIANCE AND ENFORCEMENT

A. Section 26.109 Information, Confidentiality, Cooperation

Metro will safeguard from disclose to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law. The California Legislature created the Public Records Act, mindful of the right of individuals to privacy, finding and declaring that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Government Code, §6250) The California legislature states public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as provided at Government Code §6253. A broad range of exceptions is provided in consideration of an individual's right to privacy or where otherwise excluded from disclosure by law.

Nothing shall be construed to require disclosure of records that are specifically identified as not to be disclosed in the Public Records Act, including, "Records Whose Disclosure Is Exempted or Prohibited," (Government Code §2654(k). This provision identifies as exempt from disclosure under California law, "records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. Federal Regulations state, that Metro must not release an individual's personal net worth (PNW) Statement, nor any documentation supporting it to any third party without the written consent of the submitter. 49 CFR Part 26, Section 26.67(a)(2)(IV). Therefore, PNW Statements are protected under the DBE program.

Notwithstanding any contrary provisions of state or local law, Metro shall not release personal financial information submitted in response to the PNW requirement to a third party (other than DOT) without the written consent of the submitter.

Monitoring Payments to DBEs

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

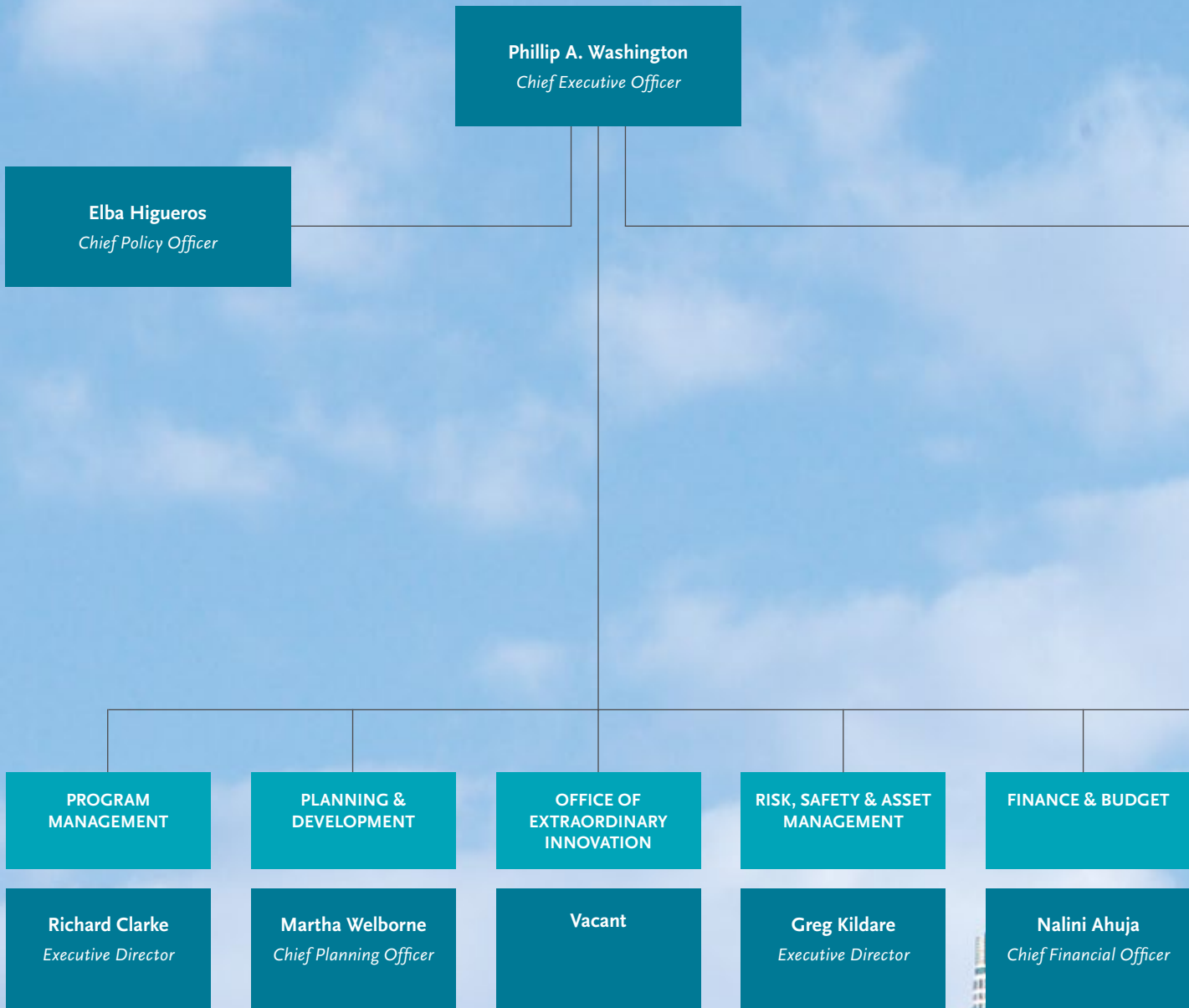
ATTACHMENTS

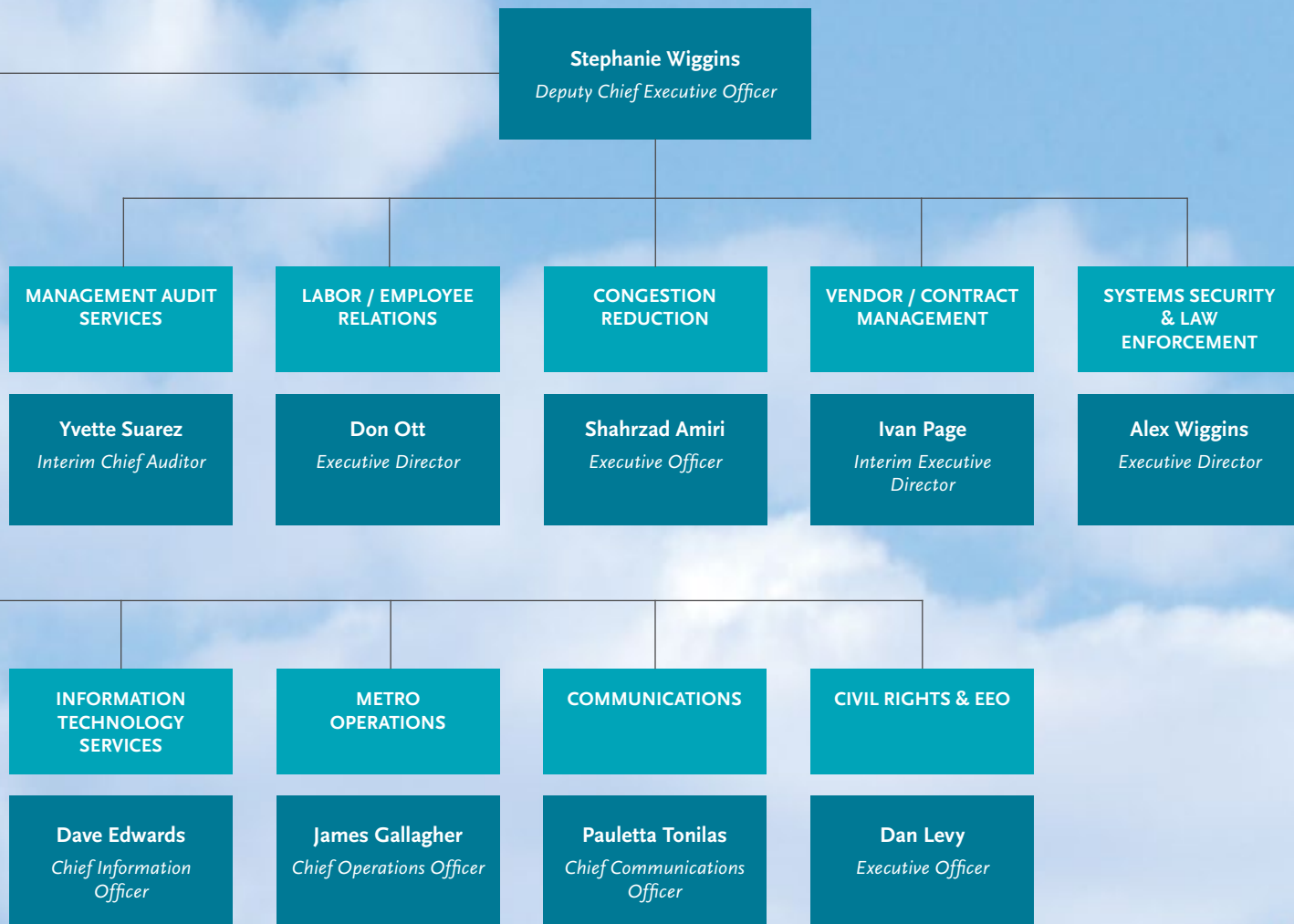
TABLE OF CONTENTS

Attachment 1	Organizational Charts
Attachment 2	Minority-Owned Financial Institutions
Attachment 3	Monitoring and Enforcement Mechanisms
Attachment 4	DBE Commitment Forms
Attachment 5	Goal Setting Methodology
Attachment 6	Certification Application Forms
Attachment 7	Procedures for Removal of DBE's Eligibility and Certification Appeals
Attachment 8	Regulations: 49 CFR Part 26
Attachment 9	Federal Register/ Vol. 71, No. 56/ Thursday, March 23, 2006
Attachment 10	Federal Register/ Vol. 74, No. 63/ Friday, April 3, 2009
Attachment 11	Federal Register/ Vol. 75, No. 22/ Wednesday, February 3, 2010
Attachment 12	Federal Register/ Vol. 76, No. 19/ Friday, January 28, 2011
Attachment 13	Federal Register/ Vol. 79, No. 191/ Thursday, October 2, 2014

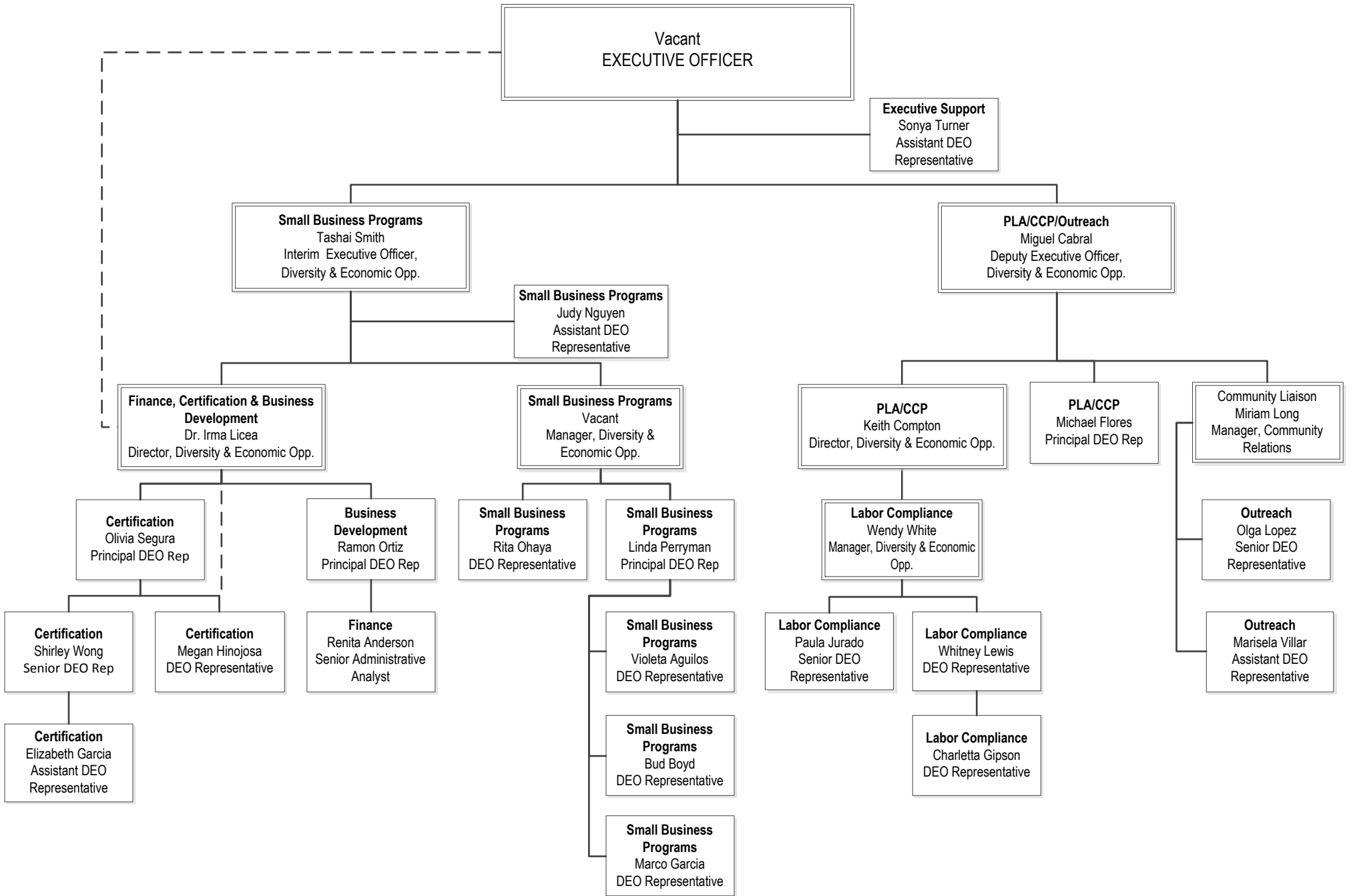
ATTACHMENT 1

ORGANIZATIONAL CHARTS





DIVERSITY & ECONOMIC OPPORTUNITY DEPARTMENT (DEOD)



ATTACHMENT 2

MINORITY-OWNED FINANCIAL INSTITUTIONS

MINORITY-OWNED FINANCIAL INSTITUTIONS

AMERICAN PLUS BANK

630 West Duarte Road
Arcadia, CA 91007
(626) 821-9188

AMERICAS UNITED BANK

801 N. Brand Boulevard, Suite 1150
Glendale, CA 91203
(818) 637-7000

ASIAN PACIFIC NATIONAL BANK

333 West Valley Boulevard
San Gabriel, CA 91776
(626) 457-4888

BANK OF THE ORIENT

233 Sansome Street
San Francisco, CA 94104
(415) 338-0672

BANK OF WHITTIER, N.A.

15141 East Whittier Boulevard
Whittier, CA 90603
(562) 945-7553

COMMUNITY COMMERCE BANK

398 West Foothill Boulevard
Claremont, CA 91711
(909) 626-0750

EASTERN INTERNATIONAL BANK

688 New High Street
Los Angeles, CA 90012
(213) 687-7228

FIRST CHOICE BANK

17414 Carmenita Road
Cerritos, CA 90703
(562) 345-9244

FIRST GENERAL BANK

1744 South Nogales Street
Rowland Heights, CA 91748
(626) 820-1099

METROPOLITAN BANK

250 East Eighteenth Street
Oakland, CA 94606
(510) 834-1933

MISSION NATIONAL BANK

3060 16th Street
San Francisco, CA 94103
(415) 826-3627

NEW OMNI BANK, N.A.

1235 South Garfield Avenue
Alhambra, CA 91801
(626) 284-5555

PACIFIC ALLIANCE BANK

8400 East Valley Boulevard
Rosemead, CA 91770
(626) 773-8888

PAN AMERICAN BANK

3626 East First Street
Los Angeles, CA 90063
(323) 264-3310

PREMIER BUSINESS BANK

700 South Flower Street, Suite 2000
Los Angeles, CA 90017
(213) 443-4853

PROAMERICA BANK

888 South Figueroa Street, Suite 100
Los Angeles, CA 90071
(213) 613-5000

SAIGON NATIONAL BANK

15606 Brookhurst Street, Suite C
Westminster, CA 92683
(714) 338-8700

Source: <http://www.federalreserve.gov/releases/mob/current/default.htm>

ATTACHMENT 3

MONITORING AND ENFORCEMENT MECHANISMS

Attachment 3

Monitoring and Enforcement Mechanisms

The following sections contain the standards, policies, practices and procedures Metro uses to assess whether a contractor is in compliance with regulatory and contract requirements applicable to DOT-assisted projects:

(1) REGULATORY PROVISIONS

Including but not limited to:

- A. 49 CFR Part 26 – Participation by Disadvantaged Business Enterprises Department of Transportation Financial Assistance Programs; particularly, Subpart F, Compliance and Enforcement
- B. 49 CFR Part 29 – Government-wide Debarment and Suspension (Non-Procurement) and Government-wide Requirements for Drug-Free Workplace.
- C. 49 CFR Part 31 – Program Fraud Civil Remedies
- D. 13 CFR Part 121 – Small Business Size Standards

(2) CONTRACT REQUIREMENTS AND REMEDIES

Contract requirements and remedies are provided in this DBE program and by administrative policies, practices and procedures requirements in each contract. All contractors, as a condition of participation in any DOT-assisted contract, shall agree to the terms of this DBE program, and shall incorporate the DBE program and the DBE administrative policies, practices and procedures requirements into their contracts and subcontracts at all tiers.

A. CONTRACTS MANUAL PROVISIONS

Metro's Diversity and Economic Opportunity Department requires each project supported by DOT-assisted funds to include in its contract terms and conditions, Metro's Contracts Manual, whose program and administrative requirements include, but not limited to:

B. AUDITING AND INSPECTION

Metro reserves the right to audit the records and inspect the facilities of its Contractors and any Subcontractors of any tier for the purpose of verifying the DBE participation and / or adherence to the DBE Program requirements. Contractors and Subcontractors shall permit access to their records at the request of Metro. Notice is hereby given that state, local and federal authorities may initiate or cooperate with Metro in auditing and inspecting such records

C. PROCUREMENT PROVISIONS

In addition to contracts manual provisions required by the Diversity and Economic Opportunity Department, Metro's procurement department requires selected policies, practices and procedures to be defined in contract provisions in response to the circumstances associated with those categories of procurements. These policies, practices and procedures likewise provide the Deputy Executive Officer, Diversity and Economic Opportunity Department with monitoring and enforcement alternatives.

(3) FINDINGS OF NON-COMPLIANCE AND ADMINISTRATIVE SANCTIONS

Contractors found not to be compliant with any part of the DBE program requirements shall be notified of Metro's finding of Non-Compliance, in writing, by certified mail. The notice shall cite the DBE program requirement under which the contractor is non-

compliant, state the date of the findings and the grounds on which the finding was made and state the category of sanctions being imposed. Upon a finding of non-compliance, Metro may choose to impose sanctions including, but not limited to:

- A. **MANDATORY DBE TRAINING**
Attendance at a DBE Training program shall be mandatory for the owners, partners, or officers, and staff member of each firm, responsible for the management of DBE businesses and for the preparation of DBE related records and reports. Contractors shall be responsible for all travel, meals, lodging and similar expenses. The Contract Compliance Unit of the Diversity and Economic Opportunity Department will conduct the program.
- B. **ASSESSMENT FOR NON-COMPLIANCE**
Contract payments will be reduced by the greater of:
an amount equal to up to Five Thousand Dollars (\$5,000) per day from the date Metro sends Notification to the contractor of the finding of non-compliance with a DBE Program requirement to the date the contractor is notified that Metro finds the firm has complied with the DBE program requirement or Metro chooses to excuse the contractor from performance of that DBE program requirement, or an amount equal to ten percent (10%) of the total contract value including any approved Change Orders.
- C. **SUSPENSION OF PAYMENT**
Metro will suspend payment to the contractor of any monies held by it, as retained on the contract.
- D. **TERMINATION OF THE CONTRACT FOR DEFAULT**
If the Board of Directors approves the action, Metro may terminate the contract for default.
- E. **SUSPENSION AND DEBARMENT (49 CFR Part 29)**
Information concerning the existence of a cause for suspension or debarment shall be reported, investigated and referred, when appropriate, to the proper official for consideration. After consideration, the official will issue the appropriate notice of proposed action.

(4) ENFORCEMENT MECHANISMS

The federal government has available several enforcement mechanisms that it may apply to firms participating in the DBE program, including, but not limited to, the following:

- A. Suspension or debarment proceedings pursuant to 49 CFR Part 26
- B. Enforcement action pursuant to 49 CFR part 31
- C. Prosecution pursuant to 18 USC 1001.

(5) RESOLUTION OF DISPUTES BETWEEN CONTRACTOR AND SUBCONTRACTORS

Disputes between the Contractor and any lower tier DBE subcontractors, which cannot be settled by discussions between the parties involved, shall be settled as described herein. Contractor shall notify Metro of such dispute within ten 10 days of failure to resolve through written cure notice process described above.

These provisions shall not apply to disputes between the Contractor and Metro. These provisions do not alter in any way or waive compliance with any provisions in Section GC36 "Submittal of Claims" included in the Contract Documents.

The Contractor and Subcontractors shall include the dispute resolution provision in their contract. Both parties shall agree to proceed through informal meetings, mediation, or arbitration, or any combination thereof. Dispute submittals shall include terms and timeframes and the service or assistance to be employed.

A. Informal Meetings

The Diversity and Economic Opportunity Department will coordinate informal meeting requests, to assist in the resolution of disputes between Contractor and subcontractor. The assigned Diversity and Economic Opportunity Representative will conduct the informal meetings with parties in dispute. All parties must agree to the procedure.

B. Mediation

The parties to a contract may agree to endeavor to settle a dispute through informal mediation under independent third party organizations. Individuals appointed to be mediators by Metro's Small Business Program Director can also be considered another source of independent third parties. Submission to informal mediation is voluntary by the parties, is not binding and offers advisory opinions only.

C. Arbitration

Should the parties fail to resolve any DBE related dispute arising out of or related to the contract via informal meetings or mediation, the parties are contractually obligated to submit the claims for arbitration within 120 days from date Metro is notified of dispute. Arbitration conducted pursuant to the contract shall be binding upon all parties to the arbitration. All arbitration is to be conducted in a manner consistent with section 1020 et seq. of the Public Contract Code and Section 1296 of Code of Civil Procedure.

Available mediation and arbitration services include:

The American Arbitration Association (213) 362-1900
Dispute Resolution Center (818) 793-7174

The Contractor shall incorporate this Section into each DBE subcontract related to work arising under this contract and shall not incorporate by reference. Only when resolution of DBE disputes attempted through informal meetings, mediation, and/or arbitration has failed may the Contractor formally request substitution of a DBE subcontractor.

D. Timeliness

Should the parties proceed to arbitration, moneys due, if any, shall be placed in a trust account. Such funds shall be released to the appropriate party within five (5) working days of a determination being issued by the arbitrator.

NOTE: Arbitration findings are binding upon the parties. However, the findings do not in any way relieve the contractor of its obligation to meet its DBE commitment.

ATTACHMENT 4

DBE COMMITMENT FORMS

TABLE 1 - DBE COMMITMENT FORMS

Form No.	Form Name	To Be Completed By		DBE Form Submittals
		Bidder/Proposer (Includes DBE Primes)	All Subcontractors/Suppliers	
Form 1	Proposed List of Subcontractors & Suppliers	<input checked="" type="checkbox"/>		Required
Form 2	DBE Affidavit	<input checked="" type="checkbox"/>		Required
Form 3	DBE Proposed Lower Tier Subcontractors & Suppliers		<input checked="" type="checkbox"/>	Required
Form 4	Business Data Sheet (DBE)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Required
Form 5	DBE Affirmation (Only if subcontracting with DBE business)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Required

- The Bidder/Proposer is required to complete and submit DBE Forms 1, 2 and 4. The Bidder/Proposer and each DBE subcontractor are required to complete and submit Form 5.
- All Subcontractors/Suppliers are required to complete and submit Form 3 (if they are subcontracting) and Form 4. Subcontractors and Suppliers are required to complete and submit Form 5 if subcontracting with a DBE business.

NOTE: All DBEs are included in the DBE contract goal: African Americans, Asian Pacific Americans, Native Americans, Hispanic Americans, Subcontinent Asian Americans, and Women (including Caucasian Women). Only RC DBEs listed in the Bidder/Proposer’s bid or proposal will be counted towards the contract goal.

LACMTA will achieve its overall DBE goal using race conscious and race neutral measures in accordance with the US Department of Transportation DBE Program Rule 49 Code of Federal Regulations, Part 26.

FORM 1 – PROPOSED LIST OF SUBCONTRACTORS AND SUPPLIERS

TO BE COMPLETED BY BIDDER/PROPOSER

Bidder/Proposer shall list all first tier DBE and non DBE firms that will perform any portion of the work on DBE Form 1. Bidders/Proposers are required to utilize Race Conscious (RC) DBE firms in the performance of this project. RC DBEs are groups that have been identified as statistically and significantly underutilized. All DBEs are included in the DBE contract goal: African Americans, Asian Pacific Americans, Native Americans, Hispanic Americans, Subcontinent Asian Americans, and Women (including Caucasian Women). LACMTA will achieve a percentage of its overall goal utilizing race neutral measures. Completion of this form and Form 4 (Business Data Sheet) fulfills the requirements of the California Subletting and Subcontracting Fair Practices Act.

1. Bidder's/Proposer's Name:	2. Project Name:
3. Total Bid/Proposal Price:	4. Bid/Proposal Due Date:

	A	B	C	D	E	F	G
	NAME OF BIDDER/PROPOSER AND ALL SUBCONTRACTORS (1 ST TIER)	DESCRIPTION OF WORK	INDICATE BELOW FOR ALL SUBCONTRACTORS:	BID PRICE	BID PRICE FOR DBE FIRMS	APPLY 60% for SUPPLIER/REGULAR DEALER OR INDICATE BROKER FEE OR COMISIONS	TOTAL DBE BID PRICE (COL # E OR F)
			C = Consultant Or Contractor S = Supplier ¹ M = Manufacturer B = Broker ¹ T = Trucker JV = Joint Venture				
Bidder/Proposer			Prime's \$ Amount → with its own workforce			\$	\$
1.							
2.							
3.							
4.							
5.							
6.							
7.							
8.							
9. TOTAL BID/PROPOSAL PRICE (Should equal Line #3 above)				\$	\$	\$	\$

¹If a DBE firm listed in column D and E are regular dealers, enter 60% of the bid price in column G. If a DBE firm listed in column D and E are brokers, enter the total amount of the fees and/or commissions charges in column F. If a DBE business is listed to provide materials/supplies, only sixty-percent (60%) of the cost for materials/supplies will be counted toward the DBE.

FORM 2 – DBE AFFIDAVIT

TO BE COMPLETED BY BIDDER/PROPOSER ONLY

PART A: DBE GOAL DECLARATION

RC DBE GOAL ACHIEVED

The Bidder/Proposer declares to the best of its knowledge, information and belief that by its efforts, it ACHIEVED a level of participation greater than or equal to the goal established for RC DBE participation.

The level achieved is _____ percent (_____ %)

RC DBE GOAL NOT ACHIEVED

The Bidder/Proposer declares to the best of its knowledge, information and belief that while it made efforts to achieve the RC DBE participation goal, it DID NOT ACHIEVE a level of RC DBE participation greater than or equal to the goal established for RC DBE participation.

The level achieved is _____ percent (_____ %)

While the Bidder/Proposer did exert efforts to achieve the goal, it was not successful. The Bidder/Proposer certifies that evidence of good faith efforts (GFE) will be submitted with the bid/proposal.

PART B: SIGNATURE

Executed on _____, 20_____, at _____, _____
Date City State

Business Name: _____

Authorized Signature: _____

Printed Name: _____

Title: _____

E-mail: _____

Phone: _____

FORM 3 - DBE PROPOSED LOWER TIER SUBCONTRACTORS & SUPPLIERS

TO BE COMPLETED BY ALL SUBCONTRACTORS

Project Name: _____

IFB/RFP #: _____

All subcontractors listed on Form 1 that are subcontracting work are requested to list ALL (DBE and Non-DBE) lower tier subcontractors. All DBEs are included in the DBE contract goal: African Americans, Asian Pacific Americans, Native Americans, Hispanic Americans, Subcontinent Asian Americans, and Women (including Caucasian Women). ONLY RC DBEs listed in the Bidder/Proposer's bid or proposal will be counted towards the contract goal. LACMTA will achieve a percentage of its overall goal utilizing race neutral measures. Completion of this form and Form 4 (Business Data Sheet) fulfills the requirements of the California Subletting and Subcontracting Fair Practices Act.

1. Subcontractor (Sub.):	2. Prime's Name:
3. Total Bid Price:	

	A	B	C	D	E	F	G
	NAME OF SUBCONTRACTOR AND ALL LOWER TIER SUBCONTRACTORS	DESCRIPTION OF WORK	<u>INDICATE BELOW FOR ALL SUBCONTRACTORS:</u> C = Consultant Or Contractor S = Supplier ¹ M = Manufacturer B = Broker ¹ T = Trucker JV = Joint Venture	BID PRICE	BID PRICE FOR DBE FIRMS	APPLY 60% for SUPPLIER/REGULAR DEALER OR INDICATE BROKER FEE OR COMISIONS	TOTAL DBE BID PRICE (COL # E OR F)
Subs			Your business' \$ Amount	\$	\$	\$	\$
1.							
2.							
3.							
4.							
5.							
6.							
7.							
8.							
9. TOTAL BID/PROPOSAL PRICE (Should equal Line #3 above)	→			\$	\$	\$	\$

Lower Tier Subcontractors

¹If a DBE firm listed in column D and E are regular dealers, enter 60% of the bid price in column G. If a DBE firm listed in column D and E are brokers, enter the total amount of the fees and/or commissions charges in column F. If a DBE business is listed to provide materials/supplies, only sixty-percent (60%) of the cost for materials/supplies will be counted toward the DBE.

FORM 4 - BUSINESS DATA SHEET (DBE)

TO BE COMPLETED BY BIDDERS/PROPOSERS AND ALL SUBCONTRACTORS LISTED ON FORM 1 AND FORM 3

Completion of this form, Form 1, and Form 3 fulfills the requirements of the California Subletting & Subcontracting Fair Practices Act.

PART A: BUSINESS DATA

- 1. Business Name: _____
- 2. Business Address: _____

Street	City	State	Zip
--------	------	-------	-----
- 3. Mailing Address: _____
(If different from above)

PO. Box or Street Address	City	State	Zip
---------------------------	------	-------	-----
- 4. County (and State) Business is located in: _____ (_____)
State
- 5. Name of Owner: _____

<small>Name</small>	<small>Title</small>
---------------------	----------------------
- 6. Owner'(s) Ethnicity: _____
- 7. Phone: () _____ - _____
- 9. Email Address: _____
- 8. Fax: () _____ - _____
- 10. Age of Business: _____ Years _____ Months
- 11. If your business requires a license, complete below:
 - a. License Type _____
 - b. License # _____
 - c. Expires on _____
- 12. Business Annual Gross Receipts:
 - a. Less than \$500,000
 - b. \$500,000 to \$1,000,000
 - c. \$1,000,000 to \$2,000,000
 - d. \$2,000,000 to \$5,000,000
 - e. Over \$5,000,000

PART B: DBE CERTIFICATION STATUS

- 13. Is your business currently a **DBE**? Yes No
- If "YES," **attach a copy of your DBE Certification Letter** and check all appropriate boxes below:

	DBE	Non-DBE
a. Certified by the California Unified Certification Program (CUCP)?	<input type="checkbox"/>	<input type="checkbox"/>
b. Certified by an organization outside of California?	<input type="checkbox"/>	<input type="checkbox"/>
c. Name of Certifying Agency: _____		
- 14. Is your business currently participating in a Joint Venture? Yes No
If "YES," a copy of the Joint Venture Agreement must be attached to this Form.
- 15. Name of Joint Venture and Partners. Is this business currently a certified DBE?

	DBE	Non-DBE
a. Business Name _____ Name of Certifying Agency _____	<input type="checkbox"/>	<input type="checkbox"/>
b. Business Name _____ Name of Certifying Agency _____	<input type="checkbox"/>	<input type="checkbox"/>
c. Business Name _____ Name of Certifying Agency _____	<input type="checkbox"/>	<input type="checkbox"/>

DBEs must attach a copy of current certification.

PART C: WORK DESCRIPTIONS

16. RFIQ, IFB, or RFP #: _____

17. Provide complete description of scope of work, services, and materials to be performed or furnished¹:

NAICS: _____

18. Will your business provide trucking company services on this project?

Please mark one: Yes No

If marked YES, please complete items a. to c. below. If answered NO, answer "Not Applicable."

- a. How many trucks does your company own? _____
- b. How many trucks does your company lease? _____
- c. How many trucks are registered to your company? _____

PART D: SIGNATURE

The authorized signer declares that the information on this form and any attachments, are current, complete and accurate.

Business Name: _____

Authorized Signature: _____
Signature of Director, Officer, General Partner or similarly situated Principal of the Business

Printed Name: _____

Title: _____

Date: _____

¹The NAICS web site <http://www.bls.gov/bls/NAICS.htm>

FORM 5 - DBE AFFIRMATION

TO BE COMPLETED BY BIDDER/PROPOSER AND AFFIRMED BY DBE SUBCONTRACTORS

Bidder/Proposer and DBE subcontractors, at any tier level, are required to complete this form and affirm that DBEs subcontractors will be utilized consistent with the level of participation referenced on the Form 1 (Proposed List of Subcontractors & Suppliers) and Form 3 (DBE Proposed Lower Tier Subcontractors & Suppliers). Bidder/Proposer and DBE subcontractors must sign this form attesting to the accuracy of the information provided.

1. RFP/IFB Number: _____
2. Project Name: _____
3. Name of the Prime: _____
4. Business Address: _____
Street City State Zip
5. Name of Proposed DBE Business: _____
6. Business Address: _____
Street City State Zip
7. Total DBE Dollars Committed: \$ _____
(Amount should match \$ Amount listed for this business on Form 1 or Form 3)
8. Identify the scope of work to be performed by DBE subcontractor and provide applicable Northern America Industry Classification System (NAICS) code(s): <http://www.census.gov/eos/www/naics/>

NAICS: _____

Affirmation:

Signatures of the authorized representatives of the Bidder/Proposer and the DBE business below, represents the commitment by both parties. A formal subcontract agreement between the Bidder/Proposer and the DBE subcontractor shall include the scope(s) of work and monetary commitment referenced above. DBE commitments in this document shall be a condition of contract award.

Name of Business

Authorized Signature of Business¹

Typed or Printed Name of Signee

Title of Signee

Telephone

Email

Date

Name of DBE Business

Authorized Signature of DBE Business

Typed or Printed Name of Signee

Title of Signee

Telephone

Email

Date

¹ Signature of the Contractor to which the DBE business will report to directly

ATTACHMENT 5

GOAL SETTING METHODOLOGY



Metro

Los Angeles County
Metropolitan Transportation Authority

One Gateway Plaza
Los Angeles, CA 90012-2952

213.922.2000 Tel
metro.net

DISADVANTAGED BUSINESS ENTERPRISE OVERALL GOAL AND GOAL SETTING METHODOLOGY REPORT

FEDERAL FISCAL YEARS 2016-2018

I. INTRODUCTION

The Disadvantaged Business Enterprise (DBE) overall goal setting methodology is a requirement set forth in the United States Department of Transportation (USDOT) DBE regulations, 49 CFR Part 26.45. The DBE regulations require USDOT recipients to set an overall triennial goal for DBE participation in their federally assisted projects.¹

The regulations require that the overall goal be prepared using a two-step process. According to the *USDOT Tips for Goal Setting*² (*USDOT Tips*), approved by the General Counsel of the USDOT, the recipient must first determine a base figure for the relative availability of certified DBEs and potentially certified Minority and Woman-owned Business Enterprises, hereafter collectively referred to as Disadvantaged Business Enterprises (DBEs), in the relevant market area. Next, the recipient must examine all relevant evidence to determine what adjustment, if any, is needed to the base figure in order to arrive at an overall goal. The final adjusted figure is the recipient's overall goal, and represents the proportion of federal transportation funding that the recipient is expected to allocate to DBEs during the subsequent three federal fiscal years (FFY). Once the adjusted overall goal is determined, the process requires considering what portion of the goal will be met by race- and gender-neutral measures.

If a recipient purports that it can meet its overall goal with race- and gender-neutral measures, those measures must be utilized. In contrast, if the recipient determines it cannot achieve the entire overall goal using only race- and gender-neutral measures, it must establish a race- and gender-conscious portion of the overall goal.³

¹ Effective February 28, 2011, the USDOT amended the DBE regulations set forth in 49 CFR Part 26 as described in the Federal Register, Volume 76, Number 19 and Vol. 79 Thursday, No. 191 October 2, 2014 Part II Disadvantaged Business Enterprise: Program Implementation Modifications; 49 CFR Part 26 [Docket No. OST-2012-0147] IN 2105-AE08.

² United States Department of Transportation, *Tips for Goal Setting in the Disadvantaged Business Enterprise (DBE) Program*, U.S. DEPARTMENT OF TRANSPORTATION, May 15, 2015, <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>.

³ Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs, 49 CFR Part 26, §26.51(f)(1), §26.51(d).

Pursuant to *Western States Paving v. State of Washington*⁴ (*Western States*), recipients in the Ninth Circuit cannot consider the use of a race- or gender-conscious goal unless a finding of statistically significant disparity has been made for the ethnic and gender groups to be included in the race- or gender-conscious goal. The Ninth Circuit determined that statistical findings demonstrating a “small disparity” are insufficient probative value to meet the strict scrutiny standard. Citing *Croson*, the Court declared that an inference of discriminatory exclusion could arise where there is a statistically significant disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or its prime contractors.

This *Overall DBE Goal Setting Report* is based upon the DBE regulations contained in 49 CFR Part 26.45, as amended, the decisions of the United States Federal Court, and the *USDOT Guidance Memorandum*.

II. PROPOSED OVERALL GOAL FOR FFY 2016-2018

Based on the requirements set forth in 49 CFR Part 26, *Western States* and the *USDOT’s Guidance Memorandum*, Los Angeles County Metropolitan Transportation Authority (Metro) is submitting a goal for FFY 2016-2018. The recommended overall DBE goal for the period is 18%. The weighted figure of 18.42% was rounded down to 18%. The Federal Transit Administration (FTA) reporting period for the recommended overall goal will be October 1, 2016, to September 30, 2018.

III. OVERALL GOAL SETTING METHODOLOGY

The two-step goal setting process required by the regulations and the findings of *Western States* has been used to determine the recommended overall goal for FFY 2016-2018. The two steps for setting an overall goal are to:

- Establish a base figure for the relative availability of DBEs
- Determine the base figure adjustment, if necessary

The base figure is intended to be a measurement of the current ready, willing, and able DBEs as a percentage of all businesses ready, willing, and able to perform the recipient’s anticipated FTA-assisted contracts.⁵ The regulations present five options for establishing a base figure for relative availability of DBEs. The five options as set forth in the regulations are listed in Table 1.01.

⁴ *Western States Paving Co. v. United States & Washington State Department of Transportation*, 407 F. 3d 983 (9th Cir. 2005).

⁵ United States Department of Transportation, *Tips for Goal Setting in the Disadvantaged Business Enterprise (DBE) Program*, U.S. DEPARTMENT OF TRANSPORTATION, May 15, 2015, <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>.

Table 1.01: Methods to Determine Baseline Figure

Baseline Figure Method
Bidders List
DBE Directories and Census Data
Other Recipient's Base Figure
Disparity Study
Alternative Method

1. Bidders List Method

This method for calculating a base figure requires Metro to have a comprehensive bidders list with DBE prime contractors and subcontractors classified by industry in order to determine availability. This method limits DBE availability to the number of businesses that have directly participated in, or attempted to participate in, Metro's FTA-assisted contracts in the recent past. It does not include potential DBEs which have not bid on Metro's FTA-assisted contracts as either a prime contractor or subcontractor.

2. DBE Directories and Census Data Method

DBE directories of California USDOT recipients are consolidated into the California Unified Certification Program (CUCP) database. Using the CUCP database to determine DBE availability is limited to USDOT-certified businesses. However, to determine availability, *USDOT Tips* requires the inclusion of businesses that are not certified but are potential DBEs to determine availability. The Census Bureau's County Business Pattern (CBP) data is derived from businesses' federal income tax filings and, therefore, cannot address businesses' willingness to do business with Metro. Additionally, the CBP does not have the functionality to filter businesses that work exclusively in the private sector, or those which are not interested in contracting with Metro.

3. Other Recipient's Base Figure Method

This method uses the goal of another USDOT recipient as the base figure for relative availability. Metro can only use another recipient's goal if it is set in accordance with DBE regulations and performs similar contracting in a similar market area. This method presumes that there is another USDOT recipient which does the same or similar contracting in the same geographic market area. These conditions cannot be met in Metro's market area.

4. Alternative Method

Alternative methods may be used to determine a base figure for the overall goal. Any methodology used to determine a base figure must be based on demonstrable evidence of the local market conditions, and be designed to ultimately attain a goal that is related to the relative availability of DBEs and potential DBEs in the recipient's market area. The

alternative method provides the most flexibility, but it is also subject to a higher level of scrutiny.

5. Disparity Study Method

The disparity study methodology is the most comprehensive method for identifying ready, willing, and able DBEs that provide goods and services for Metro's anticipated FTA-assisted projects. A disparity study identifies businesses that made bids to the agency as either a prime or subcontractor, and those that are interested in bidding. It enumerates DBEs that are bidders as well as willing and able businesses which have not bid. This method is also recommended by the *USDOT Guidance Memorandum* for recipients in the Ninth Circuit. The availability data derived from Metro's 2012 Disadvantaged Business Enterprise (DBE) Program Disparity Study was utilized in the goal setting process. The availability of businesses as enumerated in the 2012 DBE Program Disparity Study was augmented with current certification, trade and business association, and chambers of commerce lists.

IV. STEP ONE BASE FIGURE CALCULATION

A. Goal Setting Methodology

The initial phase of the Step One analysis requires the compilation of critical data regarding the recipient's procurement. The relevant data includes:

- Definition of the market area from an analysis of previous contract awards
- Identification of the anticipated federally assisted projects and their costs
- Classification of the anticipated federally assisted projects by North American Industry Classification System (NAICS) code
- Enumeration of qualified businesses in the market area that are willing and able to provide the goods or services Metro anticipates awarding
- Analyses of Metro's expenditures that were funded by federal dollars during the 2008-2011 study period

1. Definition of Metro's Relevant Market Area

The relevant market area in Metro's 2012 DBE Program Disparity Study was determined by the business location of prime contracts awarded during the January 1, 2008, to December 31, 2010 study period. A cluster analysis was prepared by business location and award amount to define the market area. All procurement with non-profits and other government agencies were excluded from the analysis. The analysis shows 71.86% of prime contract dollars were awarded to 107 businesses located in Los Angeles County, Metro's market area. The remaining 75 businesses, which represent 28.14% of contract

dollars, were awarded in areas outside of Los Angeles County.⁶ Table 1.02 presents the location of utilized businesses during the study period.

Table 1.02: Vendors Utilized During Study Period

Business Location	Total Businesses	Percentage of Contract Dollars
Los Angeles County	107	71.86%
Outside Los Angeles County	75	28.14%
TOTAL	182	100.00%

2. Identify Procurement Types by NAICS Codes

A six-digit NAICS code was assigned to each of the anticipated federally funded projects in FFY 2016-2018. The NAICS codes were derived from the descriptions of the anticipated federally assisted projects. Table 1.04 below defines the NAICS codes by industry.

Table 1.03: FFY 2016-2018 Federally Assisted Projects by NAICS Code

NAICS Code	Industry	NAICS Code Description
238190	Construction	Other Foundation, Structure, and Building Exterior Contractors
237990		Other Heavy and Civil Engineering Construction
238990		All Other Specialty Trade Contractors
541330	Architecture and Engineering, Professional Services	Engineering Services
541370		Surveying and Mapping (except Geophysical) Services
541380		Testing Laboratories
541990		All Other Professional, Scientific, and Technical Services
423120	Goods and Other Services	Motor Vehicle Supplies and New Parts Merchant Wholesalers

⁶ For complete market area information, see the *Chapter 5: Market Area Analysis* in the 2012 Disadvantaged Business Enterprise (DBE) Program Disparity Study Final Report. The market area distribution for all industries can be found on page 5-11 in Table 5.06.

3. Identify Anticipated Federally Assisted Projects

The federally assisted projects Metro anticipates awarding over the next three fiscal years were identified with the estimated cost of each project. Estimated project costs for the three-year projections were grouped by NAICS code based on individual project descriptions. Table 1.03 presents the anticipated FFY 2016-2018 projects with the estimated budget.

Table 1.04: Anticipated Projects Estimated Contract Amount

NAICS Code	Industry	NAICS Code Description	Anticipated Amount
238190	Construction	Other Foundation, Structure, and Building Exterior Contractors	\$12,810,000.00
237990		Other Heavy and Civil Engineering Construction	\$1,608,000,000.00
238990		All Other Specialty Trade Contractors	\$500,000.00
541330	Architecture and Engineering, Professional Services	Engineering Services	\$174,601,033.00
541370		Surveying and Mapping (except Geophysical) Services	\$10,000.00
541380		Testing Laboratories	\$60,000.00
541990		All Other Professional, Scientific, and Technical Services	\$20,000.00
423120	Goods and Other Services	Motor Vehicle Supplies and New Parts Merchant Wholesalers	\$1,722,400.00
Total			\$1,797,723,433.00

B. Base Figure Determination

The base figure is intended to be a measurement of the relative percentage of ready, willing, and able DBEs. The recipient is required to measure willing and able businesses in its marketplace, using the best available evidence, to derive a fair and accurate base figure that represents the percentage of available DBEs.

According to Section 26.45(c) and *USDOT Tips*, the overall goal must be based on demonstrable evidence of ready, willing, and able DBEs relative to all ready, willing, and able non-DBEs available to participate on Metro's FTA-assisted contracts.

The USDOT rules require the calculation of the base figure using the following formula:

$$\text{Step One Base Figure} = \frac{\text{Ready, willing and able DBEs}}{\text{All ready, willing and able businesses (Including DBEs and Non – DBEs)}}$$

The availability database compiled for Metro’s 2012 DBE Program Disparity Study, which was augmented with updated certification and business directories, was used as the source to determine the availability of DBEs and non-DBEs. The availability database was populated using three sources which identified businesses in the market area that provide the goods and services that Metro procures. The first source was Metro’s utilized businesses, the second source was local, state and federal government certification lists, and the third source was business associations’ membership lists. Any business identified from more than one source was counted only once in an industry.

To enumerate a more refined accounting of availability, the database was then queried for businesses within the NAICS codes of the anticipated contracts only. Businesses that do not perform the types of work related to the anticipated contracts were excluded to ensure that the base figure did not overstate the number of available businesses. Table 1.05 below presents the relative availability by NAICS code for FFY 2016-2018. The percent of available businesses in each NAICS code reflects the portion of all available businesses in the market area. The relative availability of DBEs within the market area is 40.77%.⁷

Table 1.05: Relative Availability by NAICS Code for FFY 2016-2018

NAICS Code	Number of Available Businesses		Percent of Total Available Businesses	
	DBE	All	DBE	All
238190	167	466	4.97%	13.86%
237990	6	47	0.18%	1.40%
238990	238	604	7.08%	17.96%
541330	532	1176	15.82%	34.97%
541370	197	545	5.86%	16.21%
541380	176	453	5.23%	13.47%
541990	55	71	1.64%	2.11%
423120	0	1	0.00%	0.03%
TOTAL	1371	3363	40.77%	100.00%

C. Weighted Base Figure

Weighting is recommended in *USDOT Tips* to determine the overall goal. The first step is to calculate a weight for each NAICS code, which is the percentage of the estimated

⁷ The availability analysis for goal setting was predicated on businesses in the NAICS codes for anticipated projects only, whereas the 2012 Disadvantaged Business Enterprise (DBE) Program Disparity Study Final Report enumerates the availability of all businesses in the market area.

budget for FFY 2016-2018 anticipated contracts. The second step is to divide the number of DBEs by the total number of businesses in each NAICS code and multiply the result by the corresponding weight in order to calculate the weighted percentage of DBE availability. Lastly, the weighted percentages in each NAICS code are combined to determine the weighted base figure. Table 1.06 presents the calculation of weighted availability. The weighted DBE availability is 18.42%.

Table 1.06: Weighted Base Figure

NAICS Code	Percent of Firms		Anticipated Contract Amount	Weight	Percent of Weighted Firms	
	DBE	Non-DBE			DBE	Non-DBE
238190	0.358	0.642	\$12,810,000	0.71%	0.26%	0.46%
237990	0.154	0.846	\$1,608,000,000	89.45%	13.76%	75.69%
238990	0.389	0.611	\$500,000	0.03%	0.01%	0.02%
541330	0.452	0.548	\$174,601,033	9.71%	4.39%	5.32%
541370	0.361	0.639	\$10,000	0.00%	0.00%	0.00%
541380	0.389	0.611	\$60,000	0.00%	0.00%	0.00%
541990	0.775	0.225	\$20,000	0.00%	0.00%	0.00%
423120	0.000	1.000	\$1,722,400	0.10%	0.00%	0.10%
TOTAL			\$1,797,723,433	100.00%	18.42%	81.58%

V. STEP TWO BASE FIGURE ADJUSTMENT

A. Considerations for Adjustments to the Base Figure

The Step Two base figure adjustment, as recommended in *USDOT Tips*, requires examining relevant and reliable data in the recipient’s market area to determine if an adjustment to the base figure is warranted. The consideration of an adjustment is intended to account for any impact the relevant factors may have on DBEs’ contracting opportunities with Metro. The following factors were considered for the Step Two adjustment:

- Past DBE participation
- Documented private-sector discrimination
- Anecdotal evidence from the Metro 2012 DBE Program Disparity Study

1. Past DBE Participation

DBE participation during FFY 2013-2015 was documented in Metro’s FFY13 2nd Semi-Annual Report, FFY14 1st and 2nd Semi-Annual Reports, and FFY15 1st Semi-Annual Report. Table 1.07 details the median prime and subcontractor race- and gender-neutral and race- and gender-conscious DBE participation during FFY 2013-2015. The median figure is the center point among an ordered list of figures. Metro achieved 2.23% median

prime and subcontractor race- and gender-neutral and race- and gender-conscious DBE utilization; the highest overall DBE utilization of 22.41% was achieved in FFY 2014.

Table 1.07: FFY 2013-2015 Median Past DBE Participation

FFY13	FFY14	FFY15
0.51%	22.41%	2.23%
Median DBE Participation 2.23%		

Table 1.08 details DBE utilization as a percent of all dollars during FFY 2013-2015.

Table 1.08: FFY 2013-2015 DBE Utilization

FFY	Total Dollars	Total Race-Conscious Dollars	Total Race-Neutral Dollars	DBE Utilization
2013	\$ 28,541,837.00	\$ -	\$ 2,332,669.00	0.51%
2014	\$ 349,839,369.00	\$ 96,830,502.00	\$ 6,019,377.00	22.41%
2015	\$ 80,569,469.00	\$ 7,168,806.00	\$ 3,045,735.00	2.23%
Total	\$ 458,950,675.00	\$ 103,999,308.00	\$ 11,397,781.00	

2. Documented Private Sector Discrimination

Private sector business practices, which are not subject to government requirements, are indicators of marketplace conditions which could affect the formation and growth of DBEs. *Concrete Works of Colorado v. City of Denver*⁸ (*Concrete Works II*) set forth a framework for considering evidence of discrimination in private sector business practices. In accordance with *Concrete Works II*, three regression models were used to examine three outcome variables—business ownership rates, business earnings, and business loan approval. Each regression model compared minority males and females and Caucasian females to similarly situated non-minority males by controlling for race- and gender-neutral explanatory variables such as age, education, marital status, and access to capital. This adjustment factor was considered, however, no adjustment was made due to the various exemplary practices and support services Metro has implemented in order to decrease the barriers that DBEs confront when attempting to do business.

3. Anecdotal Evidence from Metro’s 2012 DBE Program Disparity Study

In the anecdotal accounts from interviews conducted for Metro’s 2012 DBE Program, Metro’s Small Business Office was credited for providing valuable technical assistance services to DBEs. Many DBEs reported that Metro’s DBE program was instrumental in building capacity for their businesses as well as aiding them in securing work from other public agencies. This adjustment factor was considered, however no adjustment was made because the anecdotal accounts were not quantifiable.

⁸ *Concrete Works of Colo., Inc. v. City of Denver*, 86 F. Supp. 2d 1042, 1073 (D. Colo. 2000); rev’d on other grounds, 321 F.3d 950 (10th Cir. 2003); cert. denied, 540 U.S. 1027 (2003).

B. Adjustments to the Base Figure

As required by the *USDOT Tips*, the factors noted above were considered and no adjustments were made for the Step Two analysis. The weighted figure of 18.42% was rounded down to 18%.

FINAL OVERALL DBE GOAL
18%

VI. RACE- AND GENDER-NEUTRAL GOAL

A. Formulation of the Race- and Gender-Conscious/Neutral Portions of the Goal

The final requirement of the goal setting process, as noted in 49 CFR 26.51, is to determine the projected portion of the overall goal that will be achieved by race- and gender-neutral measures. The DBE regulations in 49 CFR 26.51 require that a recipient meet the maximum feasible portion of its overall goal by using race- and gender-neutral measures. Based on Metro's median past DBE participation, as documented in Table 1.09, it is expected that 2% of the 18% overall can be achieved using race- and gender-neutral measures. The remaining 16% will be met through race- and gender-conscious measures.

Table 1.09: Race and Gender-Neutral/Conscious Portions of the Goal

FFY	DBE Utilization
2013	0.51%
2014	22.41%
2015	2.23%

$$2\% \text{ Race Neutral} + 16\% \text{ Race Conscious} = \mathbf{18\% \text{ Overall DBE Goal}}$$

Recipients in the Ninth Circuit cannot consider the use of a race-conscious goal unless a finding of disparity has been made for the ethnic groups to be included in the application. The disparity findings in Metro's 2012 DBE Program Disparity Study documented a disparity for African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and Hispanic Americans.⁹ Caucasian females were over utilized.

An updated analysis was conducted to determine the current utilization of Caucasian females since the race-conscious program was implemented in 2013 without Caucasian females. Unlike racial discrimination which is subject to strict scrutiny, gender discrimination is only subject to an intermediate scrutiny standard of review. Therefore,

⁹ For the complete disparity analysis findings, see *Chapter 9: Disparity Analysis* in the 2012 Disadvantaged Business Enterprise (DBE) Program Disparity Study Final Report.

Caucasian females need only to be underutilized to be included in a gender-conscious remedy. Since not including Caucasian females in the DBE goal, utilization is now considerably lower than in the 2012 DBE Program Disparity Study. Given the fact that Caucasian females are currently underutilized, this gender group will be included in the FFY 2016-2018 overall DBE goal.

B. Race and Gender-Neutral Initiatives

a) Small Business Prime

Launched in June of 2014, this set-aside initiative reserves certain types of contracts for Small Business Enterprises (SBEs) qualified under the appropriate North American Industry Classification System codes. The program covers competitively negotiated contracts, sealed bids and public works that meet threshold criteria from \$3,000 up to \$5 million. Applicable procurements will be set aside for competition among SBEs when and if there is a competitive pool of three or more SBE firms available to perform the work. To date, SBE prime awards have increased 72% in FY15 from FY14.

b) Metro Connect

This site is designed to give small businesses a direct route to working and growing with Metro. The site gives access to tools and resources that are designed to support small business growth, such as networking events, an online Tool Kit, and certification information. Small business can also view current contracting opportunities, or visit the 12-Month Look Ahead page to see future opportunities. Metro Connect aims to increase the opportunity for small businesses through various efforts that provide greater access and transparency around the agency's procurement process and a direct route to Metro's small business programs.

c) Vendor Portal (Beta)

Metro's Vendor Portal is a "one-stop shop" with all the information and resources that make doing business with Metro easier and more efficient than ever.

The site includes online tools to:

- Access current & future metro business opportunities
- Learn about guidelines & qualification programs
- Complete online programs
- Complete online forms
- Access small business tools
- Learn about the latest procurement news & tips

d) Twelve Month Look-Ahead

The information listed on the twelve month look-ahead in the vendor portal is a preview of Metro's planned solicitations for the next twelve months. Newly designed in response to feedback from the business community, this web-based, single source of upcoming agency-wide procurement opportunities will enable businesses to better plan for pursuing bids. (The information is subject to change at any time without notice.)

e) Meet the Project Managers Networking/Relationship Building Event

Metro and the Transportation Business Advisory Council (see below) introduced this new networking opportunity in May of 2015. The event provides small businesses the opportunity to meet face-to-face with Project Managers (PMs) who oversee large and small Metro projects, a vital link to working with Metro, given the vast number of projects that are in the works or being considered for future development. A listing of PMs and their areas of expertise is sent to all who register for this event.

f) Meet the Primes Network/Relationship Building Event

These events provide opportunities for small businesses to build relationships with large contractors that do business with Metro, and other agencies in the Southern California region. At these events, small businesses can share their products, services and professional expertise with approximately 20 large businesses, and with Metro personnel.

g) Meet the Buyers Network/Relationship Building Event

This event, conducted at least twice per year, provides an opportunity to meet in person with Metro's Contract Administrators and Buyers. DBEs and other small businesses can share their products and services with pertinent Metro staff. They can also receive information and assistance on registering as a vendor, certification as a DBE, completing prequalification requirements, enrolling in the Small Business Orientation sessions, and meeting key Metro personnel.

h) Monthly "How to Do Business with MTA" Workshops

The Small Business Orientation helps small and disadvantaged businesses understand how to do business with Metro. The orientation covers the requirements a business must meet in order to do business with Metro, the certifications that are required for certain programs or types of projects, the types of contracts Metro typically performs, where to find project solicitations, and how to obtain other information about Metro. Small business owners also meet procurement staff in their area of expertise to ask questions, as staff is available.

i) Small Business Enterprise Program

The Small Business Enterprise (SBE) Program was first adopted in 1997 and was designed to comply with California's Proposition 209, which prohibits explicit consideration of race or gender in the award of state and locally funded contracts. The 15 percent SBE utilization in federally assisted contracts was increased to 30 percent for fiscal years 2012 and 2013. The SBE Program applies a SBE subcontracting goal to competitively bid and negotiated contracts, and is identical in practice and scope to Metro's DBE program. Metro uses the California Unified Certification Program (CUCP) DBE application for the SBE program, as the requirements are similar, except for the necessity to establish the owner's social disadvantage for DBE Program eligibility. All businesses which received DBE certification are also certified as a SBE.¹⁰

j) Shared Responsibility Program

In 2011, Metro launched a new Chief Executive Officer initiative agency-wide in order to engage departments at the highest level in increasing DBE participation. Metro has established an internal 20 percent small and disadvantaged business target for each department. This shared responsibility requires department executives to identify contracting opportunities within their respective departments for small business participation. Department year-end performance is tracked and reported to the Chief Executive Officer, and is included in executive performance reviews.

k) Transportation Business Advisory Council

Small Business owners and interested parties are welcomed and encouraged to attend the monthly Transportation Business Advisory Council (TBAC) meeting. TBAC meetings provide small businesses a forum to discuss topics and issues impacting business owners throughout the contracting community. Particularly, TBAC advocates for small business owners to have increased access to Metro's procurement process. TBAC meetings are beneficial for all business interests. The meetings feature: a monthly speaker series, Metro current and future contract opportunities, legislation updates, and current trends in transportation. TBAC is comprised of professional business associations representing an array of industries and trades. TBAC has been instrumental in working with the Diversity & Economic Opportunity Department to develop a successful path toward bridging relationships between small businesses and Metro.¹¹

1 Los Angeles County Metropolitan Transportation Authority, Small Business Enterprise (SBE), <http://www.metro.net/about/deod/sbe/>

2 Los Angeles County Metropolitan Transportation Authority, Transportation Business Advisory Council (TBAC), <http://www.metro.net/about/deod/tbac/>

l) Unbundling Prime Contracts

Metro currently unbundles large contracts in order to facilitate the participation of DBE businesses. In addition to ongoing efforts, Metro will take additional affirmative steps to break up large contracts, when feasible, in order to increase small business contracting opportunities and participation.

m) Insurance Broker Panel

Metro has established a panel of commercial insurance brokers to assist businesses that lack required insurance coverage. The panel provides proposals and insurance placement for contractors in order to assist them in meeting Metro's risk management requirements. The broker panel is disseminated to small businesses through the Transportation Business Advisory Council (TBAC), small business outreach events, Metro's small business orientation classes and published on Metro's website.

n) Attendance at Vendor Fairs/Business Networking Events

Metro representatives attend vendor fairs of other agencies to provide information on how to do business with Metro, and to provide information on upcoming contracting opportunities.

o) Memberships in Contracting Organizations

Metro is a member of various contracting organizations, and attends membership meetings and membership events to provide information on how to register as a Metro vendor and become SBE or DBE certified.

VII. PUBLIC NOTICE AND CONSULTATION

In accordance with 49 CFR 26.45(g), Metro shall provide opportunity for public participation in establishing its overall DBE goal.

1. Metro posted DBE overall goal and goal methodology report on its Metro Vendor Portal website for public comment on June 19, 2015.
2. Metro held a 30-day public comment period beginning June 19, 2015 through July 20, 2015. The goal report was also made available for inspection for the same 30-day period.
3. Metro sent E-blasts to its small business outreach databases, with over 4,424 email recipients.

4. Metro issued a Public Notice in the following newspapers: *LA Daily News, LA Times, Long Beach Press Telegram, Passenger Transport, LA Watts Times, LA Sentinel, Southwest Wave, LA Opinion, Asian Journal, Chinese Daily/World Journal, Korea Times, Korea Daily, Saigon Times, Thoi Luan, Armenian Media Network, India Post, Eastside Sun, and CA Journal for Filipino Americans.*
5. Metro presented the Overall Goal and Goal Methodology at the monthly July 2, 2015 Transportation Business Advisory Council Meeting and held a public consultation meeting on July 8, 2015. Written comments were received and reviewed. Metro responded to all comments received.

ATTACHMENT 6

CERTIFICATION APPLICATION FORMS



Metro

Firm: _____

METRO SMALL BUSINESS CERTIFICATION APPLICATION

How did you learn of Metro's Certification Programs? (Please circle one and give information.)

- 1. Metro Event? Event name: _____
- 2. Metro Workshop? Workshop name: _____
- 3. TBAC Organization? Member organization: _____
- 4. Metro Print ad/flyer? Describe: _____
- 5. Metro Staff? Name/Department: _____
- 6. Another Agency? City of LA Caltrans OCTA Other: _____
- 7. Other? Describe: _____

THE ATTACHED CUCP APPLICATION IS USED BY THE LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY (METRO) TO PROCESS

- DISADVANTAGED BUSINESS ENTERPRISE (DBE) CERTIFICATIONS
- SMALL BUSINESS ENTERPRISE (SBE) CERTIFICATIONS. **(SUBMIT THE SAME APPLICATION)**

Please check below all the certification(s) your firm is applying for:

- DBE Yes No *(Submit all required documents – see DBE Document Checklist in application)*
- SBE Yes No *(Submit all required documents – see SBE Instructions in SBE Program)*

When completed, please return, ***with all the supporting documents***, to:

Diversity & Economic Opportunity Department (DEOD)
Certification Unit, Mail Stop 99-8-4
One Gateway Plaza
Los Angeles, CA 90012

NOTE: Failure to provide ALL required documentation will delay the processing of your certification application. No action will be taken on your application until all items have been submitted.

If you are pursuing a Metro contract opportunity and would like to request expedited certification, please provide us the following information:

IFB / RFP No.: _____ Due Date: _____

Project Title: _____

Comments: _____

If you have any questions, please contact us at the Metro DEOD Hotline at 213-922-2600 or fax at 213-922-7660.
Email (preferable): CertificationUnit@metro.net

CALIFORNIA UNIFIED CERTIFICATION PROGRAM (CUCP)

**DISADVANTAGED BUSINESS ENTERPRISE (DBE)/
AIRPORT CONCESSIONS DISADVANTAGED BUSINESS
ENTERPRISE (ACDBE)**

UNIFORM CERTIFICATION APPLICATION



To access the statewide CUCP DBE database, please log onto:

CALIFORNIAUCP.COM

CALIFORNIA UNIFIED CERTIFICATION PROGRAM (CUCP)



Dear Business Owner:

Thank you for your interest in participating in the California Unified Certification Program (CUCP) for Disadvantaged Business Enterprise (DBE) and Airport Concessions Disadvantaged Business Enterprise (ACDBE). As mandated by the United States Department of Transportation (U.S. DOT), 49 Code of Federal Regulations (CFR), Part 23 and 26, all U.S. DOT recipients of federal financial assistance must participate in a statewide UCP by March 2002. The UCP is a "One-Stop Shopping" certification procedure that eliminates the need for DBE/ACDBE firms to obtain certifications from multiple agencies within the State.

The CUCP is charged with the responsibility of certifying firms and compiling and maintaining the Database of certified DBE/ACDBEs for U.S. DOT grantees in California, pursuant to 49 CFR Part 23 and 26. The Database is intended to expand the use of DBE/ACDBE firms by maintaining complete and current information on those businesses and the products and services they can provide to all grantees of California.

Please complete the attached application and supplemental questionnaire if you wish to be considered for DBE/ACDBE certification and your business meets the following general guidelines:

- a) The firm must be at least 51% owned by one or more socially and economically disadvantaged individuals.
- b) The firm must be an independent business, and one or more of the socially and economically disadvantaged owners must control its management and daily operations.
- c) Only existing for-profit "Small Business Concerns," as defined by the Small Business Act and Small Business Administration (SBA) regulations may be certified.

DBE Applicants are first subject to the applicable small business size standards of the SBA. Second, the average annual gross receipts for the firm (including its affiliates) over the previous three fiscal years must not exceed U.S. DOT's cap of \$23.98 million.

ACDBE Applicants are considered a small business if its gross receipts (including its affiliates), averaged over the firm's previous three fiscal years, do not exceed \$56.42 million, with the following exceptions:

- (1) *Banks and financial institutions*: \$1 billion in assets;
- (2) *Car rental companies*: \$75.23 million average annual gross receipts over the firm's three previous fiscal years.
- (3) *Pay telephones*: 1,500 employees;
- (4) *Automobile dealers*: 350 employees.

- d) The Personal Net Worth (PNW) of each socially and economically disadvantaged owner must not exceed \$1.32 million, excluding the individual's ownership interest in the applicant firm and the equity in his/her primary residence.

Socially and economically disadvantaged individual means any individual who is a citizen of the United States (or lawfully admitted permanent resident) and who is a member of the following groups: Black American, Hispanic American, Native American, Asian-Pacific American, Subcontinent Asian American, or Women,

or

Any individual found to be socially and economically disadvantaged on a case-by-case basis by a certifying agency pursuant to the standards of the U.S. DOT 49 CFR Part 26, Appendix E

In order to avoid unnecessary delays, please complete all portions of the application and supplemental questionnaire, placing "N/A" next to items that are not applicable. Include all copies of documents requested on the application, and have the *Affidavit of Certification* notarized. Additional documentation may be requested if it is considered necessary to make a certification determination. Incomplete applications/supplemental questionnaires or applications/supplemental questionnaires without all the required documents will not be evaluated until such documents are submitted. We recommend keeping a copy of all submitted documents for your records.

REMEMBER: It is no longer necessary to apply at more than one agency. If your firm meets the criteria for certification, it will be entered into the Database of DBE/ACDBEs for all U.S. DOT grantees in California. Only firms currently certified as eligible DBE/ACDBEs may participate in the DBE programs of U.S. DOT grantees of California.

The CUCP has Certifying agencies throughout the State to effectively facilitate statewide DBE/ACDBE certification activities. Please forward your completed certification packet to one of the agencies serving the county where your firm has its principal place of business (see enclosed Roster of Certifying Agencies).

For Out-of-State Firms: The CUCP cannot process a new application for DBE certification from a firm having its principal place of business in another state unless the firm has already been certified in that state. If your firm is located outside of California and is certified as a DBE in your home state, please forward the following pursuant to *49 CFR Part 26.85*, CUCP Out of State Declaration form, a copy of the approval letter, a complete copy of the application form, all supporting documents and any other information you have submitted (to-date) to your home state or any other state related to your firm's certification to the California Department of Transportation. ACDBE applicants submit the same information to the appropriate ACDBE Certifying Agency (see enclosed Roster of Certifying Agencies).

Notwithstanding any provision of Federal or state information disclosure law, the CUCP shall not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm. However, if a USDOT recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information from the CUCP, the information will be made available to the other recipient.

CALIFORNIA UNIFIED
CERTIFICATION PROGRAM



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

Roadmap for Applicants

1. Should I apply?

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

- The firm is a for-profit business that performs or seeks to perform transportation related work (or a concession activity) for a recipient of Federal Transit Administration, Federal Highway Administration, or Federal Aviation Administration funds.
- The firm is at least 51% owned by a socially and economically disadvantaged individual(s) who also controls it.
- The firm's disadvantaged owners are U.S. citizens or lawfully admitted permanent residents of the U.S.
- The firm meets the Small Business Administration's size standard and does not exceed \$23.98 million in gross annual receipts for DBE (\$52.47 million for ACDBEs). (Other size standards apply for ACDBEs 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? *SEE ATTACHED ROSTER OF DBE CERTIFYING AGENCIES*

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

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

5. Where can I find more information?

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

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

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

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



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

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

Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information

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

B. Prior/Other Certifications and Applications

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

Section 2: GENERAL INFORMATION

A. Business profile:

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

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

B. Relationships and Dealings with Other Businesses

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



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

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

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

Section 3: MAJORITY OWNER INFORMATION

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

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

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

B. Additional Owner Information

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

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

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

Section 4: CONTROL

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

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



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

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

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

C. Inventory: Indicate firm inventory in these categories:

(1) Equipment and Vehicles

State the make and model, and current dollar value of each piece of equipment and motor vehicle held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm or owner, whether it is used as collateral, and where this item is stored.

(2) Office Space

State the street address of each office space held and/or used by your firm. Indicate whether your firm or owner owns or leases the office space and the current dollar value of that property or its lease.

(3) Storage Space

State the street address of each storage space held and/or used by your firm. Indicate whether your firm or owner owns or leases the storage space and the current dollar value of that property or its lease. Provide a signed lease agreement for each property.

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

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

E. Financial / Banking Information

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

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

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

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

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

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

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

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

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

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

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

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

AIRPORT CONCESSION (ACDBE) APPLICANTS

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

AFFIDAVIT & SIGNATURE

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



Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information

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

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

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

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

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

B. Prior/Other Certifications and Applications

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

DBE ACDBE Names of certifying agencies: _____

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

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

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

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

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

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

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

Section 2: GENERAL INFORMATION

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

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

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

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

Started new business Bought existing business Inherited business Secured concession

Merger or consolidation Other (explain) _____



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

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

- Sole Proprietorship
- Partnership
- Limited Liability Company
- Applying as an ACDBE
- Limited Liability Partnership
- Corporation
- Joint Venture (Identify all JV partners _____)
- Other, Describe _____

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

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

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

B. Relationships and Dealings with Other Businesses

(1) Is your firm co-located at any of its business locations, or does it share a telephone number, P.O. Box, office or storage space, yard, warehouse, facilities, equipment, inventory, financing, office staff, and/or employees with any other business, organization, or entity? Yes No

If Yes, explain the nature of your relationship with these other businesses by identifying the business or person with whom you have any formal, informal, written, or oral agreement. Also detail the items shared.

(2) Has any other firm had an ownership interest in your firm at present or at any time in the past?

Yes No If Yes, explain _____

(3) At present, or at any time in the past, has your firm:

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

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



Section 3: MAJORITY OWNER INFORMATION

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

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

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

(8) Number of years as owner: _____
(9) Percentage owned: _____ %
Class of stock owned: _____
Date acquired _____
(10) Initial investment to acquire ownership interest in firm:

Type	Dollar Value
Cash	\$
Real Estate	\$
Equipment	\$
Other	\$

Describe how you acquired your business:
 Started business myself
 It was a gift from: _____
 I bought it from: _____
 I inherited it from: _____
 Other _____
(Attach documentation substantiating your investment)

B. Additional Owner Information

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

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

(b) Does this owner work for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week? If yes, identify this activity: _____
(4)(a) What is the personal net worth of this disadvantaged owner applying for certification ? \$ _____
(b) Has any trust been created for the benefit of this disadvantaged owner(s)? Yes No
(If Yes, you may be asked to provide a copy of the trust instrument).
(5) Do any of your immediate family members, managers, or employees own, manage, or are associated with another company? Yes No If Yes, provide their name, relationship, company, type of business, and indicate whether they own or manage the company: (Please attach extra sheets, if needed): _____



Section 3: 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: [] Male [] Female
(6) Ethnic group membership (Check all that apply)
[] Black [] Hispanic
[] Asian Pacific [] Native American
[] Subcontinent Asian
[] Other (specify) _____
(7) U.S. Citizenship:

[] U.S. Citizen
[] Lawfully Admitted Permanent Resident

(8) Number of years as owner: _____
(9) Percentage owned: _____ %
Class of stock owned: _____
Date acquired _____

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

Describe how you acquired your business:
[] Started business myself
[] It was a gift from: _____
[] I bought it from: _____
[] I inherited it from: _____
[] Other _____

(Attach documentation substantiating your investment)

B. Additional Owner Information

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

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

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

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

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

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

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



Section 4: CONTROL

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

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

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

Yes No If Yes, identify for each:

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

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

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

Yes No If Yes, identify for each:

Firm Name: _____ Person: _____
 Nature of Business Relationship: _____

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

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

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

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

A= Always S = Seldom F = Frequently N = Never	Officer/Director/Manager/Key Personnel				Officer/Director/Manager/ Key Personnel			
	Name: _____ Title: _____ Race and Gender: _____ Percent Owned: _____				Name: _____ Title: _____ Race and Gender: _____ Percent Owned: _____			
Sets policy for company direction/scope of operations	A	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

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

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

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

1. Equipment and Vehicles

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

2. Office Space

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



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

Street Address

Owned or Leased by
Firm or Owner?

Current Value of Property or Lease

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

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

Name of bank: _____ City and State: _____

The following individuals are able to sign checks on this account: _____

Name of bank: _____ City and State: _____

The following individuals are able to sign checks on this account: _____

Bonding Information: If you have bonding capacity, identify the firm's bonding aggregate and project limits:

Aggregate limit \$ _____ Project limit \$ _____

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

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

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

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

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

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



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

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

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

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

AIRPORT CONCESSION (ACDBE) APPLICANTS ONLY MUST COMPLETE THIS SECTION

Identify the following information concerning the ACDBE applicant firm:

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

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

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



AFFIDAVIT OF CERTIFICATION

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

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

I _____ (full name printed),
swear or affirm under penalty of law that I am
_____ (title) of the applicant firm
_____ and that I

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

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

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

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

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

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

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

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

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

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

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

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

NOTARY CERTIFICATE



UNIFORM CERTIFICATION APPLICATION SUPPORTING DOCUMENTS CHECKLIST

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

Required Documents for All Applicants

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

Partnership or Joint Venture

- Original and any amended Partnership or Joint Venture Agreements

Corporation or LLC

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

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

Optional Documents to Be Provided on Request

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

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

Suppliers

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



U.S. Department of
Transportation

**Personal Net Worth Statement
For DBE/ACDBE Program Eligibility**

As of _____

OMB APPROVAL NO:

EXPIRATION DATE:

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

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

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

Section 2. Notes Payable to Banks and Others

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

Section 3. Brokerage and custodial accounts, stocks, bonds, retirement accounts. (Full Value) (Use attachments if necessary).

Name of Security / Brokerage Account / Retirement Account	Cost	Market Value Quotation/Exchange	Date of Quotation/Exchange	Total Value

Section 4. Real Estate Owned (Including Primary Residence, Investment Properties, Personal Property Leased or Rented for Business Purposes, Farm Properties, or any Other Income Producing property). (List each parcel separately. Add additional sheets if necessary).

	Primary Residence	Property B	Property C
Type of Property			
Address			
Date Acquired and Method of Acquisition (purchase, inherit, divorce, gift, etc.)			
Names on Deed			
Purchase Price			
Present Market Value			
Source of Market Valuation			
Name of all Mortgage Holders			
Mortgage Acc. # and balance (as of date of form)			
Equity line of credit balance			
Amount of Payment Per Month/Year (Specify)			

Section 5. Life Insurance Held (Give face amount and cash surrender value of policies, name of insurance company and beneficiaries).

Insurance Company	Face Value	Cash Surrender Amount	Beneficiaries	Loan on Policy Information



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

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

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

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

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

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

Assets

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

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

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

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

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

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

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

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

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

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

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

Liabilities

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

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

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

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

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

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

Transfers of Assets:

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

Affidavit

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

CALIFORNIA UNIFIED CERTIFICATION PROGRAM (CUCP)



Supplemental Document Checklist

Firm Name: _____

In order to complete your application for DBE certification, you must also attach copies of all of the following documents:

- Documentation of Group Membership. Please comply with one of the following: (1) For each owner seeking social disadvantaged status on the basis of Ethnic membership, please provide a document (e.g., birth certificate, U.S. Passport, Green Card, parents' birth certificate, etc.) evidencing Ethnic heritage or similar document evidencing Ethnic community affiliation. (2) For each owner seeking social disadvantaged status on the basis of Gender, please provide a document evidencing gender (e.g., birth certificate, driver's license, etc.). (3) For each owner seeking an individual showing of social disadvantage, please provide documents you deem appropriate for consideration.
- Documentation of U.S. citizenship or lawful permanent residence, e.g., U.S. birth certificate, Green Card, etc.

Supplemental Questionnaire

1. Is the firm's principal place of business in California? Yes _____ No _____

If no, instead of this application please forward the following, pursuant to 49 CFR Part 26.85: CUCP Out of State Declaration form, a copy of the approval letter, a complete copy of the application form, all supporting documents and any other information you have submitted (to-date) to your home state or any other state related to your firm's certification. The CUCP cannot process a new application for DBE/ACDBE certification from a firm having its principal place of business in another state unless the firm has already been certified in that state.

2. Is the firm authorized to do business in the State of California? Yes _____ No _____

3. List all office locations in California: _____

4. Has the firm ever done business with any U.S. DOT Grantees of California? Yes _____ No _____

If yes, please indicate the agency name(s) and latest year(s):

Agency	Latest Year

Agency	Latest Year

5. Is there an upcoming project in which the firm is interested and therefore, would need to be certified prior to a specific date in order to be counted toward DBE participation? Yes _____ No _____

If yes, please provide the following information:

Agency letting contract: _____

Contract Number and Name: _____ Bid Opening date or Request for Proposal due date: _____

6. Indicate areas where you prefer to do your work.

- | | | | | | |
|--|---|---------------------------------------|---|---|--------------------------------------|
| <input type="checkbox"/> 01 Alameda | <input type="checkbox"/> 11 Glenn | <input type="checkbox"/> 21 Marin | <input type="checkbox"/> 31 Placer | <input type="checkbox"/> 41 San Mateo | <input type="checkbox"/> 51 Sutter |
| <input type="checkbox"/> 02 Alpine | <input type="checkbox"/> 12 Humboldt | <input type="checkbox"/> 22 Mariposa | <input type="checkbox"/> 32 Plumas | <input type="checkbox"/> 42 Santa Barbara | <input type="checkbox"/> 52 Tehama |
| <input type="checkbox"/> 03 Amador | <input type="checkbox"/> 13 Imperial | <input type="checkbox"/> 23 Mendocino | <input type="checkbox"/> 33 Riverside | <input type="checkbox"/> 43 Santa Clara | <input type="checkbox"/> 53 Trinity |
| <input type="checkbox"/> 04 Butte | <input type="checkbox"/> 14 Inyo | <input type="checkbox"/> 24 Merced | <input type="checkbox"/> 34 Sacramento | <input type="checkbox"/> 44 Santa Cruz | <input type="checkbox"/> 54 Tulare |
| <input type="checkbox"/> 05 Calaveras | <input type="checkbox"/> 15 Kern | <input type="checkbox"/> 25 Modoc | <input type="checkbox"/> 35 San Benito | <input type="checkbox"/> 45 Shasta | <input type="checkbox"/> 55 Tuolumne |
| <input type="checkbox"/> 06 Colusa | <input type="checkbox"/> 16 Kings | <input type="checkbox"/> 26 Mono | <input type="checkbox"/> 36 San Bernardino | <input type="checkbox"/> 46 Sierra | <input type="checkbox"/> 56 Ventura |
| <input type="checkbox"/> 07 Contra Costa | <input type="checkbox"/> 17 Lake | <input type="checkbox"/> 27 Monterey | <input type="checkbox"/> 37 San Diego | <input type="checkbox"/> 47 Siskiyou | <input type="checkbox"/> 57 Yolo |
| <input type="checkbox"/> 08 Del Norte | <input type="checkbox"/> 18 Lassen | <input type="checkbox"/> 28 Napa | <input type="checkbox"/> 38 San Francisco | <input type="checkbox"/> 48 Solano | <input type="checkbox"/> 58 Yuba |
| <input type="checkbox"/> 09 El Dorado | <input type="checkbox"/> 19 Los Angeles | <input type="checkbox"/> 29 Nevada | <input type="checkbox"/> 39 San Joaquin | <input type="checkbox"/> 49 Sonoma | |
| <input type="checkbox"/> 10 Fresno | <input type="checkbox"/> 20 Madera | <input type="checkbox"/> 30 Orange | <input type="checkbox"/> 40 San Luis Obispo | <input type="checkbox"/> 50 Stanislaus | |

CALIFORNIA UNIFIED CERTIFICATION PROGRAM (CUCP)



Roster of Certifying Agencies

Note: If you received this information on hard copy, the Uniform DBE/ACDBE Certification Application Package is available on the website at <http://californiaucp.org/>

If the firm has its principal place of business in another state and is currently certified in that state, please contact the California Department of Transportation.

AREA	COUNTIES	DBE CERTIFYING AGENCIES		
Riverside, Imperial & San Diego (RIS)	Imperial Riverside San Diego	<p style="text-align: center;"><u>SUBMIT APPLICATION PACKAGE TO:</u></p> <ul style="list-style-type: none"> ➤ CITY OF LOS ANGELES* ➤ LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY <p style="text-align: center;"><u>OR</u></p> <ul style="list-style-type: none"> ➤ CALIFORNIA DEPARTMENT OF TRANSPORTATION <p style="text-align: center;">SEE CONTACT INFORMATION BELOW</p>		
Los Angeles Area	Kern Los Angeles Orange San Bernardino San Luis Obispo Santa Barbara Ventura	<table style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top;"> CITY OF LOS ANGELES* Bureau of Contract Admin. Centralized Certification Section 1149 S. Broadway, Ste 300 Los Angeles, CA 90015 Phone: (213) 847-2684 Fax: (213) 847-2777 http://bca.lacity.org </td> <td style="width: 50%; vertical-align: top;"> LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY (METRO) Diversity and Economic Opportunity Department One Gateway Plaza, MS 99-8-4 Los Angeles, CA 90012 Phone: (213) 922-2600 Fax: (213) 922-7660 Email: certificationunit@metro.net www.metro.net </td> </tr> </table> <p>*Only firms located within City of Los Angeles may apply</p>	CITY OF LOS ANGELES* Bureau of Contract Admin. Centralized Certification Section 1149 S. Broadway, Ste 300 Los Angeles, CA 90015 Phone: (213) 847-2684 Fax: (213) 847-2777 http://bca.lacity.org	LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY (METRO) Diversity and Economic Opportunity Department One Gateway Plaza, MS 99-8-4 Los Angeles, CA 90012 Phone: (213) 922-2600 Fax: (213) 922-7660 Email: certificationunit@metro.net www.metro.net
CITY OF LOS ANGELES* Bureau of Contract Admin. Centralized Certification Section 1149 S. Broadway, Ste 300 Los Angeles, CA 90015 Phone: (213) 847-2684 Fax: (213) 847-2777 http://bca.lacity.org	LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY (METRO) Diversity and Economic Opportunity Department One Gateway Plaza, MS 99-8-4 Los Angeles, CA 90012 Phone: (213) 922-2600 Fax: (213) 922-7660 Email: certificationunit@metro.net www.metro.net			

Note: List of agencies subject to change

AREA	COUNTIES	DBE CERTIFYING AGENCIES
Bay Area/ Central Valley	Alameda Amador Calaveras Contra Costa Fresno Kings Madera Marin Mariposa Merced Monterey Napa San Benito San Francisco San Joaquin San Mateo Santa Clara Santa Cruz Solano Sonoma Stanislaus Tulare Tuolumne	<p>S.F. BAY AREA RAPID TRANSIT DISTRICT (BART) Office of Civil Rights 300 Lakeside Drive 18th Floor Oakland, CA 94612 Phone: (510) 464-6100 Fax: (510) 464-7587 www.bart.gov</p> <p>CITY OF FRESNO Finance Department, Purchasing Division, DBE Program 2600 Fresno Street, Room 2156 Fresno, CA 93721-3622 Phone: (559) 621-1182 Fax: (559) 488-1069 www.fresno.gov</p> <p>SANTA CLARA VALLEY TRANSPORTATION AUTHORITY (VTA) Office of Small & Disadvantaged Businesses 3331 North First Street, Bldg. A San Jose, CA 95134-1906 Phone: (408) 321-5962 Fax: (408) 955-9729 www.vta.org</p> <p>CENTRAL CONTRA COSTA TRANSIT AUTHORITY (CCCTA) Office of Civil Rights 2477 Arnold Industrial Way Concord, CA 94520-5327 Phone: (925) 676-1976 Fax: (925) 686-2630 www.cccta.org</p>
Northern California	Alpine Butte Colusa Del Norte El Dorado Glenn Humboldt Inyo Lake Lassen Mendocino Modoc Mono Nevada Placer Plumas Sacramento Shasta Sierra Siskiyou Sutter Tehama Trinity Yolo Yuba	<p>CALIFORNIA DEPARTMENT OF TRANSPORTATION (CALTRANS) Office of Business and Economic Opportunity MS 79 1823 - 14th Street Sacramento, CA 95814 Phone: (916) 324-1700 or (866) 810-6346 Fax: (916) 324-1862 www.dot.ca.gov</p>

ACDBE CERTIFYING AGENCIES

CALIFORNIA DEPARTMENT OF TRANSPORTATION (CALTRANS)
Office of Business and Economic Opportunity/MS 79
1823 14th Street
Sacramento, CA 95814
Phone: (916) 324-1700 or (866) 810-6346
Fax: (916) 324-1862
www.dot.ca.gov

CITY OF LOS ANGELES
Office of Contract Compliance
1149 S. Broadway Street, Suite 300
Los Angeles, CA 90015
Phone (213) 847-2684 ** Fax: (213) 847-2777
<http://bca.lacity.org>

SAN DIEGO COUNTY REGIONAL AIRPORT AUTHORITY (SDRAA)
Small Business Development Department
P.O. Box 82776
San Diego, CA 92138-2776
Phone: (619) 400-2568 ** Fax: (619) 400-2566
www.san.org

(San Diego Concessions Only)

SAN FRANCISCO INTERNATIONAL AIRPORT
Airport Small Business Affairs Office
P.O. Box 8097
San Francisco, CA 94128
Phone: (650) 821-5021 ** Fax: (650) 821-5146
www.flvsfo.com

(SFO Concessions Only)

**SAN FRANCISCO MUNICIPAL
TRANSPORTATION AGENCY (SFMTA)**
Contract Compliance Office
1 S. Van Ness Avenue, 6th Floor
San Francisco, CA 94103
Phone: (415) 701-4436
Fax: (415) 701-4347
www.sfmuni.com

ATTACHMENT 7

**PROCEDURES FOR REMOVAL OF DBE'S ELIGIBILITY AND
CERTIFICATION APPEALS**

Attachment 7

Procedures for Removal of DBE's Eligibility and Certification Appeals

Removal of DBE Certification (26.87)

If it is found through the annual update, the five year review process or an ineligibility complaint (third party) that a firm no longer meets the certification criteria the firm is sent a proposal to remove letter including due process information giving the firm 30 calendar days to respond. The firm may respond by requesting an informal hearing or they may elect to present information and arguments in writing addressed to the Reconsideration Official in Metro's Office of Appeals.

Metro's Office of Appeals will track the firms that have been notified of proposed ineligibility. Metro Office of Appeals will notify the Small Business Certification unit when an appeal is received. Further Removal activity will be suspended pending the administratively final decision of Metro Office of Appeals.

If the firm does not request an appeal with Metro Office of Appeals within the appropriate time frame (30 days), the firm will be decertified. The decertification action will be made 45 days after the date of the notice proposing to find the firm ineligible to allow for mailing delays, but will be in effect retroactive to the 31st day after the notice proposing to find the firm ineligible. Metro Office of Appeals will notify all CUCP Members of the decertification.

After an administratively final determination is made in favor of Removal, under Section 26.87, the disappointed firm may appeal directly to the U.S. DOT. The firm shall be notified in the letter providing notice of the administratively final determination that it's next Appeal must be filed by sending a letter to the U.S. DOT within the DOT timeframe stated on the notice letter. If the firm's Appeal is not timely filed with the DOT, the determination to remove is not subject to further Appeal.

Metro will update the CUCP database upon the removal of DBE. A firm that has been removed may not re-apply until 12 months have passed from the date of the letter that notified the firm of the determination to remove certification.

Certification Appeals

The CUCP provides a uniform procedure for the Appeals Process to ensure consistency, objectivity and fairness to a firm that appeals a notice proposing to find a firm ineligible to continue participation in the DBE Program. Title 49 of the Code of Federal Regulations (CFR), Part 26 governs the Appeals Process. Due process is afforded to a firm that is currently participating in the DBE program only if the firm is:

- 1) found to no longer meet the certification requirements; or
- 2) decertified as a result of an ineligibility complaint (challenge), recipient-initiated proceedings or a U.S. DOT directive.

Metro has established an Office of Appeals. This office consists of individuals knowledgeable about the certification requirements of the DBE Program. The Office of Appeals is separate from Metro Small Business Certification unit. [49 CFR, Part 26, Section 26.87 (e)].

To ensure separation of functions in a de-certification, the Executive Officer of the DEOD or a delegate will serve as the decision-maker in Removal proceedings. Metro has established an administrative "firewall" to ensure that each Reconsideration and/or Removal Official will not have participated in any way in the prior Removal proceeding against the firm (including in the decision to initiate such a proceeding).

In the event of a certification denial or Removal action, Metro will notify a firm in writing of its right to due process. When Metro issues its administratively final decision to deny certification or, after rebuttal, to remove a firm, Metro will notify the firm of its right to Appeal the decision to U.S. DOT.

Before Metro Small Business Certification unit removes a firm's eligibility for any reason, except graduation from the program based on PNW, the Small Business Certification unit will issue a notice, in the form of a letter, proposing to find a firm ineligible. The firm will be notified of its right to appeal the determination to Metro Office of Appeals.

A firm may appeal a notice proposing to find the firm ineligible to Metro by:

- 1) submitting a written appeal/rebuttal within 30 days from the date of the notice proposing to find the firm ineligible; or
- 2) requesting an Informal Hearing within 30 days from the date of the notice proposing to find the firm ineligible.

Submission of Written Appeal/Rebuttal

A firm must notify Metro Office of Appeals of its intent to Appeal and must submit its written rebuttal within 30 days of the date on the notice proposing to find the firm ineligible. All supporting evidence and documentation must be received within this time frame, with the exception of any additional documentation specifically requested by Metro Office of Appeal subsequent to their receipt of the rebuttal. The firm will be given a reasonable period of time to submit requested documentation. If documentation is not received, Metro Office of Appeals will proceed with its analysis and recommendation based on the documentation and facts at hand. The appeal must specifically address and rebut all issues raised in the notice proposing to find the firm ineligible. Failure to address and rebut any issue may be reason for upholding the decision. Failure to submit the rebuttal letter to Metro within the specified time frame will result in the automatic Removal of Certification of the firm. A firm may file an Appeal, to U.S. DOT within 90 days of the date of the final decision.

Changes in the form and/or status of the firm after the date of the notice proposing to find the firm ineligible will not be considered.

A firm may waive the option of Appealing to Metro and appeal directly to U.S. DOT. The U.S. DOT may remand the appeal back to Metro Member to apply the provisions of Section 26.87. When a firm appeals directly to U.S. DOT, waiving Metro appeal, the firm will be decertified 45 calendar days following issuance of the notice proposing to find the firm ineligible. The decertification will be effective retroactive to the 31st day following issuance of the notice.

The appeal request must be made in writing to U.S. DOT within 90 days of the date of the administratively final decision of a CUCP Member [49 CFR Part 26, Section 26.89(c)]. U.S. DOT may refuse to grant this appeal procedure to firms that do not, in the opinion of U.S. DOT, perform transportation-related work. If U.S. DOT reverses the decision of Metro, the firm shall be certified as of the date Metro is notified of U.S. DOT's final decision [49 CFR Part 26, Section 26.91(b)(3)].

Processing Written Appeals in Metro Reconsideration

If the firm submits its written appeal of the determination by the Certification Unit within the 30-day time frame, Metro Office of Appeals will send a letter to the firm acknowledging the receipt of the firm's appeal. Metro Office of Appeals will conduct an independent review of the entire file. The reviewer may request additional information and/or clarification regarding issues raised in the notice proposing to find the firm ineligible in order to complete the analysis. The reviewer may occasionally determine that one or more areas have not been fully examined and/or an additional on-site visit may be required. In this case, Metro Office of Appeals will remand the file back to the Small Business Certification unit with a specific request for the relevant information that is missing. The Small Business Certification unit will return the file with the relevant information within sufficient time to enable Metro Office of Appeals to complete the appeals

process within the specified time frames. If the Office of Appeals determines the new information supports certifying the firm, Metro Office of Appeals will complete the certification process.

Metro Office of Appeals will make a recommendation to the CUCP Part 26 Cluster to either "Sustain or Overturn" Metro Small Business Certification Unit's decision based on the analysis of the written rebuttal or the information provided by the Small Business Certification unit as the result of a remand. The CUCP Part 26 Cluster will render a decision on the Office of Appeal's recommendation.

Request for Informal Hearing

A firm desiring an Informal Hearing must submit the request to Metro Office of Appeals within 30 days of the date of the notice proposing to find the firm ineligible. Metro Office of Appeals will provide the firm with written notification of the date, time and place of the Informal Hearing within 15 days of the request for a hearing. The firm may bring counsel, witnesses and other interested parties to the hearing; however, unless other parties at the hearing are questioned directly, it is the owner of the firm that is expected to respond to any questions asked at the hearing. The Informal Hearing will be tape-recorded.

Processing Informal Hearings

Metro will strive to conduct the Informal Hearing within 15 days of the date of the written notification. At the Informal Hearing, Metro Office of Appeals may question the firm's owner, witnesses, counsel and other interested parties. The Office of Appeals may also request additional documentation to complete the file.

Administrative Final Decision

Once a determination has been made, the firm will be notified by Metro Office of Appeals in writing. The letter will also include information on how to proceed with an appeal to U.S. DOT. A firm may not re-apply for certification as a DBE for twelve months after the decertification action.

Withdrawn and Closed Appeals

A firm may withdraw its appeal at any time. The firm must do so by notifying Metro Office of Appeals, in writing, of its intent to withdraw. Metro will issue its administrative final decision to find the firm ineligible (decertify) the firm as of the date the Office of Appeals receives the written withdrawal. The file will be closed and no further action will be taken. All CUCP Members will be notified of the firm's withdrawal and decertification.

Notification of a firm's withdrawal from the U.S. DOT appeals process will be received by Metro from U.S. DOT, or in writing from the firm. Metro will notify the other CUCP Members of the firm's withdrawal.

Any firm or complainant may appeal a Metro determination in a certification matter to the U.S. DOT. Such appeals may be sent to:

Department of Transportation
Office of Civil Rights
Certification Appeals Branch
1200 New Jersey, SE W-35
Washington, DC 20590

Internet: <https://www.civilrights.dot.gov/disadvantaged-business-enterprise/search-dbe-appeals-and-denials>

Phone: (202) 366-4754

Fax: (202) 366-5575

Metro will promptly implement any DOT certification appeal decisions affecting the eligibility of DBEs for DOT-assisted contracting (e.g., certify a firm if DOT has determined that Metro's denial of its application was erroneous).

Metro's system of administrative appeals of certification decision is not a remedy a firm need exhaust before making a certification appeal to DOT under 26.89.

California Unified Certification Program

[home](#) [apply](#) [database](#) [notices](#) [site map](#) [contact](#)

Navigation

[DBE or ACDBE?](#)
[Application Info](#)
[Application Form](#)
[Download Database in Excel](#)
[Business Opportunities](#)
[Certifying UCP Agencies](#)
[Non-Certifying UCP Agencies](#)
[FAQ's](#)
[Important Links](#)
[Agency Logon](#)

Public Notices

NEW
[Small Businesses Encouraged to Seek USDOT-funded Projects](#)

NEW
[Caltrain Modernization: INDUSTRY DAY](#)

NEW
[San Francisco Meet The Buyers Procurement Forum](#)

[DBE Certificates are Discontinued](#)

[Caltrans FFY2013-2015 DBE Goal and Methodology](#)

[Airport Concessions Disadvantaged Business Enterprise Program Improvements](#)

[National DBE/ACDBE Ineligibility Database](#)

[DOT Fraud Investigations](#)

[Caltrans/SBA Bonding Assistance Program](#)

CUCP Agencies

CUCP agencies include over 400 municipalities, counties, special districts, airports, transit agencies, and the State Department of Transportation (Caltrans) that administer and award contracts funded by the U.S. Department of Transportation (USDOT). CUCP agencies are classified as certifying and non-certifying members.

A certifying agency performs Disadvantaged Business Enterprise (DBE and/or ACDBE) certification on behalf of the State of California and this certification applies to all USDOT funded contracts. Certification activities performed by a certifying member include, among others, processing DBE or ACDBE applications, performing site interviews, making certification decisions, investigating certification complaints and appeals, and maintaining a single Statewide directory of certified DBEs and ACDBEs. Contact a certifying member, if you have a question about DBE or ACDBE certification.

A non-certifying agency adheres to all aspects of the USDOT DBE program, except it does not perform DBE certification activities. A non-certifying member accepts all firms certified as a DBE by a certifying member. Accordingly, the DBEs listed on the CUCP DBE directory are eligible to participate on all U.S. DOT funded contracts administered by a CUCP participant. Contact a CUCP participant, both certifying and non-certifying, about contract opportunities. A list of these agencies is provided below.

Certifying UCP Member Agencies

For certification inquiries for Imperial, Riverside, Kern, Los Angeles, Orange, San Bernardino, San Luis Obispo, Santa Barbara, Ventura, and San Diego counties, contact one of the agencies listed below:

CALIFORNIA DEPARTMENT OF TRANSPORTATION (CALTRANS)

Office of Business & Economic Opportunity - MS 79
 1823 - 14th Street
 Sacramento, CA 95814
 Phone: (916) 324-1700 or (866) 810-6346
 Fax: (916) 324-1862
 Email: DBE_Certification@dot.ca.gov
caltrans.ca.gov

CITY OF LOS ANGELES*

Office of Contract Compliance
 Centralized Certification
 1149 S. Broadway Street, Suite 300
 Los Angeles, CA 90015
 Phone: (213) 847-2684
 Fax: (213) 847-2777
 Email: bca.certifications@lacity.org
bca.lacity.org

** Please note City of Los Angeles is only accepting applications from firms located within Los Angeles city limits. Firms located outside city limits should apply to Los Angeles County Metropolitan Transportation Authority (Metro) or California Department of Transportation (Caltrans).*

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY (METRO)

Diversity and Economic Opportunity Department
 One Gateway Plaza
 Los Angeles, CA 90012
 Phone: (213) 922-2600
 Fax: (213) 922-7660
 Email: certificationunit@metro.net
mta.net

For Alameda, Amador, Calaveras, Contra Costa, Fresno, Kings, Madera, Marin, Mariposa, Merced, Monterey, Napa, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma, Stanislaus, Tulare, and Tuolumne counties, contact one of the agencies listed below:

CENTRAL CONTRA COSTA TRANSIT AUTHORITY (CCCTA)

Office of Civil Rights
 2477 Arnold Industrial Way
 Concord, CA 94520-5327
 Phone: (925) 676-1976

Fax: (925) 686-2630
cccta.org

CITY OF FRESNO

DBE Program
 2101 G Street, Building A
 Fresno, CA 93706
 Phone: (559) 621-1182
 Fax: (559) 488-1069
ci.fresno.ca.us

S.F. BAY AREA RAPID TRANSIT DISTRICT (BART)

Office of Civil Rights
 300 Lakeside Drive
 18th Floor
 Oakland, CA 94612
 Phone: (510) 464-7580
 Fax: (510) 464-7587
bart.gov

SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY (SFMTA)

Contract Compliance Office
 San Francisco Municipal Railway
 1 South Van Ness Avenue, 3rd Floor
 San Francisco, CA 94103
 Phone: (415) 701-4443
 Fax: (415) 701-4347
sfmta.com

**SAN MATEO COUNTY TRANSIT DISTRICT (SAMTRANS)/
 PENINSULA CORRIDOR JOINT POWERS BOARD (JPB)**

DBE Office
 1250 San Carlos Avenue
 San Carlos, CA 94070
 Phone: (650) 508-7939
 Fax: (650) 508-7738
 Email: DBEinfo@samtrans.com
samtrans.com

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY (VTA)

Small & Disadvantaged Businesses
 3331 North First Street
 San Jose, CA 95134-1906
 Phone: (408) 321-5962
 Fax: (408) 955-9729
 Email: osdb@vta.org
vta.org

For Alpine, Butte, Colusa, Del Norte, El Dorado, Glenn, Humboldt, Inyo, Lake, Lassen, Mendocino, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Yolo, and Yuba counties, contact one of the agencies listed below:

CALIFORNIA DEPARTMENT OF TRANSPORTATION (CALTRANS)

Office of Business & Economic Opportunity - MS 79
 1823 - 14th Street
 Sacramento, CA 95814
 Phone: (916) 324-1700 or (866) 810-6346
 Fax: (916) 324-1862
 Email: DBE_Certification@dot.ca.gov
caltrans.ca.gov

YOLO COUNTY TRANSPORTATION DISTRICT (YOLOBUS)

DBE Programs
 350 Industrial Way
 Woodland, CA 95776
 Phone: (530) 661-0816
 Fax: (530) 661-1732
yctd.org

Airport Concessions (ACDBE) Certification

CALIFORNIA DEPARTMENT OF TRANSPORTATION (CALTRANS)

Office of Business & Economic Opportunity - MS 79
 1823 - 14th Street
 Sacramento, CA 95814
 Phone: (916) 324-1700 or (866) 810-6346
 Fax: (916) 324-1862
 Email: DBE_Certification@dot.ca.gov
caltrans.ca.gov

LOS ANGELES, ORANGE, SAN BERNARDINO, VENTURA, IMPERIAL, AND RIVERSIDE COUNTIES:

CITY OF LOS ANGELES
 Office of Contract Compliance

Centralized Certification
1149 S. Broadway Street, Suite 300
Los Angeles, CA 90015
Phone:(213) 847-6480
Fax: (213) 847-5566
Email: bca.certifications@lacity.org
bca.lacity.org

SAN DIEGO AIRPORT CONCESSIONS ONLY:
SAN DIEGO COUNTY REGIONAL AIRPORT AUTHORITY

Small Business Development Department
P.O. Box 82776
San Diego, CA 92138-2776
Phone: (619) 400-2569
Fax: (619) 400-2566
san.org

SAN FRANCISCO AIRPORT CONCESSIONS ONLY:
SAN FRANCISCO INTERNATIONAL AIRPORT

Airport Small Business Affairs Office
P.O. Box 8097
San Francisco, CA 94128
Phone: (650) 821-5021
Fax: (650) 821-5146
Email: SFO.ASBAO@flysfo.com
flysfo.com

Copyright © 2009-2014 CUCP. [Contact Us](#)
Design by [Free Web Templates](#)

ATTACHMENT 8

REGULATIONS: 49 CFR PART 26

[Home Page](#) > [Executive Branch](#) > [Code of Federal Regulations](#) > [Electronic Code of Federal Regulations](#)

Electronic Code of Federal Regulations

e-CFR
TM

e-CFR Data is current as of May 19, 2011

Title 49: Transportation

[Browse Previous](#) | [Browse Next](#)

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

Section Contents

Subpart A—General

- [§ 26.1 What are the objectives of this part?](#)
- [§ 26.3 To whom does this part apply?](#)
- [§ 26.5 What do the terms used in this part mean?](#)
- [§ 26.7 What discriminatory actions are forbidden?](#)
- [§ 26.9 How does the Department issue guidance and interpretations under this part?](#)
- [§ 26.11 What records do recipients keep and report?](#)
- [§ 26.13 What assurances must recipients and contractors make?](#)
- [§ 26.15 How can recipients apply for exemptions or waivers?](#)

Subpart B—Administrative Requirements for DBE Programs for Federally-Assisted Contracting

- [§ 26.21 Who must have a DBE program?](#)
- [§ 26.23 What is the requirement for a policy statement?](#)
- [§ 26.25 What is the requirement for a liaison officer?](#)
- [§ 26.27 What efforts must recipients make concerning DBE financial institutions?](#)
- [§ 26.29 What prompt payment mechanisms must recipients have?](#)
- [§ 26.31 What information must you include in your DBE directory?](#)
- [§ 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?](#)
- [§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?](#)
- [§ 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?](#)
- [§ 26.39 Fostering small business participation.](#)

Subpart C—Goals, Good Faith Efforts, and Counting

- [§ 26.41 What is the role of the statutory 10 percent goal in this program?](#)
- [§ 26.43 Can recipients use set-asides or quotas as part of this program?](#)
- [§ 26.45 How do recipients set overall goals?](#)
- [§ 26.47 Can recipients be penalized for failing to meet overall goals?](#)
- [§ 26.49 How are overall goals established for transit vehicle manufacturers?](#)
- [§ 26.51 What means do recipients use to meet overall goals?](#)
- [§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?](#)

§ 26.55 How is DBE participation counted toward goals?

Subpart D—Certification Standards

§ 26.61 How are burdens of proof allocated in the certification process?

§ 26.63 What rules govern group membership determinations?

§ 26.65 What rules govern business size determinations?

§ 26.67 What rules determine social and economic disadvantage?

§ 26.69 What rules govern determinations of ownership?

§ 26.71 What rules govern determinations concerning control?

§ 26.73 What are other rules affecting certification?

Subpart E—Certification Procedures

§ 26.81 What are the requirements for Unified Certification Programs?

§ 26.83 What procedures do recipients follow in making certification decisions?

§ 26.85 Interstate certification.

§ 26.86 What rules govern recipients' denials of initial requests for certification?

§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?

§ 26.89 What is the process for certification appeals to the Department of Transportation?

§ 26.91 What actions do recipients take following DOT certification appeal decisions?

Subpart F—Compliance and Enforcement

§ 26.101 What compliance procedures apply to recipients?

§ 26.103 What enforcement actions apply in FHWA and FTA programs?

§ 26.105 What enforcement actions apply in FAA programs?

§ 26.107 What enforcement actions apply to firms participating in the DBE program?

§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

Appendix A to Part 26—Guidance Concerning Good Faith Efforts

Appendix B to Part 26—Uniform Report of DBE Awards or Commitments and Payments Form

Appendix C to Part 26—DBE Business Development Program Guidelines

Appendix D to Part 26—Mentor-Protégé Program Guidelines

Appendix E to Part 26—Individual Determinations of Social and Economic Disadvantage

Appendix F to Part 26—Uniform Certification Application Form

Authority: 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, *et seq.* ; 49 U.S.C. 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105–178, 112 Stat. 107, 113.

Source: 64 FR 5126, Feb. 2, 1999, unless otherwise noted.

Subpart A—General



[top](#)

§ 26.1 What are the objectives of this part?



[top](#)

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.

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

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, 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, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

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

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35553, June 16, 2003; 76 FR 5096, Jan. 28, 2011]

§ 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) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999 express the official positions and views of the Department of Transportation or any of its operating administrations.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or any of its operating administrations, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

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

[72 FR 15617, Apr. 2, 2007]

§ 26.11 What records do recipients keep and report?



(a) You must transmit the Uniform Report of DBE Awards or Commitments and Payments, found in Appendix B to this part, at the intervals stated on the form.

(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; 76 FR 5096, Jan. 28, 2011]

§ 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?



[top](#)

(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 information must you include in your DBE directory?



(a) In the directory required under §26.81(g) of this Part, you must list 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.

(b) You must list each type of work for which a firm is eligible to be certified by using the most specific NAICS code available to describe each type of work. You must make any changes to your current directory entries necessary to meet the requirement of this paragraph (a) by August 26, 2011.

[76 FR 5096, Jan. 28, 2011]

§ 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?



(a) If you determine that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, you must devise appropriate measures to address this overconcentration.

(b) These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. You may also consider varying your use of contract goals, to the extent consistent with §26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

(c) You must obtain the approval of the concerned DOT operating administration for your determination of overconcentration and the measures you devise to address it. Once approved, the measures become part of your DBE program.

§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?



(a) You may or, if an operating administration directs you to, you must establish a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program. You may require a DBE firm, as a condition of receiving assistance through the BDP, to agree to terminate its participation in the DBE program after a certain time has passed or certain objectives have been reached. See Appendix C of this part for guidance on administering BDP programs.

(b) As part of a BDP or separately, you may establish a "mentor-protégé" program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm.

(1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protégé program are eligible to participate in the mentor-protégé program.

(2) During the course of the mentor-protégé relationship, you must:

(i) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than one half of its goal on any contract let by the recipient; and

(ii) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.

(3) For purposes of making determinations of business size under this part, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program. See Appendix D of this part for guidance concerning the operation of mentor-protégé programs.

(c) Your BDPs and mentor-protégé programs must be approved by the concerned operating administration before you implement them. Once approved, they become part of your DBE program.

§ 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?



(a) You must implement appropriate mechanisms to ensure compliance with the part's requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state and local law). You must set forth these mechanisms in your DBE program.

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. This mechanism must include a written certification that you have reviewed contracting records and monitored work sites in your state for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of contract performance for other purposes (e.g., close-out reviews for a contract).

(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; 76 FR 5097, Jan. 28, 2011]

§ 26.39 Fostering small business participation.



(a) Your DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.

(b) This element must be submitted to the appropriate DOT operating administration for approval as a part of your DBE program by February 28, 2012. As part of this program element you may include, but are not limited to, the following strategies:

(1) Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million).

(2) In multi-year design-build contracts or other large contracts (e.g., for "megaprojects") requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.

(3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.

(4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.

(5) To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

(c) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your DBE program.

[76 FR 5097, Jan. 28, 2011]

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 three fiscal years.

(2) If you are an FTA or FAA recipient, as a percentage of all FT or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the three forthcoming fiscal years.

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.

(i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.

(ii) A project goal covers the entire length of the project to which it applies.

(iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.

(iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

(f)(1)(i) If you set your overall goal on a fiscal year basis, you must submit it to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency's Web site.

(ii) You may adjust your three-year overall goal during the three-year period to which it applies, in order to reflect changed circumstances. You must submit such an adjustment to the concerned operating administration for review and approval.

(iii) The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.

(iv) While you are required to submit an overall goal to FHWA, FTA, or FAA only every three years, the overall goal and the provisions of Sec. 26.47(c) apply to each year during that three-year period.

(v) You may make, for informational purposes, projections of your expected DBE achievements during each of the three years covered by your overall goal. However, it is the overall goal itself, and not these informational projections, to which the provisions of section 26.47(c) of this part apply.

(2) If you are a recipient and set your overall goal on a project or grant basis as provided in paragraph (e)(3) of this section, you must submit the goal for review at a time determined by the FHWA, FTA or FAA Administrator, as applicable.

(3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence you relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see 26.51(c)).

(4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating 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.

(6) Timely submission and operating administration approval of your overall goal is a condition of eligibility for DOT financial assistance.

(7) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive DOT financial assistance.

(g) In establishing an overall goal, you must provide for public participation. This public participation must include:

(1) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs.

(2) A published notice announcing your proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at your principal office for 30 days following the date of the notice, and informing the public that you and the Department will accept comments on the goals for 45 days from the date of the notice. The notice must include addresses to which comments may be sent, and you must publish it in general circulation media and available minority-focused media and trade association publications.

(h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 65 FR 68951, Nov. 15, 2000; 68 FR 35553, June 16, 2003; 75 FR 5536, Feb. 3, 2010; 76 FR 5097, Jan. 28, 2011]

§ 26.47 Can recipients be penalized for failing to meet overall goals?



[top](#)

(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.

(c) If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your DBE program in good faith:

(1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;

(2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;

(3)(i) If you are a state highway agency; one of the 50 largest transit authorities as determined by the FTA; or an Operational Evolution Partnership Plan airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (c)(1) and (2) of this section to the appropriate operating administration for approval. If the operating administration approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

(ii) As a transit authority or airport not meeting the criteria of paragraph (c)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to FTA or FAA on request for their review.

(4) FHWA, FTA, or FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.

(5) You may be regarded as being in noncompliance with this Part, and therefore subject to the remedies in §26.103 or §26.105 of this part and other applicable regulations, for failing to implement your DBE program in good faith if any of the following things occur:

(i) You do not submit your analysis and corrective actions to FHWA, FTA, or FAA in a timely manner as required under paragraph (c)(3) of this section;

(ii) FHWA, FTA, or FAA disapproves your analysis or corrective actions; or

(iii) You do not fully implement the corrective actions to which you have committed or conditions that FHWA, FTA, or FAA has imposed following review of your analysis and corrective actions.

(d) If, as recipient, your Uniform Report of DBE Awards or Commitments and Payments or other information coming to the attention of FTA, FHWA, or FAA, demonstrates that current trends make it unlikely that you will achieve DBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FHWA, FTA, or FAA, as applicable, may require you to make further good faith efforts, such as by modifying your race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011]

§ 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?



[top](#)

(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 participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under §26.39 of this part.

(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, unless it becomes necessary in order meet your overall goal.

Example to paragraph (f)(1): Your overall goal for Year 1 is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year 1. However, if part way through Year 1, your DBE awards or commitments are not at a level that would permit you to achieve your overall goal for Year 1, you could begin setting race-conscious DBE contract goals during the remainder of the year as part of your obligation to implement your program in good faith.

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.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011]

§ 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 a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.
- (2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the DBE firm.
- (3) For purposes of this paragraph, good cause includes the following circumstances:
- (i) The listed DBE subcontractor fails or refuses to execute a written contract;
- (ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the

failure or refusal of the **DBE** subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;

(iii) The listed **DBE** subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.

(iv) The listed **DBE** subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;

(v) The listed **DBE** subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;

(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;

(x) Other documented good cause that you determine compels the termination of the **DBE** subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a **DBE** it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the **DBE** contractor was engaged or so that the prime contractor can substitute another **DBE** or non-**DBE** contractor after contract award.

(4) Before transmitting to you its request to terminate and/or substitute a **DBE** subcontractor, the prime contractor must give notice in writing to the **DBE** subcontractor, with a copy to you, of its intent to request to terminate and/or substitute, and the reason for the request.

(5) The prime contractor must give the **DBE** five days to respond to the prime contractor's notice and advise you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why you should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than five days.

(6) In addition to post-award terminations, the provisions of this section apply to preaward deletions of or substitutions for **DBE** firms put forward by offerors in negotiated procurements.

(g) 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.

(h) 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.

(i) 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.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011]

§ 26.55 How is **DBE participation counted toward goals?**



top

(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. As a recipient, you must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$22.41 million.

(c) The Department adjusts the number in paragraph (b) of this section annually using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.

[74 FR 15224, Apr. 3, 2009]

§ 26.67 What rules determine social and economic disadvantage?



(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

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

(ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. 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 documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under section 26.89 of this part or to any other state to which the individual's firm has applied for certification under §26.85 of this part.

(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 \$1.32 million, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of §26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(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 \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35554, June 16, 2003; 76 FR 5099, Jan. 28, 2011]

§ 26.69 What rules govern determinations of ownership?



[top](#)

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole.

(b) To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

(2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

(3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

(c) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if—

(1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or

(2) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.

(e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

(1) The owner's expertise must be—

(i) In a specialized field;

(ii) Of outstanding quality;

(iii) In areas critical to the firm's operations;

(iv) Indispensable to the firm's potential success;

(v) Specific to the type of work the firm performs; and

(vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

(2) The individual whose expertise is relied upon must have a significant financial investment in the firm.

(g) You must always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the

individual—

(1) As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce 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 must not require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(1) The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available NAICS code for that type of work. If you choose, you may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. If your Directory does not list types of work for any firm in a manner consistent with this paragraph (a)(1), you must update the Directory entry for that firm to meet the requirements of this paragraph (a)(1) by August 28, 2011.

(2) Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

(3) If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

(4) A certifier is not precluded from changing a certification classification or description if there is a factual basis in the record. However, certifiers must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5099, Jan. 28, 2011]

§ 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)(1) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.

(2) You must not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of this Part, the firm is eligible for certification.

(c) DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

(d) Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

(e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.

(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) You may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:

Example 1: Socially and economically disadvantaged individuals own 100 percent of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

Example 2: Disadvantaged individuals own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

Example 3: Disadvantaged individuals own 80 percent of the holding company, which in turn owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is 56 percent (80 percent of the 70 percent). This is more than 51 percent, so you may certify the subsidiary, if all other requirements are met.

Example 4: Same as Example 2 or 3, but someone other than the socially and economically

disadvantaged owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, you cannot certify it because it fails to meet control requirements.

Example 5: Disadvantaged individuals own 60 percent of the holding company, which in turn owns 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is about 31 percent. This is less than 51 percent, so you cannot certify the subsidiary.

Example 6: The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of §26.65(b). Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

(f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

(g) You must not require a DBE firm to be prequalified as a condition for certification unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.

(h) A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of §26.35. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in §26.71.

(i) The following special rules apply to the certification of firms related to Alaska Native Corporations (ANCs).

(1) Notwithstanding any other provisions of this subpart, a direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification as a DBE if it meets all of the following requirements:

(i) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;

(ii) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and

(iii) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.

(2) As a recipient to whom an ANC-related entity applies for certification, you do not use the DOT uniform application form (see Appendix F of this part). You must obtain from the firm documentation sufficient to demonstrate that entity meets the requirements of paragraph (i)(1) of this section. You must also obtain sufficient information about the firm to allow you to administer your program (e.g., information that would appear in your DBE Directory).

(3) If an ANC-related firm does not meet all the conditions of paragraph (i)(1) of this section, then it must meet the requirements of paragraph (h) of this section in order to be certified, on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003; 76 FR 5099, Jan. 28, 2011]

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 part), 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 and shall revise the print version of the Directory at least once a year.

(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.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5100, Jan. 28, 2011]

§ 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) [Reserved]

(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 until and unless you have removed its certification, in whole or in part, through the procedures of section 26.87. You may not require DBEs to reapply for certification or require "recertification" of currently certified firms. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, three years from the date of the firm's most recent certification, or sooner if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section), a complaint, or other information concerning the firm's eligibility. If you have grounds to question the firm's eligibility, you may conduct an on-site review on an unannounced basis, at the firm's offices and jobsites.

(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.

(l) As a recipient or UCP, you must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional

information or action is required.

(m) Except as otherwise provided in this paragraph, if an applicant for DBE certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time. As a recipient or UCP, you may not apply the waiting period provided under §26.86(c) of this part before allowing the applicant to resubmit its application. However, you may place the reapplication at the "end of the line," behind other applications that have been made since the firm's previous application was withdrawn. You may also apply the waiting period provided under §26.86(c) of this part to a firm that has established a pattern of frequently withdrawing applications before you make a decision.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003; 76 FR 5100, Jan. 28, 2011]

§ 26.85 Interstate certification.



(a) This section applies with respect to any firm that is currently certified in its home state.

(b) When a firm currently certified in its home state ("State A") applies to another State ("State B") for DBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures.

(1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.

(2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A's electronic directory or obtaining written confirmation from State A.

(c) In any situation in which State B chooses not to accept State A's certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your firm's certification. This includes affidavits of no change (see §26.83(j)) and any notices of changes (see §26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A's UCP or any other recipient concerning your application or status as a DBE firm.

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

(3) If you have filed a certification appeal with DOT (see §26.89), you must inform State B of the fact and provide your letter of appeal and DOT's response to State B.

(4) You must submit an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

(i) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by §26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct.

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (see §26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by "State A" or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) Determine whether there is good cause to believe that State A's certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

(i) Evidence that State A's certification was obtained by fraud;

(ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;

(iii) State A's certification was factually erroneous or was inconsistent with the requirements of this part;

(iv) The State law of State B requires a result different from that of the State law of State A.

(v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(3) If, as State B, unless you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms.

(4) If, as State B, you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility, or both. If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the firm's request.

(iii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B's notice. The firm is not otherwise responsible for further demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.

(v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.

(vi) The firm's application for certification is stayed pending the outcome of this process.

(vii) A decision under this paragraph (d)(4) may be appealed to the Departmental Office of Civil Rights under s§26.89 of this part.

(e) As State B, if you have not received from State A a copy of the site visit review report by a date 14 days after you have made a timely request for it, you may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.

(f)(1) As a UCP, when you deny a firm's application, reject the application of a firm certified in State A or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm, in whole or in part, you must make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. You must enter the following information:

- (i) The name of the firm;
- (ii) The name(s) of the firm's owner(s);
- (iii) The type and date of the action;
- (iv) The reason for the action.

(2) As a UCP, you must check the DOCR Web site at least once every month to determine whether any firm that is applying to you for certification or that you have already certified is on the list.

(3) For any such firm that is on the list, you must promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, you must provide a copy of the decision to the requesting UCP within 7 days of receiving the request. As the UCP receiving the decision, you must then consider the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.

(g) You must implement the requirements of this section beginning January 1, 2012.

[76 FR 5100, Jan. 28, 2011]

§ 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) [Reserved]

(i) *Status of firm during proceeding.* (1) A firm remains an eligible **DBE** during the pendency of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(j) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a **DBE** prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible **DBE** firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its **DBE** goal for the firm's work. In this case, or in a case where you have let a prime contract to the **DBE** that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception:* If the **DBE's** ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(k) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under §26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003; 76 FR 5101, Jan. 28, 2011]

§ 26.89 What is the process for certification appeals to the Department of Transportation?



[top](#)

(a)(1) If you are a firm that is denied certification or whose eligibility is removed by a recipient, including SBA-certified firms applying pursuant to the DOT/SBA MOU, you may make an administrative appeal to the Department.

(2) If you are a complainant in an ineligibility complaint to a recipient (including the concerned operating administration in the circumstances provided in §26.87(c)), you may appeal to the Department if the recipient does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) Send appeals to the following address: Department of Transportation, Office of Civil Rights, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(b) Pending the Department's decision in the matter, the recipient's decision remains in effect. The Department does not stay the effect of the recipient's decision while it is considering an appeal.

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and arguments concerning why the recipient's decision should be reversed. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal.

(1) If you are an appellant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under §26.109(c).

(2) If you are an appellant other than one described in paragraph (c)(1) of this section, the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in paragraph (c)(1) of this section. Failure to provide this information may be deemed a failure to cooperate under §26.109(c).

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a recipient's showing of good cause. To facilitate the Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

(f) As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.

(2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or 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; 73 FR 33329, June 12, 2008]

§ 26.91 What actions do recipients take following DOT certification appeal decisions?



[top](#)

(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 2 CFR parts 180 and 1200.

(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 2 CFR parts 180 and 1200.

(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.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5101, Jan. 28, 2011]

§ 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 any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under §26.89 of this part or to any other state to which the individual's firm has applied for certification under §26.85 of this part.

(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; 76 FR 5101, Jan. 28, 2011]

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 AIF 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 through 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(I) should equal the sum of 8(C) plus 9(C), and similarly, the TOTALS value in 11(I) 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 contracts (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.

[View or download PDF](#)

UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS

Please refer to the instructions sheet for directions on filing out this form

1. Submitted to (check only one): PHVA FAA FTA-Vendor Number: _____

2. AIP Numbers (FAA Recipients Only): _____

3. Federal fiscal year in which reporting period ends: FY _____ 4. Date This Report Submitted: _____
 Report due June 1 (for period Oct. 1-Mar. 31) Report due Dec. 1 (for period Apr. 1-Sept. 30)

5. Reporting Period: FAA Annual Report

6. Name of the Recipient: _____

7. Annual DBE Goal: _____ % Race Neutral Goal: _____ % Overall Goal: _____ %

AWARDS/COMMITMENTS MADE DURING THIS REPORTING PERIOD (Total awards and subcontracts awarded or committed during this reporting period.)	Race Conscious Goal			Race Neutral Goal			OVERALL Goal		
	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/guaranteed 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)	A			B			C		
11. Total Dollar Value	A			B			C		
ACTUAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD	A			B			C		
12. Race Conscious	A			B			C		
13. Race Neutral	A			B			C		
14. Totals	A			B			C		
15. Submitted by (Print Name of Authorized Representative)	16. Signature of Authorized Representative			17. Title			18. Signature of Authorized Representative		
17. Phone Number:	19. FAA Number:			20. DBE Participation (Dollars)			21. Percentage of Total DBE Participation		

[View or download PDF](#)

[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



[top](#)

(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



[top](#)

**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/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, de-certified, 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.

[View or download PDF](#)

- (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:

[View or download PDF](#)

- (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 Bidder 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.

[View or download PDF](#)

**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.sba.gov/naics> (provides a listing of NAICS codes) and <http://www.sba.gov/size/indexableofsize.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.

Page 1 of 8

[View or download PDF](#)

Section 1: CERTIFICATION INFORMATION

A. Prior/Other Certifications

Is your firm currently certified for any of the following programs? <i>(If Yes, check appropriate box(es))</i>	<input type="checkbox"/> DBE	Name of certifying agency:
		Has your firm's state UCP conducted an on-site visit?
		<input type="checkbox"/> Yes, on / / State: <input type="checkbox"/> No
	<input type="checkbox"/> §(a)	⊗ STOP! If you checked either the §(a) or SDB box, you <u>may not</u> have to complete this application. Ask your state UCP about the streamlined application process under the SBA-DOT MOU.
	<input type="checkbox"/> 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):			
<input type="checkbox"/> Started new business <input type="checkbox"/> Bought existing business <input type="checkbox"/> Inherited business <input type="checkbox"/> Secured concession <input type="checkbox"/> Merger or consolidation <input type="checkbox"/> Other (explain)			
(6) Is your firm "for profit"? <input type="checkbox"/> Yes <input type="checkbox"/> 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.	

[View or download PDF](#)

(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 \$
_____	_____
_____	_____
_____	_____

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?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(b) consisted of a partnership in which one or more of the partners are other firms?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(c) owned any percentage of any other firm?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(d) had any subsidiaries?	<input type="checkbox"/> Yes <input type="checkbox"/> 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. _____	_____	_____	_____	_____

[View or download PDF](#)

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: <input type="checkbox"/> Male <input type="checkbox"/> Female	(6) Ethnic group membership (Check all that apply):	
(7) U.S. Citizen: <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Black <input type="checkbox"/> Hispanic <input type="checkbox"/> Native American <input type="checkbox"/> Asian Pacific <input type="checkbox"/> Subcontinent Asian <input type="checkbox"/> Other (specify): _____	
(8) Lawfully Admitted Permanent Resident: <input type="checkbox"/> Yes <input type="checkbox"/> 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? <input type="checkbox"/> Yes <input type="checkbox"/> 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.)? <input type="checkbox"/> Yes <input type="checkbox"/> 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)? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, explain (attach additional sheets if needed):

[View or download PDF](#)

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, assets, 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 <i>(responsibility for acquisition of lines of credit, surety bonding, supplies, etc.)</i>	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.			

[View or download PDF](#)

(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: _____

[View or download PDF](#)

(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.					

[View or download PDF](#)

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.

[View or download PDF](#)

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) _____

[View or download PDF](#)

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

[View or download PDF](#)

[68 FR 35559, June 16, 2003]

[Browse Previous](#) | [Browse Next](#)

For questions or comments regarding e-CFR editorial content, features, or design, email ecfr@nara.gov.

For questions concerning e-CFR programming and delivery issues, email webteam@gpo.gov.

[Section 508 / Accessibility](#)

ATTACHMENT 9

FEDERAL REGISTER/ VOL.71, NO. 56/THURSDAY, MARCH 23, 2006

based on the criteria in the law and further explained in part F of this notice, the team will provide a recommendation to the Secretary of the Interior. The Secretary of the Interior, after consultation with and in cooperation with the Secretary of Transportation, shall determine the final selection and amount of funding for each project.

The Department of the Interior plans to announce the projects selected by summer 2006. The Department of the Interior will notify each Federal land management agency of projects awarded for sites under the agency's jurisdiction. FTA will publish the list of all selected projects and funding levels in the **Federal Register**, as well as in its annual report to Congress on the Alternative Transportation in Parks and Public Lands program submitted as part of its Annual Report on New Starts in early February 2007. Criteria and application procedures may be reassessed for subsequent years.

IV. Additional Program Information

A. Funds Administration and Oversight

Once proposals have been reviewed and projects have been chosen based on selection criteria, the cognizant federal agency (or agencies), will award funds to the proposing entity to implement the project. These funds will be administered according to federal requirements as well as the appropriate policies, guidelines and rules of the pertinent agencies.

For projects directly administered by a Federal land management agency, these funds will be administered by interagency agreement between the FTA and the respective agency. For programs administered by a State, tribal, or local governmental authority, these funds will be administered through a grant administered by FTA. With regard to interagency agreement and grant requirements, 49 U.S.C. 5320(i) authorizes the Secretary to apply the requirements of 49 U.S.C. 5307 (Urbanized Area Formula Grant) and 5333(a) (Prevailing Wages Requirement) "to the extent the Secretary deems appropriate." FTA is in the process of developing the interagency agreement and grant requirements for this program and will make these available for public notice and comment in the **Federal Register** prior to award of program funds.

Additionally, each recipient (federal land management agency, and State, tribal, and local governments) of federal funds must comply with requisite federal guidelines governing the management of federal funds and

specific program requirements. Program Oversight, as defined by FTA, will ensure that projects meet the basic statutory, administrative, and regulatory requirements as stipulated by the conditions for accepting Federal funds.

B. Performance Measures

Participants may be asked to compile data for use in measuring program performance.

C. Technical Assistance, Planning, and Research

The Alternative Transportation in Parks and Public lands program allows the Department of Transportation to spend not more than ten percent of program funds to carry out planning, research, and technical assistance activities. FTA will oversee the funds allocated to technical assistance to assist program participants in planning, implementing, and evaluating alternative transportation projects. In addition, FTA will be responsible for the provision of planning guidance and dissemination of research findings.

Issued in Washington, DC, this 17th day of March, 2006.

Sandra K. Bushue,

Deputy Administrator.

[FR Doc. E6-4208 Filed 3-22-06; 8:45 am]

BILLING CODE 4910-57-P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA-2006-24063]

Disadvantaged Business Enterprises; Western States Guidance for Public Transportation Providers

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of policy implementation and request for comments.

SUMMARY: This notice provides the opportunity for public comment on specific issues regarding the Federal Transit Administration's (FTA) implementation of Department of Transportation (DOT) guidance for participants of the Disadvantaged Business Enterprise (DBE) program. This guidance is applicable to recipients of Federal financial assistance from the Federal Transit Administration (FTA) located in the states under the U.S. Court of Appeals for the 9th Circuit (California, Oregon, Washington, Alaska, Arizona, Idaho, Montana, Nevada, and Hawaii).

DATES: *Effective Date:* Comments must be received on or before April 24, 2006.

Late-filed comments will be considered to the extent practicable.

ADDRESSES: Written Comments: Submit written comments to the Docket Management System, U.S. Department of Transportation, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. You may submit comments identified by the docket number (FTA-06-24063) by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- Web Site: <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.

- Fax: 1-202-493-2478.

- Mail: Docket Management System; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.

- Hand Delivery: To the Docket Management System; Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name (Federal Transit Administration) and Docket number (FTA-2006-24063) for this notice. Note that all comments received will be posted without change to <http://dms.dot.gov> including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Scheryl Portee, Attorney Advisor, Office of the Chief Counsel, (202) 366-4011 (telephone) and (202) 366-3809 (fax).

SUPPLEMENTARY INFORMATION:

Background

The General Counsel of the Department of Transportation recently reviewed and approved guidance concerning the effects of the *Western States Paving Co. v. United States & Washington State Department of Transportation*, 407 F. 3d 983 (9th Cir. 2005), court decision on participants in the Department's disadvantaged business enterprise (DBE) program. The guidance applies to recipients of Federal funds authorized under chapter 53 of Title 49 of the United States Code that are located within the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

The Court of Appeals for the 9th Circuit, like other Federal courts that have reviewed the Department of Transportation's DBE program, held that 49 CFR Part 26 and the authorizing statute for the DBE program in TEA-21

are constitutional. The court upheld congressional determination that there is a compelling need for the DBE program and the DOT rules at Part 26 are narrowly tailored to meet that need.

However, the 9th Circuit held that the DBE Program administered by the Washington State Department of Transportation was not narrowly tailored because the evidence of discrimination supporting the use of race-conscious measures in the program was inadequate. Since the *Western States* decision and DOT's guidance on the effects of that decision will impact FTA grantees in the 9th Circuit, we are issuing this Federal Register notice.

Specifically, this notice provides information on the procedures that FTA will employ as a review process for fiscal year 2006 DBE goal submissions (due on August 1, 2005) to FTA in regard to: Race-neutral submissions, the evidence-gathering process to determine evidence of discrimination or its effects in grantees' market, and action plans for disparity/availability studies or other appropriate evidence gathering process, is undertaken. FTA will apply the following guidance to recipients of Federal funds:

The DOT Guidance

The following is the text of the DOT Western States guidance:

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.

Question: To Whom Do These Questions and Answers Apply?

Answer

These questions and answers apply only to recipients of Federal financial assistance from the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Aviation Administration (FAA) located in the states comprising the 9th Federal Judicial Circuit. These states are California, Oregon, Washington, Alaska, Arizona, Idaho, Montana, Nevada, and Hawaii.

These questions and answers do not apply to recipients in other states.

These questions and answers apply only to the disadvantaged business enterprise programs (DBE) of recipients of Federal financial assistance governed by 49 CFR Part 26.

Question: What Did the Court Say in Western States?

Answer

Like other Federal courts that have reviewed the Department of

Transportation's DBE program, the 9th Circuit panel held that 49 CFR Part 26 and the authorizing statute for the DBE program in TEA-21 were constitutional. The court affirmed that Congress had determined that there was a compelling need for the DBE program and the Part 26 was narrowly tailored.

The court agreed that Washington State did not need to establish a compelling need for its DBE program, independent of the determinations that Congress made on a national basis.

However, the court said that race-conscious elements of a national program, to be narrowly tailored as applied, must be limited to those parts of the country where its race-based measures are demonstrably needed.

Whether race-based measures are needed depends on the presence or absence of discrimination or its effects in a state's transportation contracting industry.

In addition, even when discrimination is present in a state, a program is narrowly tailored only if its application is limited to those specific groups that have actually suffered discrimination or its effects.

- The court concluded that Washington State DOT's DBE program was not narrowly tailored because the evidence of discrimination supporting its application was inadequate. The court mentioned several ways in which the state's evidence was insufficient:

- + Washington State DOT had not conducted statistical studies to establish the existence of discrimination in the highway contracting industry that were completed or valid.

- + Washington State DOT's calculation of the capacity of DBEs to do work was flawed because it failed to take into account the effects of past race-conscious programs on current DBE participation.

- + The disparity between DBE participation on contracts with and without affirmative action components did not provide any evidence of discrimination.

- + A small disparity between the proportion of DBE firms in the state and the percentage of funds awarded to DBEs in race-neutral contracts (2.7% in the case of Washington State DOT) was entitled to little weight as evidence of discrimination, because it did not account for other factors that may affect the relative capacity of DBEs to undertake contracting work.

- + This small statistical disparity is not enough, standing alone, to demonstrate the existence of discrimination. To demonstrate discrimination, a larger disparity would be needed.

- + Washington State DOT did not present any anecdotal evidence of discrimination.

- + The affidavits required by 49 CFR 26.67(a), in which DBEs certify that they are socially and economically disadvantaged, are not evidence of the presence of discrimination.

Consequently, the court found that the Washington State DOT DBE program was unconstitutional as applied.

The court cited the 8th Circuit's decision in *Sherbrooke Turf v. Minnesota Department of Transportation*. In that case, the court said, Minnesota and Nebraska had hired outside consulting firms to conduct statistical analyses of the availability and capacity of DBEs in their local markets, which the 8th Circuit had relied on in holding that the two states' DBE programs were constitutional as applied.

Question: What Action Should Recipients Take With Respect to Submitting Their Overall Goals for FY 2006?

Answer

Recipients should examine the evidence they have on hand of discrimination and its effects. Does this evidence appear to address successfully the problems the 9th Circuit's decision articulated concerning the Washington State DOT DBE program?

If the recipient currently has sufficient evidence of discrimination or its effects, the recipient should go ahead and submit race- and gender-conscious goals where appropriate, as provided in Part 26. (This submission would include the normal race-conscious/race-neutral "split" in overall goals.)

If the evidence of discrimination and its effects pertains to some, but not all, of the groups that Part 26 presumes to be socially and economically disadvantaged, then these race- and gender-conscious goals should apply only to the group or groups for which the evidence is adequate.

If necessary, the Department may entertain program waivers of Part 26's prohibition of group-specific goals in this situation.

If the recipient does not currently have sufficient evidence of discrimination or its effects, then the recipient would submit an all-race neutral overall goal for FY 2006. The recipient's submission would include a statement concerning the absence of adequate evidence of discrimination and its effects.

A race-neutral submission of this kind should include a description of plans to conduct a study or other appropriate

evidence-gathering process to determine the existence of discrimination or its effects in the recipient's market. An action plan describing the study and time lines for its completion should also be included.

The Department's operating administrations are willing, in response to recipients' requests, to extend the time for submitting FY 2006 goals for a time sufficient to allow recipients to evaluate the adequacy of their current evidence of discrimination or its effects.

Operating administrations will review recipients' annual goal submissions to determine whether recipients have provided evidence of discrimination or its effects.

Question: Should Recipients Who Will Be Submitting All Race-Neutral Overall Goals for FY 2006 Because They Do Not Have Sufficient Evidence of Discrimination or Its Effects Make Any Changes to Contracts Issued During FY 2005 or Earlier?

Answer

No. Even where FY 2005 contracts used race-conscious contract goals, we do not believe it is appropriate to attempt to revise or reform those contracts.

Question: If Recipients Will Be Operating an All-Race Neutral DBE Program in FY 2006 or Subsequent Years, What Should Such a Program Include?

With few exceptions, generally there is no difference in how the DBE program regulations apply to a race- and gender-neutral program (hereafter race-neutral) as compared to a race- and gender-conscious program (hereafter race-conscious).

In a wholly race-neutral program (e.g., the annual overall DBE goal has been approved with no portion of it projected to be attained by using race- and gender-conscious means) the recipient does not set contract goals on any of its U.S. DOT-assisted contracts for which DBE subcontracting possibilities exist. Recipients having an all race-neutral program are not required to establish contract goals to meet any portion of their overall goal.

Recipients should take affirmative steps to use as many of the race-neutral means of achieving DBE participation identified at 49 CFR 26.51(b) as possible to meet the overall goal and to demonstrate that you are administering your program in good faith. The Department expects that recipients using all race-neutral programs will use methods such as unbundling of contracts, technical assistance, capital

and bonding assistance, business development programs, etc., rather than waiting passively for DBEs to participate.

The good faith efforts requirements in 49 CFR 26.53 that apply when DBE contract goals are set have no required application to recipients implementing a race-neutral program. However, recipients must continue to collect the data required to be reported in the Uniform Report of DBE Awards or Commitments and Payments Form (see § 26.11) and to monitor compliance with the commercially useful function requirements.

The prompt payment and retainage requirements of 49 CFR 26.29 are race-neutral mechanisms designed to benefit all subcontractors, DBEs and non-DBEs alike. Recipients using all race-neutral programs must continue to implement them.

The requirement that DBEs must perform a commercially useful function to receive credit toward the overall goal applies to race neutral programs just as it does to programs that use race-conscious means to meet program objectives.

It is helpful for recipients to maintain an effective monitoring and enforcement program to track DBE participation obtained through race neutral means that the recipient claims credit (see 49 CFR 26.37(b)).

Question: What Must Recipients Do That Have Already Submitted Their FY 2006 Goals to Modal Administrations for Approval?

Answer

If the appropriate modal administration determines that the FY 2006 DBE goal submission does not contain the kind of information or documentation suggested by this guidance that would comport with the law established by the Ninth Circuit Court of Appeals, the recipient will be directed to revise and resubmit its DBE goal submission consistent with this guidance.

Question: Will the Process Used by the Modal Administrations to Review and Approve Goal Submissions Made by Recipients in the Ninth Circuit Change?

For FHWA recipients in the 9th Circuit, FY 2006 DBE goal submissions will require concurrence by the FHWA Office of Civil Rights and the Office of Chief Counsel in Washington, DC before approval by the appropriate FHWA division office.

FTA's process will remain the same. [Note—Please see request for comment below].

For FAA recipients in the 9th Circuit, FY 2006 DBE goal submissions with a race-conscious component will require concurrence by the FAA Headquarters Office of Civil Rights and a legal sufficiency review by the Office of Chief Counsel in Washington, DC before being approved by the appropriate FAA Regional Office of Civil Rights and Office of Chief Counsel. Those with an all race-neutral overall goal will be approved by the Regional Office of Civil Rights.

Question: If A Recipient Lacks Sufficient Evidence of Discrimination or Its Effects, What Should It Do To Remedy the Lack of Information?

Answer

A recipient in this situation should immediately begin to conduct a rigorous and valid study to determine whether there is evidence of discrimination or its effects.

The Department expects recipients who submit an all-race neutral goal for FY 2006 because they lack sufficient evidence of discrimination to ensure that this evidence-gathering effort is completed expeditiously.

Studies to determine the presence of discrimination or its effects are often referred to as "disparity" or "availability" studies, though there can also be rigorous and scientifically valid studies which may have different names. Whatever label is applied to a study, however, the key point is that it be designed to determine, in a fair and valid way, whether evidence of the kind the 9th Circuit decision determined was essential to a DBE program including race-conscious elements exists.

Question: What Should Recipients' Studies Include?

Answer

Based on the 9th Circuit decision, recipients should consider the following points as they design their studies:

The study should ascertain the evidence for discrimination and its effects separately for each of the groups presumed by Part 26 to be disadvantaged.

The study should include an assessment of any anecdotal and complaint evidence of discrimination.

Recipients may consider the kinds of evidence that are used in "Step 2" of the Part 26 goal-setting process, such as evidence of barriers in obtaining bonding and financing, disparities in business formation and earnings.

With respect to statistical evidence, the study should rigorously determine the effects of factors other than discrimination that may account for

statistical disparities between DBE availability and participation. This is likely to require a multivariate/ regression analysis.

The study should quantify the magnitude of any differences between DBE availability and participation, or DBE participation in race-neutral and race-conscious contracts. Recipients should exercise caution in drawing conclusions about the presence of discrimination and its effects based on small differences.

In calculating availability of DBEs, the study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.

Recipients should consider, as they plan their studies, evidence-gathering efforts that Federal courts have approved in the past. These include the studies by Minnesota and Nebraska cited in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), cert. denied 124 S. Ct. 2158 (2004) and the Illinois evidence cited in *Northern Contracting, Inc. v. State of Illinois, et al.* 2005 WL 2230195, N.D.Ill., September 08, 2005 (No. 00 C 4515)

Question: Can There Be Statewide or Regional Studies, as Opposed to a Separate Study for Each Individual Recipient?

Answer

If feasible, studies may be undertaken on a regional or statewide basis to reduce the costs that would be involved if each recipient conducted its own separate study.

We would expect that each State DOT would conduct a statewide study. Such a study should be conducted in cooperation with transit and airport recipients in the state, so that the study would apply to recipients in all three modes.

Larger transit and/or airport recipients may want to conduct their own study, since the demographics of large urban areas may differ from that of the state as a whole.

Question: Will Federal Funds Help To Defray the Costs of Recipients' Studies?

Answer

Yes. FHWA, FTA, and FAA have all stated that the costs of conducting disparity studies are reimbursable from Federal program funds, subject to the availability of those funds.

Recipients should contact their operating administration for more detailed information.

FTA Requests for Comment

FTA requests comment on two matters concerning the implementation of the DOT General Counsel's DBE Guidance on the Western States court decision:

1. For 9th circuit recipients only, with respect to FY 2006 overall DBE goals, recipients should submit DBE goals to their FTA Regional Office for review by the Regional Civil Rights Officer. As determined by the Regional Civil Rights Officer, recipients with race-neutral goals may be required to certify that they will conduct or participate in a disparity or availability study or other appropriate evidence gathering process and the time frame for completion of the study or process.

2. As mentioned in the DOT Guidance, disparity studies using FY 2006 funding allocations will be an authorized expense for reimbursement, subject to the availability of funds. We seek comment on whether disparity studies should receive grantee funding priority, and on whether any additional funding should be made available for this purpose.

Issued on: March 20, 2006.

Sandra K. Bushue,

Deputy Administrator.

[FR Doc. E6-4226 Filed 3-22-06; 8:45 am]

BILLING CODE 4910-57-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms, and Recordkeeping Requirements Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The Federal Register document with a 60-day comment period was published on November 29, 2005 [70 FR 71601].

DATES: Comments must be received on or before April 24, 2006.

FOR FURTHER INFORMATION CONTACT: Carlita Ballard at the National Highway Traffic Safety Administration, Office of

International Vehicle, Fuel Economy and Consumer Standards, (NVS-131), 202-366-5222, 400 Seventh Street, SW., Room 5320, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: 49 CFR part 544; Insurer Reporting Requirement.

OMB Control Number: 2127-0547.

Type of Request: Request for public comment on a previously approved collection of information.

Abstract: NHTSA must ensure that passenger motor vehicle insurance companies and rental/leasing companies comply with 49 CFR part 544, Insurer Reporting Requirement. Part 544 requires that the insurance/rental and leasing companies provide information on comprehensive insurance premiums, theft and recoveries and actions taken to address motor vehicle theft.

Affected Public: Business or other for-profit.

Estimated Total Annual Burden: 64,610 hours (56,700 man-hours for 28 insurance companies and 7,910 man-hours for 14 rental and leasing companies).

Estimated Annual Cost: \$2,325,960.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: NHTSA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued in Washington, DC on: March 20, 2006.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 06-2838 Filed 3-22-06; 8:45 am]

BILLING CODE 4910-59-P

ATTACHMENT 10

FEDERAL REGISTER/ VOL.74, NO. 63/FRIDAY, APRIL 3, 2009

II. Provisions of the Final Rule

This action delays the effective date of the December 3, 2008 final rule. The effective date of that rule, which would have been February 2, 2009, was delayed until April 3, 2009 (74 FR 5808) and is now delayed until December 31, 2009. Upon review and consideration of the new provisions of CHIPRA and the public comments we received during the reopened comment period, we believe that it may be necessary to revise a substantial portion of the December 3, 2008 final rule. Therefore, to inform future rulemaking on this issue, we are delaying the effective date a second time to give the public an additional opportunity to submit additional comments on the policy set forth in the December 3, 2008 final rule as well as the provisions of CHIPRA, discussed above. We anticipate that this time period will allow sufficient time for CMS to consider such comments and develop appropriate revisions to the delayed rule.

IV. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the *Federal Register* to provide a period for public comment before the provisions of a notice such as this take effect, in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). We also ordinarily provide a 30-day delay in the effective date of the provisions of a notice in accordance with section 553(d) of the APA (5 U.S.C. 553(d)). However, we can waive both the notice and comment procedure and the 30-day delay in effective date if the Secretary finds, for good cause, that it is impracticable, unnecessary or contrary to the public interest to follow the notice and comment procedure or to comply with the 30-day delay in the effective date, and incorporates a statement of the finding and the reasons in the notice.

This final rule delays the effective date of the December 3, 2008 final rule that was promulgated through notice and comment rulemaking, and does not make substantive changes to that final rule. Delay in the effective date and reopening of the comment period is necessary to ensure that the final rule, when effective, fully takes into account public comments, and conforms to recently enacted legislation. We do not believe that there will be any adverse impact or effect on the public from this delay in the effective date. Moreover, it would not be in the public interest for the underlying rule to go into effect, or to have uncertainty about whether it is

in effect, when the underlying rule does not conform to statutory requirements. In addition, it is not in the public interest to put into effect a rule that we intend to revise in a reasonable time frame after fully taking into account public comment and statutory changes. For the reasons stated above, we find that both notice and comment procedures and the 30-day delay in effective date for this final rule are unnecessary and contrary to the public interest. Therefore, we find there is good cause to waive notice and comment procedures and the 30-day delay in effective date for this final rule.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: March 25, 2009.

Charlene Frizzera,
Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: March 30, 2009.

Charles E. Johnson,
Acting Secretary.

[FR Doc. E9-7505 Filed 4-2-09; 8:45 am]
BILLING CODE 4120-01-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Parts 23 and 26

[Docket No. DOT-OST-2009-0074]

RIN 2105-AD79

Disadvantaged Business Enterprise Program; Inflationary Adjustment

AGENCY: Office of the Secretary, DOT.
ACTION: Final rule.

SUMMARY: Under the statutes governing the Department's Disadvantaged Business Enterprise (DBE) Program, firms are not considered small business concerns and are therefore ineligible as DBEs once their average annual receipts over the preceding three fiscal years reach specified dollar limits. The Department of Transportation is amending the size limits or gross receipts caps to ensure that the opportunity of small businesses to participate in the Department's DBE programs remains unchanged after taking inflation into account. This final rule provides 2009 inflation adjustment of size limits on small businesses participating in the DOT's Disadvantaged Business Enterprise programs.

DATES: This rule is effective April 3, 2009.

FOR FURTHER INFORMATION CONTACT:

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 1200 New Jersey Avenue, SE., W94-302, Washington, DC 20590, phone numbers (202) 366-9310 (voice), (202) 366-9313 (fax), (202) 755-7687 (TTY), bob.ashby@dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

Background

On April 2, 2007, the Department published a final rule revising 49 CFR part 23, the regulation governing the airport concessions disadvantaged business enterprise (ACDBE) program, to require that the Department adjust the general ACDBE gross receipts cap for inflation. That rule also adjusted the gross receipts cap for the Department's financial assistance programs in 49 CFR part 26. This final rule updates the gross receipts cap for the ACDBE program and the Department's financial assistance program for 2009.

The DBE Airport Concession and Contracting Programs

The DOT-assisted contracts DBE rule and airport concessions DBE rule are based on different statutes. Each statute applies to a distinct type of business that may seek DOT financial assistance. The ACDBE program is designed to give business opportunities to certain small business concerns that operate at airports and that are owned and controlled by socially and economically disadvantaged individuals. The ACDBE program is mandated by 49 U.S.C. 47107(e), originally enacted in 1987 and amended in 1992.

The DBE program for DOT-assisted contracts is a statutory program intended to ensure nondiscriminatory contracting opportunities for small business concerns owned and controlled by socially and economically disadvantaged individuals in the Department's highway, mass transit and airport financial assistance programs. The statutory provision governing the DBE program in the highway and mass transit financial assistance programs is 1101(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, August 10, 2005. The statutory provision governing the DBE program as it relates to the airport financial assistance programs is 49 U.S.C. 47113.

ACDBE Gross Receipts Size Standards

Under the current DOT rule, if the airport concessions firm's annual gross receipts average over the preceding three fiscal years exceed \$47,780,000,

then, it is not considered a small business eligible to be certified as an ACDBE. This final rule adjusts the size standards for eligibility as an ACDBE for inflation.

This adjustment compensates for the rise in the general level of prices over time from the third quarter of 2006 through the fourth quarter of 2008. In order to ensure that this adjustment is made on a timely basis in the future, the rule was amended to provide for a similar adjustment every two years, using the same method. At two year intervals, the Department is to publish a final rule to update the size standard numbers. This final rule updates the ACDBE gross receipts cap for 2009. It should be emphasized that this action does not increase the size standard for ACDBEs in real dollar terms. It simply maintains the status quo, adjusting to 2008 dollars.

In order to make an inflation adjustment to the gross receipts figures, the Department of Transportation uses a Department of Commerce price index. The Department of Commerce's Bureau of Economic Analysis prepares constant dollar estimates of state and local government purchases of goods and services by deflating current dollar estimates by suitable price indexes.¹ These indices include purchases of durable and non-durable goods, and other services. Using these price deflators enables the Department to adjust dollar figures for past years' inflation. Given the nature of the Department's DBE Program and ACDBE Program, adjusting the gross receipts cap in the same manner in which inflation adjustments are made to the costs of state and local government purchases of goods and services is simple, accurate, and fair.

The inflation rate on purchases by state and local governments for the current year is calculated by dividing the price deflator for the fourth quarter of 2008 (140.964) by 2006's third quarter price deflator (128.352). The result of the calculation is 1.0982, which represents an inflation rate of 1.098% from the third quarter of 2006. Multiplying the \$47,780,000 figure for small business enterprises by 1.0982 equals \$52,471,996, which will be rounded off to the nearest \$10,000, or \$52,470,000.

Therefore, under this new rule, if a firm's gross receipts, averaged over the firm's previous three fiscal years, exceeds \$52,470,000, then it exceeds the

airport concessions small business size limit contained in part 23.

ACDBE Car Rental Company Size Standards

Under the existing rule, car rental companies are not eligible to participate in the ACDBE program if their average gross receipts over the three previous fiscal years exceed \$63,710,000. This final rule adjusts the size standard for car rental companies to reflect the effects of inflation on the real dollar value.

The inflation rate on purchases by state and local governments for the current year is calculated by dividing the price deflator for the fourth quarter of 2008 (140.964) by 2006's third quarter price deflator (128.352). The result of the calculation is 1.0982, which represents an inflation rate of 1.098% from the third quarter of 2006.

Multiplying the \$63,710,000 figure for car rental companies by 1.0982 equals \$69,966,322, which will be rounded off to the nearest \$10,000, or \$69,970,000.

Therefore, under this new rule, if a car rental company's gross receipts, averaged over the company's previous three fiscal years, exceeds \$69,970,000, then it exceeds the airport concessions car rental company size limit contained in part 23.

Business Size Standards for the DBE DOT Financial Assistance Programs

This rule also adjusts the gross receipts cap for the Department's financial assistance programs in 49 CFR part 26. Under the existing rule, if a firm's average annual gross receipts, as defined by Small Business Administration (SBA) regulations (see 13 CFR 121.402), over the preceding three fiscal years exceed \$20,410,000, then it cannot qualify as an eligible DBE firm. SAFETEA-LU Section 1101(b)(1)(a) instructs the Secretary of Transportation to adjust this amount annually for inflation.

The inflation rate on purchases by state and local governments for the current year is calculated by dividing the price deflator for the fourth quarter of 2008 (140.964) by 2006's third quarter price deflator (128.352). The result of the calculation is 1.0982, which represents an inflation rate of 1.098% from the third quarter of 2005. Multiplying the \$20,410,000 figure for disadvantaged business enterprises in Department of Transportation financial assistance programs by 1.0982 equals \$22,414,262, which will be rounded off to the nearest \$10,000, or \$22,410,000.

Therefore, if a firm's gross receipts, averaged over the firm's previous three fiscal years, exceeds \$22,410,000, then it

exceeds the small business size limit for participation by disadvantaged business enterprises in Department of Transportation financial assistance programs contained in part 26.

Regulatory Analyses and Notices

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. The Department finds that notice and comment for this rule is unnecessary and contrary to the public interest because it relates only to ministerial updates of business size standards and gross receipts caps to account for inflation, which does not change the standards or caps in real dollar terms. These updates will assist entities attempting to be part of the Department's DBE program and should not be unnecessarily delayed. Accordingly, the Department finds good cause under 5 U.S.C. 553(b)(B) to waive notice and opportunity for public comment. The Department also finds good cause under 5 U.S.C. 553(d)(3) to make this rule effective upon publication.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

This rule is nonsignificant for purposes of the Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. The rule is a ministerial adjustment for inflation of a statutory small business size standard that does not change the standard in real dollar terms. It will not impose burdens on any regulated parties. In addition, this rule would not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), we have evaluated the effects of this action on small entities and have determined that the action will not have a significant economic impact on a substantial number of small entities. Therefore, the Department certifies that this rule would not have a significant economic impact on a substantial number of small entities.

The rule is a ministerial update to the dollar limits and size limits to define small businesses for the Department's Airport Concessions Disadvantaged

¹ See Bureau of Economic Analysis National Income and Product Account Table: Table 3.10.4 Price Indexes for Government Consumption Expenditures and General Government Gross Output.

Business Enterprise Program and for the Department's Financial Assistance Program for Disadvantaged Business Enterprises. The only effect of the rule on small entities is to allow some small businesses to continue to participate in the ACDBE and the DBE programs by adjusting for inflation. Therefore, the rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the Department has determined that this action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The Department has also determined that this action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 13084

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments"). Because this rule would not significantly or uniquely affect the Indian tribal communities, and would not impose substantial direct compliance costs, the funding and consultation requirements of the Executive Order do not apply.

Unfunded Mandates Reform Act of 1995

This rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 109 Stat. 48). This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$128.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the Department will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector. Additionally, the definition of "Federal Mandate" in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. Since this rule pertains to a

nondiscrimination requirement and affects only Federal financial assistance programs, the Unfunded Mandates Act does not apply.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The Department has determined that this rule does not contain collection of information requirements for the purposes of the PRA.

National Environmental Policy Act

The Department has analyzed this rule for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) and has determined that the inflationary adjustment for dollar limits and size limits used to define small businesses that can participate in the Department's Disadvantaged Business Enterprises programs, would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects

49 CFR Part 23

Administrative practice and procedure, Airports, Civil rights, Concessions, Government contracts, Grant programs—transportation, Minority businesses, Reporting and recordkeeping requirements.

49 CFR Part 26

Administrative practice and procedure, Airports, Civil rights, Concessions, Government contracts, Grant programs—transportation, Highways and roads, Mass transportation, Minority business, Reporting and recordkeeping requirements.

■ For the reasons stated 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 continues to read as follows:

Authority: 49 U.S.C. 47107; 42 U.S.C. 2000d; 49 U.S.C. 322; Executive Order 12138.

■ 2. Revise § 23.33 to read as follows:

§ 23.33 What size standards do recipients use to determine the eligibility of ACDBEs?

(a) As a recipient, you must, except as provided in paragraph (b) of this section, treat a firm as a small business eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous three fiscal years, do not exceed \$52.47 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) Car rental companies: \$69.97 million average annual gross receipts over the firm's three previous fiscal years, as adjusted by the Department for inflation every two years from April 3, 2009.

(3) Pay telephones: 1,500 employees;

(4) Automobile dealers: 350 employees.

(c) The Department adjusts the numbers in paragraphs (a) and (b)(2) of this section using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment. The Department publishes a Federal Register document informing the public of each adjustment.

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

■ 3. The authority citation for 49 CFR part 26 continues to read as follows:

Authority: 23 U.S.C. 324; 42 U.S.C. 2000d, et seq.; 49 U.S.C. 1615, 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107, 113.

■ 4. Revise § 26.65 to read as follows:

§ 26.65 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by

Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal

fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$22.41 million.

(c) The Department adjusts the number in paragraph (b) of this section annually using the Department of Commerce price deflators for purchases

by State and local governments as the basis for this adjustment.

Issued this 22nd day of March, 2009, at Washington, DC.

Ray LaHood,

Secretary of Transportation.

[FR Doc. E9-7118 Filed 4-2-09; 8:45 am]

BILLING CODE 4910-9X-P

ATTACHMENT 11

FEDERAL REGISTER/ VOL.75, NO. 22/WEDNESDAY, FEBRUARY 3, 2010

Federalism (64 FR 43255, August 10, 1999).

F. Executive Order 13175

This proposed rule would not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This proposed rule would not significantly or uniquely affect the communities of Indian Tribal governments, nor would it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), do not apply to this proposed rule.

G. Executive Order 13045

This action is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

H. Executive Order 13211

This proposed rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use and because this action is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

In addition, since this action does not involve any technical standards, section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), does not apply to this action.

J. Executive Order 12898

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: January 27, 2010.

Wendy C. Hamnett,

Acting Director, Office of Pollution Prevention and Toxics.

Therefore, it is proposed that 40 CFR part 721 be amended as follows:

PART 721—[AMENDED]

1. The authority citation for part 721 would continue to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

2. Add § 721.10183 to subpart E to read as follows:

§ 721.10183 Multi-walled carbon nanotubes (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as multi-walled carbon nanotubes (PMN P-08-199) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(2)(i), (a)(2)(ii), (a)(4), (a)(5) (National Institute for Occupational Safety and Health (NIOSH)-approved full-face respirators with N100 cartridges), (a)(6)(i), and (c).

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j) (additive/filler for polymer composites and support media for industrial catalysts).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

[FR Doc. 2010-2256 Filed 2-2-10; 8:45 am]

BILLING CODE 6560-50-S

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 23

[Docket No. OST-2010-0022]

RIN 2105-AD88

Participation by Disadvantaged Business Enterprises in Airport Concessions

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Transportation is proposing to remove the "sunset" provision from its rule governing the airport concessions disadvantaged business enterprise program. The rule would instead provide for periodic program reviews. In addition, in the interest of initiating a program review, the Department is soliciting comments on any changes that should be made in the rule. These comments would assist the Department in reviewing the rule and, if warranted, proposing modifications to it in the future.

DATES: Comments on the proposal to remove the sunset provision must be received by March 5, 2010. Responses to the request for comments on potential modifications to the rule must be received by November 1, 2010. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments (identified by the agency name and DOT Docket ID Number OST-2010-0022) by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.

- *Hand Delivery or Courier:* West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

- *Fax:* 202-493-2251.

Instructions: You must include the agency name (Office of the Secretary, DOT) and Docket number (OST-2010-0022) for this notice at the beginning of your comments. You should submit two copies of your comments if you submit them by mail or courier. Note that all comments received will be posted without change to <http://www.regulations.gov> including any

personal information provided and will be available to internet users. You may review DOT's complete Privacy Act Statement in the *Federal Register* published on April 11, 2000 (65 FR 19477) or you may visit <http://DocketsInfo.dot.gov>.

Docket: For internet access to the docket to read background documents and comments received, go to <http://www.regulations.gov>. Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Ave, SE., Docket Operations, M-30, West Building Ground Floor, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, Room W94-302, 202-366-9310, bob.ashby@dot.gov.

SUPPLEMENTARY INFORMATION: When the Department issued its final rule revising its ACDBE rule (49 CFR Part 23) in 2005, the rule included at section 23.7 a "sunset" provision. This provision said unless extended by the Department, the provisions of Part 23 would terminate and become inoperative on April 21, 2010. The preamble to the rule explained the rationale for this provision as follows:

The Department is introducing a "sunset" provision into the final rule as a way of addressing the durational element of narrow tailoring. A narrowly-tailored rule is not intended to remain in effect indefinitely. Rather, the rule should be reviewed periodically to ensure that it continues to be needed and that it remains a constitutionally appropriate way of implementing its objectives. Consequently, this provision states that this rule will terminate and cease being operative in five years, unless the Department extends it. We intend, beginning four years from now, to review the rule to determine whether it should be extended, modified, or allowed to expire. Of course, the underlying DBE statute remains in place, and its requirements continue to apply regardless of the status of this regulation, absent future Congressional action. (70 FR 14502; March 22, 2005).

The Department believes that it would be useful to begin reviewing the provisions of Part 23 at this time, for the purpose of determining what, if any, modifications, are appropriate to improve its operations, in context of the "strict scrutiny" requirements of narrowly tailoring a program to meet a compelling need to combat discrimination and its effects.

Consequently, with this notice, the Department is soliciting comments from interested parties concerning any and all changes to Part 23 they believe would be useful in helping the Department, airports, ACDBEs, and other airport-related businesses to achieve the ACDBE program's objectives. The Department will use the information we receive to assist us in determining whether to issue a proposed rule to modify the ACDBE regulation. In addition, the Department is planning to meet with stakeholders, at times and places to be determined, to discuss potential changes to Part 23.

However, the Department does not believe it is appropriate to retain the "sunset" provision itself. The Department can, and will, review the provisions of the rule without this provision being in place. Moreover, as the preamble discussion for section 23.7 itself pointed out, the ACDBE program is mandated by statute. The Department does not believe that it would be meaningful to eliminate a regulation when its underlying statutory mandate remains applicable to airports and other participants. Doing so would simply cause confusion and disruption, making it more difficult for all parties concerned to carry out their responsibilities under the statute, which is not self-executing. A regulatory framework is necessary for rational implementation of the statute. Periodic program reviews by the Department, as well as consideration from time to time of the continuing need for the program by Congress, meet the durational element of narrow tailoring satisfactorily.

Moreover, the Department is convinced that programs like those in 49 CFR part 23 and its companion DBE rule, 49 CFR part 26, remain necessary to redress discrimination and its effects in airport programs and to ensure a level playing field for small businesses owned and controlled by socially and economically disadvantaged individuals. The extensive evidence provided to a March 2009 hearing of the House Transportation and Infrastructure Committee on this subject, and the findings of continuing need for DBE programs in the House-passed version of the Federal Aviation Administration reauthorization bill (H.R. 915), as well as the Department's long-term experience in operating the program, support this conclusion.

For these reasons, the Department proposes to amend section 23.7 by removing the "sunset" language and substituting a requirement for program review. The current notice initiates such a review. The opportunity for

stakeholder input and public comment is part of this review. The Department seeks comment on whether the final rule should state a specific interval for future program reviews or whether this determination should, as stated in the text of the proposed amendment to the rule, be left to the Department's discretion.

Regulatory Analyses and Notices

Administrative Procedure Act

Having considered the potentially high risk of disruption posed by the current "sunset" provision, the Department believes that the program review approach proposed by this NPRM provides a better way of achieving the objective of ensuring that the durational element of narrow tailoring is achieved. In order to ensure that all parties understand that the program and regulation will continue without interruption or uncertainty, the Department believes that it is important to propose removing the provision at this time and substituting the program review approach at this time. A short comment period is essential in order to permit a final rule to be issued before April 21, 2010. We also believe that beginning the program review now, rather than later, will serve the interests of the program and program participants well.

Executive Order 12866 and Regulatory Flexibility Act

The Department has determined that this action is not a significant regulatory action for purposes of Executive Order 12866 or the Department's regulatory policies and procedures. The rule would not impose any costs or burdens on grantees or other parties and would keep in place the opportunity for interested parties to participate in a program review. It makes no changes in the obligations of any party. For these reasons, the Department certifies that the rule would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This rule does not create any information collection requirements covered by the Paperwork Reduction Act.

List of Subjects in 49 CFR Part 23

Administrative practice and procedures, Airports, Civil rights, Government contracts, Grant programs—transportation, Minority business, Reporting and recordkeeping requirements.

Issued at Washington, DC this 20th day of January 2010.

Raymond F. LaHood,
Secretary of Transportation.

For reasons discussed in the preamble, the Department of Transportation proposes to amend Title 49 of the Code of Federal Regulations, Part 23, as follows:

PART 23—[AMENDED]

1. The authority citation for 49 CFR Part 23 continues to read as follows:

Authority: 49 U.S.C. 47107; 42 U.S.C. 2000d; 49 U.S.C. 322; Executive Order 12138.

2. Section 23.7 is proposed to be revised to read as follows:

§23.7 Program Reviews.

In 2010, and thereafter at the discretion of the Secretary, the Department will initiate a review of the ACDBE program to determine what, if any, modifications should be made to this Part.

[FR Doc. 2010-2293 Filed 2-2-10; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA-2010-0012

RIN 2127-AK58

Federal Motor Vehicle Safety Standards; Motor Vehicle Brake Fluids

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This NPRM proposes to amend FMVSS No. 116, *Motor Vehicle Brake Fluids*, so that brake fluids would be tested with ethylene, propylene, and diene terpolymer (EPDM) rubber, as this type of rubber is increasingly being used in brake fluid seals. This NPRM also updates references to standards issued by the Society of Automotive Engineers (SAE) and the American Society for Materials and Testing (ASTM) (no substantive changes to the standard would be made by these updates), and corrects minor errors in the standard.

DATES: Comments must be received on or before April 5, 2010.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- **Mail:** Docket Management Facility, M-30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- **Hand Delivery or Courier:** West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.
- **Fax:** (202) 493-2251.

Regardless of how you submit your comments, you should mention the docket number of this document.

You may call the Docket at 202-366-9324.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the SUPPLEMENTARY INFORMATION section of this document. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act discussion below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the *Federal Register* published on April 11, 2000 (65 FR 19477-78).

FOR FURTHER INFORMATION CONTACT:

For non-legal issues: Mr. Samuel Daniel, Office of Crash Avoidance Standards, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 (202-366-4921). Mr. Daniel's fax number is: (202) 366-7002.

For legal issues: Ms. Dorothy Nakama, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 (202-366-2992). Ms. Nakama's fax number is: (202) 366-3820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background
- II. Testing With Ethylene, Propylene, and Diene Terpolymer Rubber
- III. Updating SAE Standard J1703
- IV. Updating American Society for Testing and Materials Standards
- V. Other Proposed Corrections and Updates to FMVSS No. 116
- VI. Effective Date

VII. Rulemaking Analyses and Notices
VIII. Public Participation

I. Background

Federal Motor Vehicle Safety Standard (FMVSS) No. 116, *Motor Vehicle Brake Fluids* (49 CFR 571.116), specifies requirements for fluids for use in hydraulic brake systems of motor vehicles, containers for these fluids, and labeling of the containers. The purpose of the standard is to reduce failures in the hydraulic braking systems of motor vehicles that may occur because of the manufacture or use of improper or contaminated fluid. FMVSS No. 116 was developed from Society of Automotive Engineers (SAE) Standards J1703, J1704, and J1705, which address the performance requirements and test procedures for DOT3, DOT4, and DOT5 brake fluid, respectively. FMVSS No. 116 incorporates by reference or otherwise refers to particular editions (by date) of SAE J1703. FMVSS No. 116 also references several standards published by the American Society for Testing and Materials (ASTM) relating to test procedures and devices.

II. Testing With Ethylene, Propylene, and Diene Terpolymer Rubber

This document proposes to update FMVSS No. 116 so that brake fluids would be tested with the materials currently used in the manufacture of brake fluid seals. Over the past two decades, the motor vehicle industry has increasingly gone from using styrene-butadiene rubber (SBR) for the brake system seals to ethylene, propylene, and diene terpolymer (EPDM)(as characterized by SAE J1703 AUG2008) rubber because EPDM rubber is more heat resistant and less expensive to manufacture. At present, FMVSS No. 116 tests the effects of brake fluid on SBR, but not on EPDM rubber.¹ In this NPRM, we propose to include the testing of brake fluid on EPDM rubber. The following amendments are proposed.

a. Definition of "Brake Fluid"

To apply FMVSS No. 116 to brake fluid that contacts EPDM rubber, we propose to expand the definition of "brake fluid" at S4 of the standard to expressly state that "brake fluid" includes liquids that contact EPDM rubber in a hydraulic brake system.

b. Corrosion Test

The corrosion test in FMVSS No. 116 (S5.1.6 and S6.6) evaluates the corrosive effects of brake fluid on several

¹ In the early 1980s, SAE added testing of EPDM rubber to SAE J1703, *Motor Vehicle Brake Fluid*, and SAE J1704, *Borate Ether Based Brake Fluid*.

ATTACHMENT 12

FEDERAL REGISTER/ VOL.76, NO. 19/FRIDAY, JANUARY 28, 2011

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map Date	Date certain federal assistance no longer available in SFHAs
Taft, Town of, Muskogee County	400128	June 26, 1976, Emerg; August 25, 1987, Reg; February 4, 2011, Susp.	.....do*	Do.
Wainwright, Town of, Muskogee County	400129	March 9, 1976, Emerg; August 8, 1978, Reg; February 4, 2011, Susp.	.....do*	Do.
Warner, Town of, Muskogee County	400130	December 29, 1976, Emerg; May 25, 1978, Reg; February 4, 2011, Susp.	.....do*	Do.
Webbers Falls, Town of, Muskogee County.	400131	November 28, 1975, Emerg; May 1, 1980, Reg; February 4, 2011, Susp.	.....do*	Do.
Texas:				
Bandera County, Unincorporated Areas	480020	January 21, 1974, Emerg; November 1, 1978, Reg; February 4, 2011, Susp.	.....do*	Do.
Benavides, City of, Duval County	480792	July 24, 1975, Emerg; March 4, 1986, Reg; February 4, 2011, Susp.	.....do*	Do.
Colorado County, WCID Number 2	481489	October 28, 1977, Emerg; June 1, 1988, Reg; February 4, 2011, Susp.	.....do*	Do.
Colorado County, Unincorporated Areas	480144	February 29, 1980, Emerg; September 19, 1990, Reg; February 4, 2011, Susp.	.....do*	Do.
Columbus, City of, Colorado County	480145	February 19, 1975, Emerg; June 19, 1985, Reg; February 4, 2011, Susp.	.....do*	Do.
Duval County, Unincorporated Areas	480202	July 24, 1975, Emerg; May 1, 1987, Reg; February 4, 2011, Susp.	.....do*	Do.
Eagle Lake, City of, Colorado County ...	480146	July 30, 1975, Emerg; April 1, 1987, Reg; February 4, 2011, Susp.	.....do*	Do.
Lamesa, City of, Dawson County	480191	February 25, 1972, Emerg; April 30, 1976, Reg; February 4, 2011, Susp.	.....do*	Do.
San Diego, City of, Duval and Jim Wells Counties.	481199	December 26, 1975, Emerg; March 1, 1987, Reg; February 4, 2011, Susp.	.....do*	Do.

*-do- = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: January 19, 2011.
Sandra K. Knight,
Deputy Federal Insurance and Mitigation Administrator, Mitigation.
[FR Doc. 2011-1930 Filed 1-27-11; 8:45 am]
BILLING CODE 9110-12-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 26

[Docket No. OST-2010-0118]

RIN 2105-AD75

Disadvantaged Business Enterprise: Program Improvements

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Final rule.

SUMMARY: This rule improves the administration of the Disadvantaged Business Enterprise (DBE) program by increasing accountability for recipients with respect to meeting overall goals, modifying and updating certification requirements, adjusting the personal net worth (PNW) threshold for inflation, providing for expedited interstate certification, adding provisions to foster small business participation, improving

post-award oversight, and addressing other issues.

DATES: Effective Dates: This rule is effective February 28, 2011.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, Room W94-302, 202-366-9310, bob.ashby@dot.gov.

SUPPLEMENTARY INFORMATION: The Department of Transportation issued an advance notice of proposed rulemaking (ANPRM) concerning several DBE program issues on April 8, 2009 (74 FR 15904). The first issue raised in the ANPRM concerned counting of items obtained by a DBE subcontractor from its prime contractor. The second concerned ways of encouraging the “unbundling” of contracts to facilitate participation by small businesses, including DBEs. The third was a request for comments on potential improvements to the DBE application form and personal net worth (PNW) form. The fourth asked for suggestions related to program oversight. The fifth concerned potential regulatory action to facilitate certification for firms seeking to work as DBEs in more than one state.

The sixth concerned additional limitations on the discretion of prime contractors to terminate DBEs for convenience, once the prime contractor had committed to using the DBE as part of its showing of good faith efforts. The Department received approximately 30 comment letters regarding these issues.

On May 10, 2010, the Department issued a notice of proposed rulemaking (NPRM) seeking further comment on proposals based on the ANPRM and proposing new provisions (75 FR 25815). The NPRM proposed an inflationary adjustment of the PNW cap to \$1.31 million, the figure that would result from proposed Federal Aviation Administration (FAA) reauthorization legislation then pending in both Houses of Congress. The Department proposed additional measures to hold recipients accountable for their performance in achieving DBE overall goals.

The NPRM also proposed amendments to the certification-related provisions of the DBE regulation. Those proposals resulted from the Department’s experience dealing with certification issues and certification appeal cases during the years since the last major revision of the DBE rule in 1999. The proposed amendments were intended to clarify issues that have arisen and avoid problems with which

recipients (*i.e.*, state highway agencies, transit authorities, and airport sponsors who receive DOT grant financial assistance) and the Department have had to grapple over the last 11 years.

The Department received approximately 160 comments on the NPRM from a variety of interested parties, including DBE and non-DBE firms, associations representing them, and recipients of DOT financial assistance. A summary of comments on the major issues in the rulemaking, and the Department's responses to those comments, follows.

Counting Purchases From Prime Contractors

Under current counting rules, a DBE subcontractor and its prime contractor may count for DBE credit the entire cost of a construction contract, including items that the DBE subcontractor purchases or leases from a third party (*e.g.*, in a so-called "furnish and install" contract). There is an exception to this general rule: A DBE and its prime contractor may not count toward goals items that the DBE purchases or leases from its own prime contractor. The reason for this provision is that doing so would allow the prime contractor to count for DBE credit items that it produced itself.

As noted in the ANPRM, one DBE subcontractor and a number of prime contractors objected to this approach, saying that it unfairly denies a DBE in this situation the opportunity to count credit for items it has obtained from its prime contractor rather than from other sources. Especially in situations in which a commodity might only be available from a single source—a prime contractor or its affiliate—the rule would create a hardship, according to proponents of this view. The ANPRM proposed four options (1) keeping the rule as is; (2) keeping the basic rule as is, but allowing recipients to make exceptions in some cases; (3) allowing DBEs to count items purchased from any third party source, including the DBE's prime contractor; and (4) not allowing any items obtained from any non-DBE third party to be counted for DBE credit. Comment was divided among the four alternatives, which each garnering some support. For purposes of the NPRM, the Department decided not to propose any change from the current rule.

Comment on the issue was again divided. Seven commenters favored allowing items obtained from any source to be counted for credit, including the firm that was the original proponent of the idea and another DBE, two prime contractors' associations, a

prime contractor, and two State Departments of Transportation (DOTs). These commenters generally made the same arguments as had proponents of this view at the ANPRM stage. Thirteen commenters, among which were several recipients, a DBE contractors' association, and DBE contractors, favored the NPRM's proposed approach of not making any change to the existing rule, and they endorsed the NPRM's rationale. Sixteen commenters, including a recipient association and a number of DBE companies, supported disallowing credit for any items purchased or leased from a non-DBE source. They believed that this approach supported the general principle of awarding DBE credit only for contributions that DBEs themselves make on a contract.

DOT Response

The Department remains unconvinced that it is appropriate for a prime contractor to produce an item (*e.g.*, asphalt), provide it to its own DBE subcontractor, and then count the value of the item toward its good faith efforts to meet DBE goals. The item—asphalt, in this example—is a contribution to the project made by the prime contractor itself and simply passed through the DBE. That is, the prime contractor, on paper, sells the item to the DBE, who then charges the cost of the item it just bought from the prime contractor as part of its subcontract price, which the prime then reports as DBE participation. In the Department's view, this pass-through relationship is inconsistent with the most important principle of counting DBE participation, which is that credit should only be counted for value that is added to the transaction by the DBE itself.

As mentioned in the ANPRM and NPRM, the current rule treats counting of items purchased by DBEs from non-DBE sources differently, depending on whether the items are obtained from the DBE's prime contractor or from a third-party source. The Department's current approach is a reasonable compromise between the commonly accepted practice of obtaining items from non-DBE sources as part of the contracting process and maintaining the principle of counting only the DBE's own contributions for credit toward goals, which is most seriously violated when the prime contractor itself is the source of the items. This compromise respects the dual, somewhat divergent, goals of accommodating a common way of doing business and avoiding a too-close relationship between a prime contractor and a DBE subcontractor that distorts the counting of credit toward DBE goals.

This compromise has been part of the regulation since 1999 and, with the exception of the proponent of changing the regulation and its prime contractor partners, has never been raised by program participants as a widespread problem requiring regulatory change. For these reasons, the Department will leave the existing regulatory language intact.

Terminations of DBE Firms

The NPRM proposed that a prime contractor who, in the course of meeting its good faith efforts requirements on a procurement involving a contract goal, had submitted the names of one or more DBEs to work on the project, could not terminate a DBE firm without the written consent of the recipient. The firm could be terminated only for good cause. The NPRM proposed a list of what constituted good cause for this purpose.

Over 40 comments addressed this subject, a significant majority of which supported the proposal. Two recipients said the proposal was unnecessary and a third expressed concern about workload implications. Several recipients said that they already followed this practice.

However, commenters made a variety of suggestions with respect to the details of the proposal. A DBE firm questioned a good cause element that would allow a firm to be terminated for not meeting reasonable bonding requirements, noting that lack of access to bonding is a serious problem for many DBEs. A DBE contractors' association said that a DBE's action to halt performance should not necessarily be a ground for termination, because in some cases such an action could be a justified response to an action beyond its control (*e.g.*, the prime failing to make timely payments). A DBE requested clarification of what being "not responsible" meant in this context. A number of commenters, including recipients and DBEs, suggested that a prime could terminate a DBE only if the DBE "unreasonably" failed to perform or follow instructions from the prime.

A prime contractors' association suggested additional grounds for good cause to terminate, including not performing to schedule or not performing a commercially useful function. Another such association said the rule should be consistent with normal business practices and not impede a prime contractor's ability to remove a poorly performing subcontractor for good cause. A recipient wanted a public safety exception to the time frame for a DBE's reply to a prime contractor's notice

proposing termination, and another recipient wanted to shorten that period from five to two days. A State unified certification program (UCP) suggested adopting its State's list of good cause reasons, and a consultant suggested that contracting officers, not just the DBE Liaison Officer (DBELO), should be involved in the decision about whether to concur in a prime contractor's desire to terminate a DBE. A recipient wanted to add language concerning the prime contractor's obligation to make good faith efforts to replace a terminated DBE with another DBE.

DOT Response

The Department, like the majority of commenters on this issue, believes that the proposed amendment will help to prevent situations in which a DBE subcontractor, to which a prime contractor has committed work, is arbitrarily dismissed from the project by the prime contractor. Comments to the docket and in the earlier stakeholder sessions have underlined that this has been a persistent problem. By specifying that a DBE can be terminated only for good cause—not simply for the convenience of the prime contractor—and with the written consent of the recipient, this amendment should help to end this abuse.

With respect to the kinds of situations in which “good cause” for termination can exist, the Department has modified the language of the rule to say that good cause includes a situation where the DBE subcontractor has failed or refused to perform the work of its subcontract in accordance with normal industry standards. We note that industry standards may vary among projects, and could be higher for some projects than others, a matter the recipient could take into account in determining whether to consent to a prime contractor's proposal to terminate a DBE firm. However, good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor (e.g., the failure of the prime contractor to make timely payments or the unnecessary placing of obstacles in the path of the DBE's work).

Good cause also does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that it can self-perform the work in question or substitute another DBE or non-DBE firm. This approach responds to commenters who were concerned about prime contractors imposing unreasonable demands on DBE subcontractors while offering recipients a more definite standard than simple

reasonableness in deciding whether to approve a prime contractor's proposal to terminate a DBE firm. We have also adopted a recipient's suggestion to permit the time frame for the process to be shortened in a case where public necessity (e.g., safety) requires a shorter period of time before the recipient's decision.

In addition to the enumerated grounds, a recipient may permit a prime contractor to terminate a DBE for “other documented good cause that the recipient determines compels the termination of the DBE subcontractor.” This means that the recipient must document the basis for any such determination, and the prime contractor's reasons for terminating the DBE subcontractor make the termination essential, not merely discretionary or advantageous. While the recipient need not obtain DOT operating administration concurrence for such a decision, FHWA, FTA, and FAA retain the right to oversee such determinations by recipients.

Personal Net Worth

The NPRM proposed to make an inflationary adjustment in the personal net worth (PNW) cap from its present \$750,000 to \$1.31 million, based on the consumer price index (CPI) and relating back to 1989, as proposed in FAA authorization bills pending in Congress. The NPRM noted that such an adjustment had long been sought by DBE groups and that it maintained the status quo in real dollar terms. The Department also asked for comment on the issue of whether assets counted toward the PNW calculation should continue to include retirement savings products. The rule currently does include them, but the pending FAA legislation would move in the direction of excluding them from the calculation.

Of the 95 commenters who addressed the basic issue of whether the Department should make the proposed inflationary adjustment, 71—representing all categories of commenters—favored doing so. Many said that such an adjustment was long overdue and that it would mitigate the problem of a “glass ceiling” limiting the growth and development of DBE firms. A few commenters said that such adjustments should be done regionally or locally rather than nationally, to reflect economic differences among areas of the country. A number of the commenters wanted to make sure the Department made similar adjustments annually in the future. A member of Congress suggested that the PNW should be increased to \$2.5 million, while a few recipients favored a smaller

increase (e.g., to \$1 million). A few commenters also suggested that the Department explore some method of adjusting PNW other than the CPI, but they generally did not spell out what the alternative approaches might be.

The opponents of making the adjustment, mostly recipients and DBEs, made several arguments. The first was that \$1.31 million was too high and would include businesses owners who were not truly disadvantaged. The second was that raising the PNW number would favor larger, established, richer DBEs at the expense of smaller, start-up firms. These larger companies could then stay in the program longer, to the detriment of the program's aims. Some commenters said that the experience in their states was that very few firms were becoming ineligible for PNW reasons, suggesting that a change in the current standard was unnecessary.

With respect to the issue of retirement assets, about 28 comments, primarily from DBE groups and recipients, favored excluding some retirement assets from the PNW calculation, often asserting that this was appropriate because such funds are illiquid and not readily available to contribute toward the owners' businesses. Following this logic, some of the commenters said that Federally-regulated illiquid retirement plans (e.g., 401k, Roth IRA, Keough, and Deferred Compensation plans, as well as 529 college savings plans) be excluded while other assets that are more liquid (CDs, savings accounts) be counted, even if said to be for retirement purposes. A number of these commenters said that a monetary cap on the amount that could be excluded (e.g., \$500,000) would be acceptable.

The 17 comments opposing excluding retirement accounts from the PNW calculation generally supported the rationale of the existing regulation, which is that assets of this kind, even if illiquid, should be regarded as part of an individual's wealth for PNW purposes. A few commenters also said that, since it is most likely wealthier DBE owners who have such retirement accounts, excluding them would help these more established DBEs at the expense of smaller DBEs who are less likely to be able to afford significant retirement savings products. Again, commenters said that this provision, by effectively raising the PNW cap, would inappropriately allow larger firms to stay in the program longer. Some of the commenters would accept exclusion of retirement accounts if an appropriate cap were put in place, however.

Finally, several commenters asked for a revised and improved PNW form with

additional guidance and instructions on how to make PNW calculations (e.g., with respect to determining the value of a house or business).

DOT Response

To understand the purpose and effect of the Department's proposal to change the PNW threshold from the long-standing \$750,000 figure, it is important to keep in mind what an inflationary adjustment does. (Because of the passage of time from the issuance of the NPRM to the present time, the amount of the inflationary adjustment has changed slightly, from \$1.31 million to \$1.32 million.) The final rule's adjustment is based on the Department of Labor's consumer price index (CPI) calculator. This calculator was used because, of various readily available means of indexing for inflation, CPI appears to be the one that is most nearly relevant to an individual's personal wealth. Such an adjustment simply keeps things as they were originally in real dollar terms.

That is, in 1989, \$750,000 bought a certain amount of goods and services. In 2010, given the effects of inflation over 21 years, it would take \$1.32 million in today's dollars to buy the same amount of goods and services. The buying power of assets totaling \$750,000 in 1989 is the same as the buying power of assets totaling \$1.32 million in 2010. Notwithstanding the fact that \$1.32 million, on its face, is a higher number than \$750,000, the wealth of someone with \$1.32 million in assets today is the same, in real dollar or buying power terms, as that of someone with \$750,000 in 1989.

Put another way, if the Department did not adjust the \$750,000 number for inflation, our inaction would have the effect of establishing a significantly lower PNW cap in real dollar terms. A PNW cap of \$750,000 in 2010 dollars is equivalent to a PNW cap of approximately \$425,700 in 1989 dollars. This means that a DBE applicant today would be allowed to have \$325,000 less in real dollar assets than his or her counterpart in 1989.

The Department believes, in light of this understanding of an inflationary adjustment, that making the proposed adjustment at this time is appropriate. This is a judgment that is shared by the majority of commenters and both Houses of Congress. We do not believe that any important policy interest is served by continuing to lower the real dollar PNW threshold, which we believe would have the effect of further limiting the pool of eligible DBE owners beyond what is intended by the Department in adopting the PNW standard.

The Department is using 1989 as the base year for its inflationary adjustment for two reasons. First, doing so is consistent with what both the House and Senate determined was appropriate in the context of FAA authorization bills that both chambers passed. Second, while the Department adopted a PNW standard in 1999, the standard itself, which was adopted by the Small Business Administration (SBA) before 1989, has never been adjusted for inflation at any time. By 1999, the real dollar value of the original \$750,000 standard had already been eroded by inflation, and the Department believes that it is reasonable to take into account the effect of inflation on the standard that occurred before as well as after the Department adopted it.

We appreciate the concerns of commenters who opposed the proposed inflationary adjustment. Some of these commenters, it appears, may not have fully understood that an inflationary adjustment simply maintains the status quo in real dollar terms. The concern that making the adjustment would favor larger, established DBEs over smaller, start-up companies has some basis, and reflects the longstanding tension in the program between its role as an incubator for new firms and its purpose of allowing DBE firms to grow and develop to the point where they may be in a better position to compete for work outside the DBE program. Allowing persons with larger facial amounts of assets may seem to permit participation of people who are less disadvantaged than formerly in the program, but disadvantage in the DBE program has always properly been understood as relative disadvantage (i.e., relative to owners and businesses in the economy generally), not absolute deprivation. People who own successful businesses are more affluent, by and large, than many people who participate in the economy only as employees, but this does not negate the fact that socially disadvantaged persons who own businesses may well, because of the effects of discrimination, accumulate less wealth than their non-socially disadvantaged counterparts. Consequently, the concerns of opponents of this change are not sufficient to persuade us to avoid making the proposed inflationary adjustment.

We do not believe that it is practical, in terms of program administration, to have standards that vary with recipient or region. We acknowledge that one size may not fit all to perfection, but the complexity of administering a national program with a key eligibility standard that varies, perhaps significantly, among

jurisdictions would be, in our view, an even greater problem. Nor do we see a strong policy rationale for a change to some fixed figure (e.g., \$1 million, \$2.5 million) that is not tied to inflation. We do agree, however, that an improved PNW form would be an asset to the program, and we will propose such a form for comment in the next stage NPRM on the DBE program, which we hope to issue in 2011. This NPRM may also continue to examine other PNW issues.

Whenever there is a change in a rule of this sort, the issue of how to handle the transition between the former rule and the new rule inevitably arises. We provide the following guidance for recipients and firms applying for DBE certification.

- For applications or decertification actions pending on the date this amendment is published, but before its effective date, recipients should make decisions based on the new standards, though these decisions should not take effect until the amendment's effective date.

- Beginning on the effective date of this amendment, all new certification decisions must be based on the revised PNW standard, even if the application was filed or a decertification action pertaining to PNW began before this date.

- If a denial of an application or decertification occurred before the publication date of this amendment, because the owner's PNW was above \$750,000 but not above \$1.32 million, and the matter is now being appealed within the recipient's or unified certification program's (UCP's) process, then the recipient or UCP should resolve the appeal using the new standard. Recipients and UCPs may request updated information where relevant. In the case of an appeal pending before the Departmental Office of Civil Rights (DOCR) under section 26.89, DOCR will take the same approach or remand the matter, as appropriate.

- If a firm was decertified or its application denied within a year before the effective date of this amendment, because the owner's PNW was above \$750,000 but not above \$1.32 million, the recipient or UCP should permit the firm to resubmit PNW information without any further waiting period, and the firm should be recertified if the owner's PNW is not over \$1.32 million and the firm is otherwise eligible.

- We view any individual who has misrepresented his or her PNW information, whether before or after the inflationary adjustment takes effect, as having failed to cooperate with the DBE

program, in violation of 49 CFR 26.109(c). In addition to other remedies that may apply to such conduct, recipients should not certify a firm that has misrepresented this information.

The Department is not ready, at this time, to make a decision on the issue of retirement assets. The comments suggested a number of detailed issues the Department should consider before proposing any specific provisions on this subject. We will further consider commenters' thoughts on this issue at a future time.

Interstate Certification

In response to longstanding concerns of DBEs and their groups, the NPRM proposed a mechanism to make interstate certification easier. The proposed mechanism did not involve pure national reciprocity (*i.e.*, in which each state would give full faith and credit to other states' certification decisions, with the result that a certification by any state would be honored nationwide). Rather, it created a rebuttable presumption that a firm certified in its home state would be certified in other states. A firm certified in home state A could take its application materials to State B. Within 30 days, State B would decide either to accept State A's certification or object to it. If it did not object, the firm would be certified in State B. If State B did object, the firm would be entitled to a proceeding in which State B bore the burden of proof to demonstrate that the firm should not be certified in State B. The NPRM also proposed that the DOT Departmental Office of Civil Rights (DOCR) would create a database that would be populated with denials and decertifications, which the various State UCPs would check with respect to applicants and currently certified firms.

This issue was one of the most frequently commented-upon subjects in the rulemaking. Over 30 comments, from a variety of sources including DBEs, DBE organizations, and a prime contractors' association. Members of Congress and others supported the proposed approach. They emphasized that the necessity for repeated certification applications to various UCPs, and the very real possibility of inconsistent results on the same facts, were time-consuming, burdensome, and costly for DBEs. In a national program, they said, there should be national criteria, uniformity of forms and interpretations, and more consistent training of certification personnel. The proposed approach, they said, while not ideal, would be a useful step toward those goals.

An approximately equal number of commenters, predominantly recipients but also including some DBEs and associations, opposed the proposal, preferring to keep the existing rules (under which recipients can, but are not required to, accept certifications made by other recipients) in place. Many of these commenters said that their certification programs frequently had to reject out-of-state firms that had been certified by their home states because the home states had not done a good job of vetting the qualifications of the firms for certification. They asserted that there was too much variation among states concerning applicable laws and regulations (*e.g.*, with respect to business licensing or marital property laws), interpretations of the DBE rule, forms and procedures, and the training of certifying agency personnel for something like the NPRM proposal to work well. Before going to something like the NPRM proposal, some of these commenters said, DOT should do more to ensure uniform national training, interpretations, forms etc.

Commenters opposed to the NPRM proposal were concerned that the integrity of the program would be compromised, as questionable firms certified by one state would slip into the directories of other states without adequate vetting. Moreover, the number of certification actions each state had to consider, and the number of certified firms that each state would have to manage, could increase significantly, straining already scarce resources.

A smaller number of commenters addressed the idea of national reciprocity. Some of these commenters said that, at least for the future, national reciprocity was a valuable goal to work toward. Some of these commenters, including an association that performs certification reviews nationally for MBE and WBE suppliers (albeit without on-site reviews) and a Member of Congress, supported using such a model now. On the other hand, other commenters believed national reciprocity was an idea whose time had not come, for many of the same reasons stated by commenters opposed to the NPRM proposal. Some of the commenters on the NPRM proposal said that the proposal would result in *de facto* national reciprocity, which they believed was bad for the program.

Two features of the NPRM proposal attracted considerable adverse comment. Thirty-one of the 34 comments addressing the proposed 30-day window for "State B" to decide whether to object to a home state certification of a firm said that the proposed time was too short. These

commenters, mostly recipients, suggested time frames ranging from 45–90 days. They said that the 30-day time frame would be very difficult to meet, given their resources, and would cause States to accept questionable certifications from other States simply because there was insufficient time to review the documentation they had been given. Moreover, the 30-day window would mean that out-of-state firms would jump to the front of the line for consideration over in-state firms, concerning which the rule allows 90 days for certification. This would be unfair to in-state firms, they said.

In addition, 22 of 28 commenters on the issue of the burden of proof for interstate certification—again, predominantly recipients—said that it was the out-of-state applicant firm, rather than State B, that should have the burden of proof once State B objected to a home state certification of the firm. These commenters also said that it was more sensible to put the out-of-state firm in the same position as any other applicant for certification by having to demonstrate to the certifying agency that it was eligible, rather than placing the certification agency in the position of the proponent in a decertification action for a firm that it had previously certified. Again, commenters said, the NPRM proposal would favor out-of-state over in-state applicants.

A few comments suggested trying reciprocal certification on a regional basis (*e.g.*, in the 10 Federal regions) before moving to a more national approach. Others suggested that only recent information (*e.g.*, applications and on-site reports less than three years old) be acceptable for interstate certification purposes. Some states pointed to state laws requiring local licenses or registration before a firm could do business in the State: Some commenters favored limiting out-of-state applications to those firms that had obtained the necessary permits, while one commenter suggested prohibiting States from imposing such requirements prior to DBE certification. Some comments suggested limiting the grounds on which State B could object to the home state certification of a firm (*i.e.*, "good cause" rather than "interpretive differences," differences in state law, evidence of fraud in obtaining home state certification).

There was a variety of other comments relevant to the issue of interstate certification. Most commenters who addressed the idea of the DOCR database supported it, though some said that denial/decertification data should be available only to certification agencies, not the general

public. Some also said that having to input and repeatedly check the data base would be burdensome. One commenter suggested including a firm's Federal Taxpayer ID number in the database entry. One commenter suggested a larger role for the database: Applicants should electronically input their application materials to the database, which would then be available to all certifying agencies, making individual submissions of application information to the States unnecessary. Some commenters wanted DOT to create or lead a national training and/or accreditation effort for certifier personnel.

DOT Response

Commenters on interstate were almost evenly divided on the best course of action for the Department to take. Most DBEs favored making interstate certification less difficult for firms that wanted to work outside their home states; most recipients took the opposite point of view. This disagreement reflects, we believe, a tension between two fundamental objectives of the program. On one hand, it is important to facilitate the entry of DBE firms into this national program, so that they can compete for DOT-assisted contracting wherever those opportunities exist, while reducing administrative burdens and costs on the small businesses that seek to participate. On the other hand, it is important to maintain the integrity of the program, so that only eligible firms participate and ineligible firms do not take unfair advantage of the program.

The main concern of proponents of the NPRM proposal was that failing to make changes to facilitate interstate certification would leave in place unnecessary and unreasonable barriers to the participation of firms outside of their home states. The main concern of opponents of the NPRM proposal was that making the proposed changes would negatively affect program integrity. Their comments suggest that there is considerable mistrust among certification agencies and programs. Many commenters appear to believe that, while their own certification programs do a good job, other states' certification programs do not. Much of the opposition to facilitating interstate certification appears to have arisen from this mistrust, as certification agencies seek to prevent questionable firms certified by what they perceive as weak certification programs in other states from infiltrating their domains.

The Department does not believe that it is constructive to take the position that certification programs nationwide

are so hopelessly inadequate that the best response is to leave interstate barriers in place to contain the perceived contagion of poorly qualified, albeit certified, firms within the boundaries of their own states. To the contrary, we believe that, under a system like that proposed in the NPRM, if firms certified by State A are regularly rebuffed by States B, C, D, etc., State A firms will have an incentive to bring pressure on their certification agency to improve its performance.

The Department also believes that suggestions made by commenters, such as improving training and standardizing forms and interpretations, can improve the performance of certification agencies generally. In the follow-on NPRM the Department hopes to issue in 2011, one of the subjects we will address is improvements in the certification application and PNW forms, which certification agencies then would be required to use without alteration. DOT already provides many training opportunities to certification personnel, such as the National Transportation Institute courses provided by the Federal Transit Administration, presentations by knowledgeable DOT DBE staff at meetings of transportation organizations, and webinars and other training opportunities provided by Departmental Office of Civil Rights personnel. The Department will consider further ways of fostering training and education for certifiers (e.g., a DOT-provided web-based training course for certifiers). The Department also produces guidance on certification-related issues to assist certifiers in making decisions that are consistent with this regulation, and we will continue that practice.

While we will continue to work with our state and local partners to improve the certification process, we do not believe that steps to facilitate interstate certification should be taken only after all recipients achieve an optimal level of performance. The DBE program is a national program; administrative barriers to participation impair the important program objective of encouraging DBE firms to compete for business opportunities; provisions to facilitate interstate certification can be drafted in a way that permits "State B" to screen out firms that are not eligible in accordance with this regulation. Consequently, the Department has decided to proceed with a modified form of the NPRM proposal. However, the final rule will not make compliance with the new section 26.85 mandatory until January 1, 2012, in order to provide additional time for recipients and UCPs to take advantage of training

opportunities and to establish any needed administrative mechanisms to carry out the new provision. This will also provide time for DOCR to make its database for denials and decertifications operational.

As under the NPRM, a firm certified in its home state would present its certification application package to State B. In response to commenters' concerns about the time available, State B would have 60 days, rather than 30 as in the NPRM, to determine whether it had specific objections to the firm's eligibility and to communicate those objections to the firm. If State B believed that the firm was ineligible, State B would state, with particularity, the specific reasons or objections to the firm's eligibility. The firm would then have the opportunity to respond and to present information and arguments to State B concerning the specific objections that State B had made. This could be done in writing, at an in-person meeting with State B's decision maker, or both. Again in response to commenters' concerns, the firm, rather than State B, would have the burden of proof with respect, and only with respect, to the specific issues raised by State B's objections. We believe that these changes will enhance the ability of certification agencies to protect the integrity of the program while also enhancing firms' ability to pursue business opportunities outside their home states.

We emphasize that State B's objections must be specific, so that the firm can respond with information and arguments focused clearly on the particular issues State B has identified, rather than having to make an unnecessarily broad presentation. It is not enough for State B to say "the firm is not controlled by its disadvantaged owner" or "the owner exceeds the PNW cap." These are conclusions, not specific, fact-based objections. Rather, State B might say "the disadvantaged owner has a full-time job with another organization and has not shown that he has sufficient time to exercise control over the day-to-day operations of the firm" or "the owner's property interests in assets X, Y, and Z were improperly valued and cause his PNW to exceed \$1.32 million." This degree of specificity is mandatory regardless of the regulatory ground (e.g., new information, factual errors in State A's certification: See section 26.85(d)(2)) on which State B makes an objection. For example, if State B objected to the firm's State A certification on the basis that State B's law required a different result, State B would say something like "State B Revised Statutes Section xx.yyyy

provides only that a registered engineer has the power to control an engineering firm in State B, and the disadvantaged owner of the firm is not a registered engineer, who is therefore by law precluded from controlling the firm in State B.”

On receiving this specific objection, the owner of the firm would have the burden of proof that he or she does meet the applicable requirements of Part 26. In the first example above, the owner would have to show that either he or she does not now have a full-time job elsewhere or that, despite the demands of the other job, he or she can and does control the day-to-day operations of the firm seeking certification. This burden would be to make the required demonstration by a preponderance of the evidence, the same standard used for initial certification actions generally. This owner would not bear any burden of proof with respect to size, disadvantage, ownership, or other aspects of control, none of which would be at issue in the proceeding. The proceeding, and the firm's burden of proof, would concern only matters about which State B had made a particularized, specific objection. This narrowing of the issues should save time and resources for firms and certification agencies alike.

The firm's response to State B's particularized objections could be in writing and/or in the form of an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility. The decision maker would have to be someone who is knowledgeable about the eligibility provisions of the DBE rule.

We recognize that, in unusual circumstances, the information the firm provided to State B in response to State B's specific objections could contain new information, not part of the original record, that could form the basis for an additional objection to the firm's certification. In such a case, State B would immediately notify the firm of the new objection and offer the firm a prompt opportunity to respond.

Section 26.85(d)(2) of the final rule lists the grounds a State B can rely upon to object to a State A certification of a firm. These are largely the same as in the NPRM. In response to a comment, the Department cautions that by saying that a ground for objection is that State A's certification is inconsistent with this regulation, we do not intend for mere interpretive disagreements about the meaning of a regulatory provision to form a ground for objection. Rather, State B would have to cite something in State A's certification that contradicted

a provision in the regulatory text of Part 26.

The final rule also gives, as a ground for objecting to a State A certification, that a State B law “requires” a result different from the law of State (see the engineering example above). To form the basis for an objection on this ground, a difference between state laws must be outcome-determinative with respect to a certification. For example, State A may treat marital property as jointly held property, while State B is a community property state. The laws are different, but both, in a given case, may well result in each spouse having a 50 percent share of marital assets. This would not form the basis for a State B objection.

With respect to state requirements for business licenses, the Department believes that states should not erect a “Catch 22” to prevent DBE firms from other states from becoming certified. That is, if a firm from State A wants to do business in State B as a DBE, it is unlikely to want to pay a fee to State B for a business license before it knows whether it will be certified. Making the firm get the business license and pay the fee before the certification process takes place would be an unnecessary barrier to the firm's participation that would be contrary to this regulation.

The Department believes that regional certification consortia, or reciprocity agreements among states in a region, are a very good idea, and we anticipate working with UCPs in the future to help create such arrangements. Among other things, the experience of actually working together could help to mitigate the current mistrust among certification agencies. However, we do not believe it would be appropriate to mandate such arrangements at this time.

The Department believes that the DOCR database of decertification and denial actions would be of great use in the certification process. However, the system is not yet up and running. Consequently, the final rule includes a one-year delay in the implementation date of requirements for use of the database.

Other Certification-Related Issues

The NPRM asked for comment on whether there should be a requirement for periodic certification reviews and/or updates of on-site reviews concerning certified firms. The interval most frequently mentioned by commenters on this subject was five years, though there was also some support for three-, six-, and seven-year intervals. A number of commenters suggested that such reviews should include an on-site update only when the firm's circumstances had

changed materially, in order to avoid burdening the limited resources of certifying agencies. Having a standardized on-site review form would reduce burdens, some commenters suggested. Other commenters suggested that the timing of reviews should be left to certifying agencies' discretion, or that on-site updates should be done on a random basis of a smaller number of firms.

The NPRM also asked about the handling of situations where an applicant withdraws its application before the certifying agency makes a decision. Should certifying agencies be able to apply the waiting period (e.g., six or 12 months) used for reapplications after denials in this situation? Comments on this issue, mostly from recipients but also from some DBEs and their associations, were divided. Some commenters said that there were often good reasons for a firm to withdraw and correct an application (e.g., a new firm unaccustomed to the certification process) and that their experience did not suggest that a lot of firms tried to game the system through repeated withdrawals. On the other hand, some commenters said that having to repeatedly process withdrawn and resubmitted applications was a burden on their resources that they would want to mitigate through applying a reapplication waiting period. One recipient said that, even in the absence of a waiting period, the resubmitted application should go to the back of the line for processing. Still others wanted to be able to apply case-by-case discretion concerning whether to impose a waiting period on a particular firm. A few commenters suggested middle-ground positions, such as imposing a shorter waiting period (e.g., 90 days) than that imposed on firms who are denied or applying a waiting period only for a second or subsequent withdrawal and reapplication by the same firm.

Generally, commenters were supportive of the various detail-level certification provision changes proposed in the NPRM (e.g., basing certification decisions on current circumstances of a firm). Commenters did speak to a wide variety of certification issues, however. One commenter said that in its state, the UCP arbitrarily limited the number of NAICS codes in which a firm could be certified, a practice the commenter said the regulation should forbid. In addition, this commenter said, the UCP inappropriately limited certification of professional services firms owned by someone who was not a licensed professional in a field, even in the

absence of a state law requiring such licensure. A number of commenters said that recipients should not have to automatically certify SBA-certified 8(a) firms, while another commenter recommended reviving the now-lapsed DOT-SBA memorandum of understanding (MOU) on certification issues. A DBE association said that certifying agencies should not count against firms seeking certification (e.g., with respect to independence determinations) investments from or relationships with larger firms that are permitted under other Federal programs (e.g., HubZone or other SBA programs). One commenter favored, and another opposed, allowing States to use their own business specialty classifications in addition to or in lieu of NAICS codes.

One recipient recommended a provision to prevent owners from transferring personal assets to their companies to avoid counting them in the PNW calculation. Another said the certification for the PNW statement should specifically say that the information is "complete" as well as true. Yet another suggested that a prime contractor who owns a high percentage (e.g., 49 percent) of a DBE should not be able to use that DBE for credit. There were a number of suggestions that more of the certification process be done electronically, rather than on paper. A few comments said that getting back to an applicant within 20 days, as proposed in the NPRM, concerning whether the application was complete was too difficult for some recipients who have small staffs.

DOT Response

The Department believes that regularly updated on-site reviews are an extremely important tool in helping avoid fraudulent firms or firms that no longer meet eligibility requirements from participating in the DBE program. Ensuring that only eligible firms participate is a key part of maintaining the integrity of the program. We also realize that on-site reviews can be time- and resource-intensive. Consequently, while we believe that it is advisable for recipients and UCPs to conduct updated on-site reviews of certified companies on regular and reasonably frequent basis, and we strongly encourage such undated reviews, we have decided not to mandate a particular schedule, though we urge recipients to regard on-site reviews as a critical part of their compliance activities. When recipients or UCPs become aware of a change in circumstances or concerns that a firm may be ineligible or engaging in misconduct (e.g., from notifications of changes by the firm itself, complaints,

information in the media, etc.), the recipient or UCP should review the firm's eligibility, including doing an on-site review.

When recipients in other states (see discussion of interstate certification above) obtain the home state's certification information, they must rely on the on-site report that the home state has in its files plus the affidavits of no change, etc. that the firm has filed with the home state. It is not appropriate for State B to object to an out-of-state firm's certification because the home state's on-site review is older than State B thinks desirable, since that would unfairly punish a firm for State A's failure to update the firm's on-site review. However, if an on-site report is more than three years old, State B could require that the firm provide an affidavit to the effect that all the facts in the report remain true and correct.

While we recognize that reports that have not been updated, or which do not appear to contain sufficient analysis of a firm's eligibility, make certification tasks more difficult, our expectation is that the Department's enhanced interstate certification process will result in improved quality in on-site reviews so that recipients in various states have a clear picture of the structure and operation of firms and the qualifications of their owners. To this end, we encourage recipients and UCPs to establish and maintain communication in ways that enable information collected in one state to be shared readily with certification agencies in other states. This information sharing can be done electronically to reduce costs.

Firms may withdraw pending applications for certification for a variety of reasons, many of them legitimate. A withdrawal of an application is not the equivalent of a denial of that application. Consequently, we believe that it is inappropriate for recipients and UCPs to penalize firms that withdraw pending applications by applying the up-to-12 month waiting period of section 26.86(c) to such withdrawals, thereby preventing the firm from resubmitting the application before that time elapses. We believe that permitting recipients to place resubmitted applications at the end of the line for consideration sufficiently protects the recipients' workloads from being overwhelmed by repeated resubmissions. For example, suppose that Firm X withdraws its application in August. It resubmits the application in October. Meanwhile, 20 other firms have submitted applications. The recipient must accept Firm X's resubmission in October, but is not

required to consider it before the 20 applications that arrived in the meantime. Recipients should also closely examine changes made to the firm since the time of its first application.

We agree with commenters that it is not appropriate for recipients to limit NAICS codes in which a firm is certified to a certain number. Firms may be certified in NAICS codes for however many types of business they demonstrate that they perform and concerning which their disadvantaged owners can demonstrate that they control. We have added language to the regulation making this point. We also agree that it is not appropriate for a recipient or UCP to insist on professional certification as a *per se* condition for controlling a firm where state law does not impose such a requirement. We have no objection to a recipient or UCP voluntarily using its own business classification system in addition to using NAICS codes, but it is necessary to use NAICS codes.

SBA has now gone to a self-certification approach for small disadvantaged business, the SBA 8(a) program differs from the DBE program in important respects, and the SBA-DOT memorandum of understanding (MOU) on certification matters lapsed over five years ago. Under these circumstances, we have decided to delete former sections 26.84 and 26.85, relating to provisions of that MOU.

DBE firms in the DBE program must be fully independent, as provided in Part 26. If a firm has become dependent on a non-DBE firm through participation in another program, then it may be found ineligible for DBE program purposes. To say otherwise would create inconsistent standards that would enable firms already participating in other programs to meet a lower standard than other firms for DBE participation.

We believe that adding a regulatory provision prohibiting owners from transferring personal assets to their companies to avoid counting them in the PNW calculation would be difficult to implement, since owners of businesses often invest assets in the companies for legitimate reasons. However, as an interpretive matter, recipients are authorized to examine such transfers and, if they conclude that the transfer is a ruse to avoid counting personal assets toward the PNW calculation rather than a legitimate investment in the company and its growth, recipients or UCPs may continue to count the assets toward PNW.

We agree that the certification for the PNW statement should specifically say

that the information is “complete” as well as true and that a somewhat longer time period would be appropriate for recipients and UCPs to get back to applicants with information on whether their applications were complete. We have added a regulatory text statement on the former point and extended the time period on the latter point to 30 days.

If a prime contractor who owns a high percentage of a DBE that it wishes to use on a contract, issues concerning independence, affiliation, and commercially useful function can easily arise. For this reason, recipients should closely scrutinize such relationships. This scrutiny may well result, in some cases, in denying DBE credit or initiating decertification action.

We encourage the use of electronic methods in the application and certification process. As in other areas, electronic methods can reduce administrative burdens and speed up the process.

Accountability and Goal Submissions

The NPRM proposed that if a recipient failed to meet its overall goal, it would, within 60 days, have to analyze the shortfall, explain the reasons for it, and come up with corrective actions for the future. All State DOTs and the largest transit authorities and airports would have to send their analyses and corrective action plans to DOT operating administrations; smaller transit authorities and airports would retain them on file. While there would not be any requirement to meet a goal—to “hit the number”—failure to comply with these requirements could be regarded as a failure to implement a recipient’s program in good faith, which could lead to a finding of noncompliance with the regulation.

In a related provision, the Department asked questions in the NPRM concerning the recent final provision concerning submitting overall goals on a three-year, rather than an annual, basis. In particular, the NPRM asked whether it should be acceptable for a recipient to submit year-to-year projections of goals within the structure of a three-year goal and how implementation of the accountability proposal would work in the context of a three-year goal, whether or not year-to-year projections were made.

About two-thirds of the 64 comments addressing the accountability provision supported it. These commenters included DBEs, recipients, and some associations and other commenters. Some of these commenters, in fact, thought the proposal should be made

stronger. For example, a commenter suggested that a violation “will” rather than “could” be found for failure to provide the requested information. Another suggested that, beyond looking at goal attainment numbers, the accountability provisions should be broadened to include the recipient’s success with respect to a number of program elements (e.g., good faith efforts on contracts, outreach, DBE liaison officer’s role, training and education of staff).

Commenters also presented various ideas for modifying the proposal. These included suggestions that the Department should add a public input component, provide more guidance on the shortfall analysis and how to do it, delay its effective date to allow recipients to find resources to comply, ensure ongoing measurement of achievements rather than just measuring at the end of a year or three-year period, ensure that there is enough flexibility in explaining the reasons for a shortfall, or lengthen the time recipients have to submit the materials (e.g., 90 days, or 60 days after the recipient’s report of commitments and achievements is due). One commenter suggested that an explanation should be required only when there is a pattern of goal shortfalls, not in individual instances. There could be a provision for excusing recipients who fell short of their goal by very small amount, or even if the recipient made 80 percent of its goal.

Opponents of the proposal—mostly recipients plus a few associations—said that the proposal would be too administratively burdensome. In addition, they feared that making recipients explain a shortfall and propose corrective measures would turn the program into a prohibited set-aside or quota program, a concern that was particularly troublesome in states affected by the *Western States* decision. Moreover, a number of commenters said, the inability of recipients to meet overall goals was often the result of factors beyond their control. In addition, recipients might unrealistically reduce goals in order to avoid having to explain missing a more ambitious target.

With respect to the reporting intervals for goals, 28 of the 39 commenters who addressed the issue favored some form of at least optional yearly reporting of goals, either in the form of annual goal submissions or, more frequently, of year-to-year projections of goals within the framework of a three-year overall goal. The main reason given for this preference was a concern that projects and the availability of Federal funding for them were sufficiently volatile that making a projection that was valid for

a three-year period was problematic. This point of view was advanced especially by airports. Some other commenters favored giving recipients discretion whether to report annually or triennially. Commenters who took the point of view that the three-year interval was preferable agreed with original rationale of reducing repeated paperwork burdens on recipients. One commenter asked that the rule specify that, especially in a three-year interval schedule of goal submission, a recipient “must” submit revisions if circumstances change.

There was discussion in the NPRM of the relationship between the goal submission interval and the accountability provision. For example, if a recipient submitted overall goals on a three-year basis, would the accountability provision be triggered annually, based on the recipient’s annual report (as the NPRM suggested) or only on the basis of the recipient’s performance over the three-year period? If there were year-to-year projections within a three-year goal, would the accountability provision relate to accountability for the annual projection or the cumulative three-year goal? Commenters who favored year-to-year projections appeared to believe that accountability would best relate to each year’s projection, though the discussion of this issue in the comments was often not explicit. Some comments, including one from a Member of Congress, did favor holding recipients accountable for each year’s separate performance.

There was a variety of other comments on goal-related issues. Some commenters asked that the three DOT operating administrations coordinate submitting goals so that a State DOT submitting goals every three years would be able to submit its FHWA, FAA, and FTA goals in the same year. A DBE group wanted the Department to strengthen requirements pertaining to the race-neutral portion of a recipient’s overall goal. A commenter who works with transit vehicle manufacturers requested better monitoring of transit vehicle manufacturers by FTA. A group representing DBEs wanted recipients to focus on potential, and not just certified, DBEs for purposes of goal setting. The same group also urged consideration of separate goals for minority- and women-owned firms.

DOT Response

Under Part 26, the Department has always made unmistakably clear that the DBE program does not impose quotas. No one ever has been, or ever will be, sanctioned for failing to “hit the number.” However, goals must be

implemented in a meaningful way. A recipient's overall goal represents its estimate of the DBE participation it would achieve in the absence of discrimination and its effects. Failing to meet an overall goal means that the recipient has not completely remedied discrimination and its effects in its DOT-assisted contracting. In the Department's view, good faith implementation of a DBE program by a recipient necessarily includes understanding why the recipient has not completely remedied discrimination and its effects, as measured by falling short of its "level playing field" estimate of DBE participation embodied in its overall goal. Good faith implementation further means that, having considered the reasons for such a shortfall, the recipient will devise program actions to help minimize the potential for a shortfall in the future.

Under the Department's procedures for reviewing overall goals and the methodology supporting them, the Department has the responsibility of ensuring that a recipient's goals are well-grounded in relevant data and are derived using a sound methodology. The Department would not approve a recipient's goal submission if it appeared to understate the "level playing field" amount of DBE participation the recipient could rationally expect, whether to avoid being accountable under the new provisions of the rule or for other reasons.

For these reasons, the Department is adopting the NPRM's proposed accountability mechanism. We do not believe that the concerns of some commenters that this mechanism would create a quota system are justified: No one will be penalized for failing to meet an overall goal. Moreover, promoting transparency and accountability is not synonymous with imposing a penalty and should not be viewed as such. Understanding the reasons for not meeting a goal and coming up with ways of avoiding a shortfall in the future, while not creating a quota system, do help to ensure that recipients take seriously the responsibility to address discrimination and its effects.

Moreover, the administrative burden of compliance falls only on those recipients who fail to meet a goal, not on all recipients. Understanding what is happening in one's program, why it is happening, and how to fix problems is, or ought to be, a normal, everyday part of implementing a program, so the analytical tasks involved in meeting this requirement should not be new to recipients. We do not envision that recipients' responses to this requirement

would be book-length; a reasonable succinct summary of the recipient's analysis and proposed actions should be sufficient though, like all documents submitted in connection with the DBE program, it should show the work and reasoning leading to the recipient's conclusions.

For example, a recipient might determine that its process for ascertaining whether prime bidders who failed to meet contract goals had made adequate good faith efforts was too weak, and that prime bidders consequently received contracts despite making insufficient efforts to find DBEs for contracts. In such a case, the recipient could take corrective action such as more stringent review of bidder submissions or meeting with prime bidders to provide guidance and assistance on how to do a better job of making good faith efforts.

We agree that there may be circumstances in which a recipient's inability to meet a goal is for reasons beyond its control. If that is the case, the recipient's response to this requirement can be to identify such factors, as well as suggesting how these problems may be taken into account and surmounted in the future. We also agree with those commenters who said that good-faith implementation of a DBE program involves more than meeting an overall goal. Factors like those cited by commenters are important as part of an overall evaluation of a recipient's success. This accountability provision, however, is intended to focus on the process recipients are using to achieve their overall goals, rather than to act as a total program evaluation tool. The operating administrations will continue to conduct program reviews that address the breadth of recipients' program implementation.

The Department believes that a clear, bright-line trigger for the application of the accountability provision makes the most sense administratively and in terms of achieving the purpose of the provision. Consequently, we are not adopting suggestions that the provision be triggered only by a pattern of missing goals, or an average of missing goals over the period of a three-year overall goal, or a shortfall of a particular percentage. Any shortfall means that a recipient has dealt only incompletely with the effects of discrimination, and we believe that it is appropriate in any such case that the recipient understand why that is the case and what steps to take to improve program implementation in the future.

The three-year goal review interval was intended to reduce administrative burdens on recipients. Nevertheless, we

understand that some recipients, especially airports, may be more comfortable with annual projections and updates of overall goals. We have no objection to recipients making annual projections, for informational purposes, within the three-year overall goal. It is still the formally submitted and reviewed three-year goal, however, and not the informal annual projections, that count from the point of view of the accountability mechanism. For example, suppose an airport has a three-year annual overall goal of 12 percent. For informational purposes, the airport chooses to make informal annual projections of 6, 12, and 18 percent for years 1–3, respectively (which, by the way, are not required to be submitted to the Department). The accountability mechanism requirements would be triggered in each of the three years covered by the overall goal if DBE achievements in each year were less than 12 percent.

The Department agrees that recipients should be accountable for effectively carrying out the race-neutral portion of their programs. If a recipient fell short of its overall goal because it did not achieve the projected race-neutral portion of its goal, then this is something the recipient would have to explain and establish measures to correct (e.g., by stepping up race-neutral efforts and/or concluding that it needed to increase race-conscious means of achieving its goal). We also agree that it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (e.g., firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance. Separate goals for various groups of disadvantaged individuals are possible with a program waiver of the DBE regulation, if a sufficient case is made for the need for group-specific goals.

In the section of the rule concerning goal-setting (49 CFR 26.45), the Department is also taking this opportunity to make a technical correction. In the final rule establishing the three year DBE goal review cycle, the Department inadvertently omitted from § 26.45(f)'s regulatory text paragraphs (3), (4), and (5), which govern the content of goal submissions, operating administration review of the submission, and review of interim goal setting mechanisms. It was never the intent of the Department to remove or otherwise change those provisions of section 26.45(f) of the rule. This final rule corrects that error by restructuring

paragraphs (1) and (2) of section 26.45(f) and restoring the language of paragraphs (3), (4), and (5) of that section of the rule. We apologize for any confusion that this error may have caused.

The Department supports strong outreach efforts by recipients to encourage minority- and women-owned firms to become certified as DBEs, so that recipients can set and meet realistic goals. However, we caution recipients against stating or implying that minority- and women-owned firms can participate in recipients' contracts only if they become certified as DBEs. It would be contrary to nondiscrimination requirements of this part and of Title VI for a recipient to limit the opportunity of minority- or women-owned firms to compete for any contract because the firm was not a certified DBE.

Program Oversight

The NPRM proposed to require recipients to certify that they have monitored the paperwork and on-site performance of DBE contracts to make sure that DBEs actually perform them. Comment was divided on this proposal, with 21 comments favoring either the proposal or stronger oversight mechanisms and 18 opposed.

Commenters who favored the proposal, including DBEs and some associations and recipients, generally believed that the provision would make it less likely that post-award abuse of DBEs by prime contractors would occur. One recipient noted that it already followed this approach with respect to ARRA grants. Some commenters wanted the Department to require additional steps, such as requiring recipients to make periodic visits to the job site and keeping records of each visit, to ensure that the DBELO did in fact have direct access to the organization's CEO concerning DBE matters, and to maintain sufficient trained staff to do needed monitoring. DBE associations wanted mandatory monitoring of good faith efforts (e.g., by keeping records of all contacts made by prime contractors) and terminations of DBEs by prime contractors, as well as to have certifications signed by persons higher up in the organization than the DBELO (e.g., the CEO). Another commenter sought further checking concerning counting issues. A consultant and a recipient suggested that recipient certifications should be more frequent than a one-time affair, (e.g., monthly or quarterly).

Commenters who opposed the NPRM proposal, most of whom were recipients, said that the workload the certification requirement would create would be too administratively

burdensome, particularly for recipients with small staffs. The certification requirement could duplicate existing commercially useful function reviews. They also doubted the payoff in terms of improved DBE program implementation would be worth the effort. Some recipients said that they did monitor post-award performance and that the proposed additional paperwork requirement step would add little to the substance of their processes. One recipient noted that it would be very difficult to perform an on-site review of contract performance in the case of professional services consultants whose work was performed out of state.

One recipient suggested that a middle ground might be to have the recipient certify monitoring of a sample of contracts, since it lacked the staff for field monitoring of all contracts. A consultant suggested selecting contracts for monitoring based on a "risk-based analysis" of contracts or by focusing on contracts where prime contractors' achievements did not measure up to their commitments. One recipient suggested limiting the certification requirement to one commercially useful function review per year on a contract. A few recipients asked for guidance on what constituted adequate staffing for the DBE program.

DOT Response

The Department's DBE rule already includes a provision (49 CFR 26.37(b)) requiring recipients to have a monitoring and enforcement mechanism to ensure that work committed to DBEs is actually performed by DBEs. The trouble is that, based on the Department's experience, this provision is not being implemented by recipients as well as it should be. The FHWA review team that has been examining state implementation of the DBE program found that many states did not have an effective compliance monitoring program in place. DBE fraud cases investigated by the Department's Office of Inspector General and criminal prosecutions in the Federal courts have highlighted numerous cases in which recipients were unaware, often for many years, of situations in which non-DBE companies were claiming DBE credit for work that DBEs did not perform.

The Department believes that, for the DBE program to be meaningful, it is not enough that prime contractors commit to the use of DBEs at the time of contract award. It is also necessary that the DBEs actually perform the work involved. Recipients need to know whether DBEs are actually performing the work involved, lest program effectiveness suffer and the door be left open to fraud.

Recipients must actually monitor each contract, on paper and in the field, to ensure that they have this knowledge. Monitoring DBE compliance on a contract is no less important, and should be no more brushed aside, than compliance of with project specifications. This is important for prime contracts performed by DBEs as well as for situations in which DBEs act as subcontractors, and the monitoring and certification requirements will apply to both situations.

Consequently, the Department believes that the proposed requirement that recipients memorialize the monitoring they are already required to perform has merit. Its intent is to make sure that the monitoring actually takes place and that the recipient stands by the statement that DBE participation claimed on a contract actually occurred. This monitoring, and the recipient's written certification that it took place, must occur with respect to every contract on which DBE participation is claimed, not just a sample or percentage of such contracts, to make sure that the program operates as it is intended. It applies to contracts entered into prior to the effective date of this rule, since the obligation to monitor work performed by DBEs has always been a key feature of the DBE program.

With respect to concerns about administrative burden, the Department believes that monitoring is something that recipients have been responsible for conducting since the inception of Part 26. Therefore, we are not asking recipients to do something with which they can claim they are unfamiliar. Moreover, as the final rule version of this provision makes clear, recipients can combine the on-site monitoring for DBE compliance with other monitoring they do. For example, the inspector who looks at a project to make sure that the contractor met contract specifications before final payment is authorized could also confirm that DBE requirements were honestly met.

While we believe that more intensive and more frequent monitoring of DBE performance on contracts is desirable, we encourage recipients to monitor contracts as closely as they can. However, we do not, for workload reasons, want to mandate more pervasive monitoring at this time. We agree with commenters that it would be difficult to do on-site monitoring of contracts performed outside the state (e.g., an out-of-state consulting contract), and we have added language specifying that the requirement to monitor work sites pertains to work sites in the recipient's state. In reference to what constitutes adequate staffing of

a DBE program, we believe that it is best to look at this question in terms of a performance standard. The Department's rule requires certain tasks (e.g., responding to applications for DBE eligibility, certification and monitoring of DBE performance on contracts) to be performed within certain time frames. If a recipient has sufficient staff to meet these requirements, then its staffing levels are adequate. If not (e.g., applications for DBE certification are backlogged for several months), then staffing is inadequate.

Small Business Provisions

The NPRM proposed that recipients would add an element to their DBE programs to foster small business participation in contracts. The purpose of this proposal was to encourage programs that, by facilitating small business participation, augmented race-neutral efforts to meet DBE goals. The program element could include items such as race-neutral small business set-asides and unbundling provisions. The NPRM did not propose to mandate any specific elements, however.

The majority of commenters addressing this part of the NPRM—38 of 55—favored the NPRM's approach. Commenters approving the proposal were drawn from DBEs, associations, and recipients. Generally, they agreed that steps to create improved opportunities for small business would help achieve the objectives of the DBE program. Specific elements that various commenters supported included unbundling (which some commenters suggested should be made mandatory), prohibiting double-bonding, small business set-asides, expansions of existing small business development programs and mentor-protégé programs.

Commenters who did not support the NPRM proposal, most of whom were recipients, were concerned that having small business programs would draw focus from programs targeted more directly at DBEs. They were also concerned about having sufficient resources to carry out the programs they might include in a small business program element. One commenter thought that a small business program element would duplicate existing supportive services programs. Another thought unbundling would not work. A number of recipients thought it would be better for DOT to issue guidance on this subject rather than to create regulatory language. A recipient association characterized the proposal as burdensome and not productive.

Eight commenters addressed the issue of bonding and insurance requirements. A bonding company association

explained that both performance and payment bonds had an appropriate place in contracting and believed that subcontractor bonds were not duplicative of prime contractor bonds. A DBE wanted to prohibit prime contractors from setting bonding requirements for subcontractors. A recipient said the Department should treat prime contractors and subcontractors the same for bonding purposes. One DBE association said the combination of payment bonds, performance bonds, and retention was burdensome for subcontractors and Another DBE association said that it was inappropriate to require bonding of the subcontractor when the prime contractor was already bonded for the overall work of the contract. This association suggested that a prime contractor could not demonstrate good faith efforts to meet a goal if it insisted on such a double bond.

DOT Response

DBEs are small businesses. Program provisions that help small businesses can help DBEs. By facilitating participation for small businesses, recipients can make possible more DBE participation, and participation by additional DBE firms. Consequently, we believe that a program element that pulls together the various ways that a recipient reaches out to small businesses and makes it easier for them to compete for DOT-assisted contracts will foster the objectives of the DBE program. Because small business programs of the kind suggested in the NPRM are race-neutral, use of these programs can assist recipients in meeting the race-neutral portions of their overall goals. This is consistent with the language that under Part 26, recipients are directed to meet as much as possible of their overall goals through race-neutral means.

It is important to keep in mind that race-neutral programs should not be passive. Simply waiting and hoping that occasional DBEs will participate without the use of contract goals does not an effective race-neutral program make. Rather, recipients are responsible for taking active, effective steps to increase race-neutral DBE participation, by implementing programs of the kind mentioned in this section of the NPRM and final rule. The Department will be monitoring recipients' race-neutral programs to make sure that they meet this standard.

In adopting the NPRM proposal requiring a small business program element, the Department believes that this element—which is properly viewed as an integral part of a recipient's DBE

program—need not distract recipients from other key parts of recipients' DBE programs, such as certification and the use of race-conscious measures. There are different ways of encouraging DBE participation and meeting DBE overall goals, and recipients' programs need to address a variety of these means. Many of the provisions that recipients can use to implement the requirements of the new section (e.g., unbundling, race-neutral small business set-asides) are already part of the regulation or DOT guidance, and carrying out these elements should not involve extensive additional burdens.

With respect to bonding, the Department believes that commenters made a good point with respect to the burden of duplicative bonding. By duplicative bonding, we mean insistence by a prime contractor that a DBE provide bonding for work that is already covered by bonding or insurance provided by the prime contractor or the recipient. Like duplicative bonding, excessive bonding—a requirement, which according to participants in the Department's stakeholder meetings, is sometimes imposed to provide a bond in excess of the value of the subcontractor's work—can act as an unnecessary barrier to DBE participation. While we believe that additional action to address these problems may have merit, there was not a great deal of comment on the implications of potential regulatory requirements in these areas. Consequently, we will defer action on these issues at this time and seek additional comment and information in the follow-on NPRM the Department is planning to issue.

Miscellaneous Comments

Several commenters expressed general support for the DBE program and/or the NPRM, while two commenters opposed the DBE program in general. A large number of comments from an advocacy organization's members supported additional bonding assistance and more frequent data reporting. A commenter wanted to add DBE coverage for Federal Railroad Administration (FRA) grants. Commenters also suggested such steps as increasing technical assistance, using project labor agreements to increase DBE participation, an SBA 8(a) program-like term limit on participation in the DBE program, a better uniform reporting form, greater ease in complaining to DOT and recipients about noncompliance issues, and putting current joint check guidance into the rule's text.

DOT Response

The Department already has programs in place concerning bonding and data reporting. There is not currently a direct, specific statutory mandate for a DBE program in FRA financial assistance programs, though the Department is considering ways of ensuring nondiscrimination in contracting in these programs. For example, like all recipients of Federal financial assistance, FRA recipients are subject to requirements under Title VI of the Civil Rights Act of 1964. Existing programs, such as the FHWA supportive services program and various initiatives by the Department's Office of Small and Disadvantaged Business Utilization, are in place to assist DBEs in being competitive. Given the language of the statutes authorizing the DOT DBE program, we do not believe that a term limit on the participation of DBE companies would be permissible. The Department is working on improvements on all its DBE forms, and we expect to seek comment on revised forms in the follow-on NPRM we anticipate publishing. At this point, we think that the joint check guidance is sufficient without codification, but we can look at this issue, among other certification issues, in the next round of rulemaking.

The Continuing Compelling Need for the DBE Program

As numerous court decisions have noted,¹ the Department's DBE regulations, and the statutes authorizing them, are supported by a compelling need to address discrimination and its effects. This basis for the program has been established by Congress and applies on a nationwide basis. Both the House and Senate FAA reauthorization bills contained findings reaffirming the compelling need for the program. We would also call to readers' attention the additional information presented to the House of Representatives in a March 26, 2009, hearing before the Transportation and Infrastructure Committee and made a part of the record of that hearing and a Department of Justice document entitled "The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-

Owned Businesses" and the information and documents cited therein. This information confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.

Regulatory Analyses and Notices**Executive Order 12866 and DOT Regulatory Policies and Procedures**

This is a nonsignificant regulation for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. Its provisions involve administrative modifications to several provisions of a long-existing and well-established program, designed to improve the program's implementation. The rule does not alter the direction of the program, make major policy changes, or impose significant new costs or burdens.

Regulatory Flexibility Act

A number of provisions of the rule reduce small business burdens or increase opportunities for small business, notably the interstate certification process and the small business DBE program element provisions. Small recipients would not be required to file reports concerning the reasons for overall goal shortfalls and corrective action steps to be taken. Only State DOTs, the 50 largest transit authorities, and the 30–50 airports receiving the greatest amount of FAA financial assistance would have to file these reports. The task of sending copies of on-site review reports to other certification entities fall on UCPs, which are not small entities, and in any case can be handled electronically (*e.g.*, by emailing PDF copies of the documents). While all recipients would have to input information about decertifications and denials into a DOT database, this would be a quick electronic process that would not be costly or burdensome. In any case, this requirement will be phased in as the Department prepares to put the database online. The rule does not make major policy changes that would cause recipients to expend significant resources on program modifications. For these reasons, the Department certifies that the rule does not have a significant economic effect on a substantial number of small entities.

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of

compliance on them. We have analyzed this rule under the Order and have determined that it does not have implications for federalism, since it merely makes administrative modifications to an existing program. It does not change the relationship between the Department and State or local governments, pre-empt State law, or impose substantial direct compliance costs on those governments.

Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995, DOT has submitted the Information Collection Requests (ICRs) below to the Office of Management and Budget (OMB). Before OMB decides whether to approve these proposed collections of information and issue a control number, the public must be provided 30 days to comment. Organizations and individuals desiring to submit comments on the collections of information in this rule should direct them to the Office of Management and Budget, *Attention: Desk Officer for the Office of the Secretary of Transportation, Office of Information and Regulatory Affairs, Washington, DC 20503*. OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the *Federal Register*. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

We will respond to any OMB or public comments on the information collection requirements contained in this rule. The Department will not impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. The Department intends to obtain current OMB control numbers for the new information collection requirements resulting from this rulemaking action. The OMB control number, when assigned, will be announced by separate notice in the *Federal Register*.

It is estimated that the total incremental annual burden hours for the information collection requirements in this rule are 47,450 hours in the first year, 83,370 in the second year, and 51,875 thereafter. The following are the information collection requirements in this rule:

Certification of Monitoring (49 CFR 26.37(b))

Each recipient would certify that it had conducted post-award monitoring of contracts which would be counted for

¹ See for instance *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007), *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d. 984 (8th Cir. 2003), *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005).

DBE credit to ensure that DBEs had done the work for which credit was claimed. The certification is for the purpose of ensuring accountability for monitoring which the regulation already requires.

Respondents: 1,050.

Frequency: 13,400 (i.e., there are about 13,400 contracts per year that have DBE participation, based on 2009 data).

Estimated Burden per Response: ½ hour.

Estimated Total Annual Burden: 6,700 hours.

Small Business Program Element (49 CFR 26.39)

Each recipient would add a new DBE program element, consisting of strategies to encourage small business participation in their contracting activities. No specific element would be required, and many of the potential elements are already part of the existing DBE regulation or implementing guidance (e.g., unbundling; race-neutral small business set-asides). The small business program element is intended to pull a recipient's small business efforts into a single, unified place in this DBE Program. This requirement goes into effect a year from the effective date of the rule.

Respondents: 1,050.

Frequency: Once (for a one-time task).

Estimated Burden per Response: 30 hours.

Estimated Total Annual Burden Hours: 31,500 (one time).

Accountability Mechanism (49 CFR 26.47(c))

If a recipient failed to meet its overall goal in a given year, it would have to determine the reasons for its failure and establish corrective steps.

Approximately 150 large recipients would transmit this analysis to DOT; smaller recipients would perform the analysis but would not be required to submit it to DOT. We estimate that about half of recipients would be subject to this requirement in a given year.

Respondents: 525 (150 of which would have to submit reports to DOT).

Frequency: Once per year.

Estimated Average Burden per Response: 80 hours + 5 for recipients sending report to DOT.

Estimated Total Annual Burden Hours: 42,750.

Affidavit of Completeness (49 CFR 26.45(c)(4))

When a firm certified in its home state seeks certification in another state ("State B"), the firm must provide an affidavit that the information the firm

provides to State B is complete and is identical to that submitted to the home state. The calculation of the burden for this item assumes that there will be an average 2600 interstate applications each year to which this requirement would apply. This requirement takes effect a year from the effective date of this rule.

Respondents: 2,600.

Frequency: Once per year to a given recipient.

Estimated Average Burden per Response: 1 hour.

Estimated Total Annual Burden Hours: 2,600 hours.

Transmittal of On-Site Report (49 CFR 26.85(d)(1))

When a "State B" receives a request for certification from a firm certified in "State A," State A must promptly send a copy of that report to State B. This would involve simply emailing a PDF or other electronic copy of an existing report. This requirement takes effect one year from the effective date of this rule.

Respondents: 52.

Frequency: An average of 50 per year per recipient.

Estimated Average Burden per Response: ½ hour.

Estimated Total Annual Burden Hours: 1,300.

Transmittal of Decertification/Denial Information (49 CFR 26.85(f)(1))

When a unified certification program (UCP) in a state denies a firm's application for certification or decertifies the firm, it must electronically notify a DOT database of the fact. The information in the database is then available to other certification agencies for their reference. The calculation of the burden of this requirement assumes that there would be an average of 100 such actions per year by each UCP.

Respondents: 52.

Frequency: An average of 100 per year per recipient.

Estimated Average Burden per Response: ½ hour.

Estimated Total Annual Burden Hours: 2,600.

Transmittal of Denial/Decertification Documents (49 CFR 26.85(f)(3))

When a UCP notes, from the DOT database, that a firm that has applied or been granted certification was denied or decertified elsewhere, the UCP would request a copy of the decision by the other state, which would then have to send a copy. The Department anticipates that this would be done by an email exchange, the response attaching a PDF or other electronic copy

of an existing document. This requirement goes into effect a year from the effective date of the rule.

Respondents: 52.

Frequency: An average of 75 per year per recipient.

Estimated Average Burden per Response: five minutes for the request; ½ hour for the response.

Estimated Total Annual Burden Hours: 2,625.

List of Subjects in 49 CFR Part 26

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant-programs—transportation, Mass transportation, Minority businesses, Reporting and record keeping requirements.

Issued this 11th day of January, 2011, at Washington, DC.

Ray LaHood,
Secretary of Transportation.

For the reasons set forth in the preamble, the Department amends 49 CFR Part 26 as follows:

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

- 1. The authority citation for part 26 is amended to read as follows:

Authority: 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C. 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105–178, 112 Stat. 107, 113.

- 2. In section 26.5, add a definition of "Home state" in alphabetical order to read as follows:

§ 26.5 What do the terms used in this part mean?

* * * * *

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

* * * * *

- 3. In § 26.11, add paragraph (a) to read as follows:

§ 26.11 What records do recipients keep and report?

(a) You must transmit the Uniform Report of DBE Awards or Commitments and Payments, found in Appendix B to this part, at the intervals stated on the form.

* * * * *

- 4. Revise § 26.31 to read as follows:

§ 26.31 What information must you include in your DBE directory?

(a) In the directory required under § 26.81(g) of this Part, you must list all

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.

* * * * *

■ 8. In § 26.47, add paragraphs (c) and (d) to read as follows:

§ 26.47 Can recipients be penalized for failing to meet overall goals?

* * * * *

(c) If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your DBE program in good faith:

- (1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;
- (2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;
- (3)(i) If you are a state highway agency; one of the 50 largest transit authorities as determined by the FTA; or an Operational Evolution Partnership Plan airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (c)(1) and (2) of this section to the appropriate operating administration for approval. If the operating administration approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

(ii) As a transit authority or airport not meeting the criteria of paragraph (c)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to FTA or FAA on request for their review.

(4) FHWA, FTA, or FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.

(5) You may be regarded as being in noncompliance with this Part, and therefore subject to the remedies in § 26.103 or § 26.105 of this part and other applicable regulations, for failing to implement your DBE program in good faith if any of the following things occur:

- (i) You do not submit your analysis and corrective actions to FHWA, FTA, or FAA in a timely manner as required under paragraph (c)(3) of this section;
- (ii) FHWA, FTA, or FAA disapproves your analysis or corrective actions; or
- (iii) You do not fully implement the corrective actions to which you have committed or conditions that FHWA, FTA, or FAA has imposed following review of your analysis and corrective actions.

(d) If, as recipient, your Uniform Report of DBE Awards or Commitments and Payments or other information coming to the attention of FTA, FHWA, or FAA, demonstrates that current trends make it unlikely that you will achieve DBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FHWA, FTA, or FAA, as applicable, may require you to make further good faith efforts, such as by modifying your race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

■ 9. In § 26.51, revise paragraphs (b)(1) and (f)(1) to read as follows:

§ 26.51 What means do recipients use to meet overall goals?

* * * * *

(b) * * *

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.

* * * * *

(f) * * *

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract

goals during that year, unless it becomes necessary in order meet your overall goal.

Example to paragraph (f)(1): Your overall goal for Year 1 is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year 1. However, if part way through Year 1, your DBE awards or commitments are not at a level that would permit you to achieve your overall goal for Year 1, you could begin setting race-conscious DBE contract goals during the remainder of the year as part of your obligation to implement your program in good faith.

* * * * *

■ 10. In § 26.53:

- a. Redesignate paragraph (g) as paragraph (i);
- b. Redesignate paragraphs (f)(2) and (3) as paragraphs (g) and (h), respectively;
- c. Revise paragraph (f)(1); and
- d. Add new paragraphs (f)(2) through (6) to read as follows:

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

* * * * *

(f)(1) You must require that a prime contractor not terminate a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

(2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the DBE firm.

(3) For purposes of this paragraph, good cause includes the following circumstances:

- (i) The listed DBE subcontractor fails or refuses to execute a written contract;
- (ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
- (iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's

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 1,200 or applicable state law;

(vii) You have determined that the listed DBE subcontractor is not a responsible contractor;

(vi) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;

(vii) The listed DBE is ineligible to receive DBE credit for the type of work required;

(viii) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;

(ix) Other documented good cause that you determine compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

(4) Before transmitting to you its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you, of its intent to request to terminate and/or substitute, and the reason for the request.

(5) The prime contractor must give the DBE five days to respond to the prime contractor's notice and advise you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why you should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than five days.

(6) In addition to post-award terminations, the provisions of this section apply to preaward deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.

* * * * *

■ 11. In § 26.67, revise paragraphs (a)(2)(i) and (iv), and in paragraphs (b), (c), and (d), remove "\$750,000" and add in its place "\$1.32 million".

The revisions read as follows:

§ 26.67 What rules determine social and economic disadvantage?

(a) * * *

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

* * * * *

(iv) Notwithstanding any provision of Federal or state law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under section 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

* * * * *

■ 12. Revise § 26.71(n) to read as follows:

§ 26.71 What rules govern determinations concerning control?

* * * * *

(n) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You must not require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(1) The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available NAICS code for that type of work. If you choose, you may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. If your Directory does not list types of work for any firm

in a manner consistent with this paragraph (a)(1), you must update the Directory entry for that firm to meet the requirements of this paragraph (a)(1) by August 28, 2011.

(2) Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

(3) If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

(4) A certifier is not precluded from changing a certification classification or description if there is a factual basis in the record. However, certifiers must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

* * * * *

■ 13. Revise § 26.73(b) to read as follows:

§ 26.73 What are other rules affecting certification?

* * * * *

(b)(1) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.

(2) You must not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of

this Part, the firm is eligible for certification.

* * * * *

§ 26.81 [Amended]

■ 14. Amend § 26.81(g) by removing the word “section” and adding in its place the word “part” and by removing the period at the end of the last sentence and adding the words “and shall revise the print version of the Directory at least once a year.”

■ 15. In § 26.83, remove and reserve paragraph (e), revise paragraph (h), and add paragraphs (l) and (m) to read as follows:

§ 26.83 What procedures do recipients follow in making certification decisions?

* * * * *

(h) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of section 26.87. You may not require DBEs to reapply for certification or require “recertification” of currently certified firms. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, three years from the date of the firm’s most recent certification, or sooner if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section), a complaint, or other information concerning the firm’s eligibility. If you have grounds to question the firm’s eligibility, you may conduct an on-site review on an unannounced basis, at the firm’s offices and jobsites.

* * * * *

(l) As a recipient or UCP, you must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

(m) Except as otherwise provided in this paragraph, if an applicant for DBE certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time. As a recipient or UCP, you may not apply the waiting period provided under § 26.86(c) of this part before allowing the applicant to resubmit its application. However, you may place the reapplication at the “end of the line,” behind other applications that have been made since the firm’s previous application was withdrawn. You may also apply the waiting period provided under § 26.86(c) of this part to a firm that has established a pattern of

frequently withdrawing applications before you make a decision.

§ 26.84 [Removed]

■ 16. Remove section 26.84.

■ 17. Revise § 26.85 to read as follows

§ 26.85 Interstate certification.

(a) This section applies with respect to any firm that is currently certified in its home state.

(b) When a firm currently certified in its home state (“State A”) applies to another State (“State B”) for DBE certification, State B may, at its discretion, accept State A’s certification and certify the firm, without further procedures.

(1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.

(2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A’s electronic directory or obtaining written confirmation from State A.

(c) In any situation in which State B chooses not to accept State A’s certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your firm’s certification. This includes affidavits of no change (see § 26.83(j)) and any notices of changes (see § 26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A’s UCP or any other recipient concerning your application or status as a DBE firm.

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

(3) If you have filed a certification appeal with DOT (see § 26.89), you must inform State B of the fact and provide your letter of appeal and DOT’s response to State B.

(4) You must submit an affidavit sworn to by the firm’s owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

(i) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by § 26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct.

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (see § 26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by “State A” or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) Determine whether there is good cause to believe that State A’s certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

(i) Evidence that State A’s certification was obtained by fraud;

(ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;

(iii) State A’s certification was factually erroneous or was inconsistent with the requirements of this part;

(iv) The State law of State B requires a result different from that of the State law of State A.

(v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(3) If, as State B, unless you have determined that there is good cause to believe that State A’s certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms.

(4) If, as State B, you have determined that there is good cause to believe that State A’s certification is erroneous or should not apply in your State, you

must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility, or both. If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the firm's request.

(iii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B's notice. The firm is not otherwise responsible for further demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.

(v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.

(vi) The firm's application for certification is stayed pending the outcome of this process.

(vii) A decision under this paragraph (d)(4) may be appealed to the

Departmental Office of Civil Rights under s§ 26.89 of this part.

(e) As State B, if you have not received from State A a copy of the site visit review report by a date 14 days after you have made a timely request for it, you may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.

(f)(1) As a UCP, when you deny a firm's application, reject the application of a firm certified in State A or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm, in whole or in part, you must make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. You must enter the following information:

- (i) The name of the firm;
- (ii) The name(s) of the firm's owner(s);
- (iii) The type and date of the action;
- (iv) The reason for the action.

(2) As a UCP, you must check the DOCR Web site at least once every month to determine whether any firm that is applying to you for certification or that you have already certified is on the list.

(3) For any such firm that is on the list, you must promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, you must provide a copy of the decision to the requesting UCP within 7 days of receiving the request. As the

UCP receiving the decision, you must then consider the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.

(g) You must implement the requirements of this section beginning January 1, 2012.

§ 26.87 [Amended]

■ 18. In § 26.87, remove and reserve paragraph (h).

§ 26.107 [Amended]

■ 19. In § 26.107, in paragraphs (a) and (b), remove "49 CFR part 29" and add in its place, "2 CFR parts 180 and 1200".

■ 20. In § 26.109, revise paragraph (a)(2) to read as follows:

§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

(a) * * *

(2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

* * * * *

[FR Doc. 2011-1531 Filed 1-27-11; 8:45 am]
BILLING CODE 4910-9X-P

ATTACHMENT 13

FEDERAL REGISTER/ VOL.79, NO. 191/THURSDAY, OCTOBER 2, 2014



FEDERAL REGISTER

Vol. 79

Thursday,

No. 191

October 2, 2014

Part II

Department of Transportation

Office of the Secretary

49 CFR Part 26

Disadvantaged Business Enterprise: Program Implementation Modifications;
Final Rule

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Part 26**

[Docket No. OST–2012–0147]

RIN 2105–AE08

Disadvantaged Business Enterprise: Program Implementation Modifications

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The U.S. Department of Transportation (DOT or Department) is amending its disadvantaged business enterprise (DBE) program regulations to improve program implementation in three major areas or categories. First, the rule revises the uniform certification application and reporting forms, creates a uniform personal net worth form, and collects data required by the Moving Ahead for Progress in the 21st Century Act (MAP–21), on the percentage of DBEs in each State. Second, the rule strengthens the certification-related program provisions, which includes adding a new provision authorizing summary suspensions under specified circumstances. Third, the rule modifies several other program provisions concerning such subjects as: Overall goal setting, good faith efforts, transit vehicle manufacturers, and counting for trucking companies. The revision also makes minor corrections to the rule.

DATES: This rule is effective November 3, 2014.

FOR FURTHER INFORMATION CONTACT: For questions related to this final rule or general information about the DBE rules/regulations, please contact Jo Anne Robinson, Senior Attorney, Office of General Law, Office of the General Counsel, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, Room W94–205, 202–366–6984, JoAnne.Robinson@dot.gov. DBE program points of contact for information related to other aspects of the DBE program, including certification appeals, programs to assist small and disadvantaged businesses, and information on the DBE program in specific operating administrations, can be found at <https://www.civilrights.dot.gov/disadvantaged-business-enterprise/about-dbe-program/dbe-program-points-contact>.

SUPPLEMENTARY INFORMATION: On September 6, 2012, the Department published in the **Federal Register** (77 FR 54952) a notice of proposed

rulemaking (NPRM) to improve implementation of the DBE program. The DBE program is designed to enable small businesses owned and controlled by socially and economically disadvantaged individuals to compete for federally-funded contracts let by State and local transportation agencies the receive funds from DOT (i.e., recipients). The proposed rule called for a 60-day comment period, with comments to be received by November 5, 2012. Subsequently, the comment period was extended to December 24, 2012, through a notice published October 25, 2012 (77 FR 65164). The Department received approximately 300 comments from State departments of transportation, transit authorities, airports, DBEs, non-DBE firms, and representatives of various stakeholder organizations. Several commenters suggested that the Department hold a public meeting or listening session on the proposed changes before issuing a final rule. The Department responded by scheduling a public listening session for October 9, 2013, as announced in a September 18, 2013 notice (78 FR 57336), to receive additional public input on the costs and benefits of certain proposed changes, among other things. The public comment period also was reopened and extended from the date of publication until October 30, 2013. However, due to the lapse in government funding on October 1, 2013, the October 9, 2013 listening session was canceled and rescheduled to December 5, 2013 (78 FR 68016; November 13, 2013). The public comment period was reopened and extended to December 26, 2013.

The Department received an additional 50 written comments during the reopened comment periods and received in-person oral testimony from 23 individuals at the listening session, which was held in Washington, DC. Over 500 individuals registered to participate in the listening session via Web conferencing made available by the Department. A transcript of the comments received at the listening session and through the Web conferencing was placed in the NPRM docket before it closed on December 26, 2013.

Many of the written comments the Department received were extensive and covered numerous proposed changes, as well as commentary on existing regulations that are not the subject of a proposed amendment. Commenters also suggested changes beyond the scope of what was proposed by the Department in the NPRM. The Department has made changes in this final rule to some of its proposals in response to comments

received during the entire comment period and at the listening session. With the exception of comments that are beyond the scope of the proposed rulemaking, or that failed to set forth any rationale or make suggestions, the Department discusses and responds to the comments on the major issues in the NPRM below.

Personal Net Worth (PNW) Form and Related Requirements*PNW Form*

The Department explained in the NPRM the reasons it believed creating a uniform personal net worth (PNW) form would clear the confusion that may exist when recipients or other entities that perform the certification function (i.e., certifying agencies) use the U.S. Small Business Administration's (SBA) Personal Financial Statement Form 413 as part of their evaluation of the economic disadvantage of an applicant for certification pursuant to the rule. For example, the SBA Form 413 requires each partner or stockholder with 20% ownership or more of voting stock to complete the form. This is not required by 49 CFR part 26 and has caused some confusion. We proposed a revision to 49 CFR 26.67 and offered a sample PNW form and accompanying instruction sheet (see the proposed Appendix G of the September 6, 2012, proposed rule). The Department proposed that a standard form be used by all applicants to the program. Recipients were encouraged to post the new form electronically in a screen-fillable format on their Web site to allow users to complete and print the form online.

The proposed PNW form differed in several respects from the SBA's form that the Department mentioned in its June 2003 revision to Part 26 as an appropriate form for use by our recipients in determining whether an applicant meets the economic disadvantage requirements. Most notably, the form's length increased when more columns and rows were added to give applicants space to fill in their answers. We also proposed that persons completing the form submit backup documentation such as current bank, brokerage, and retirement account statements, mortgage notes, and instruments of conveyance and encouraged recipients when reasonable questions or concerns arise to look behind the statement and the submissions. A related proposal involved requiring applicants to submit documentation for items excluded from the PNW calculation, such as net equity in the primary residence and the value

of the disadvantaged owner's interest in the applicant firm.

The Department invited comment on whether the spouse of an applicant owner should have to file a PNW statement even if the spouse is not involved in the business in question. We noted that the SBA requires the submission of a separate form from a non-applicant spouse if the applicant is not legally separated. However, the SBA requirement is linked to the agency's consideration of a spouse's financial situation in determining a person's access to credit and capital; the existing DOT rule does not take this into account except in cases involving individual determinations of social and economic disadvantage (e.g., Appendix E situations). Currently, certifiers are able to request relevant information on a case-by-case basis. The NPRM proposed adding language to 49 CFR 26.67 to recognize the authority of certifiers to request information concerning the assets of the disadvantaged owner's spouse where needed to clarify whether assets have been transferred to the spouse.

On a related subject, the Department asked for comment on whether the treatment of assets held by married couples should extend to couples who are part of domestic partnerships or civil unions where these relationships are formally recognized under State law.

Over 60 comments addressed issues related to the PNW form, a significant majority of which supported the idea of a DOT-developed PNW form, although some did advocate for the continued use of SBA Form 413. One commenter suggested that the Department mandate that the new form be used without modification and that regulatory provisions be added to address violations by Unified Certification Program (UCP) certifying agencies that revise the form. There were many comments regarding the propriety of including in the PNW form assets that are excluded from the calculation used to determine economic disadvantage under the terms of the existing regulations at 49 CFR 26.67(a). While the majority of the commenters supported creating a DOT form, many thought the proposed form was too burdensome, requested too much documentation, is complicated, and should not be used for those reasons. Similarly, other commenters objected to the form's length, with some likening it to a Federal income tax filing. Some commenters requested information on the methodology used to estimate the paperwork burden associated with completing the proposed DOT PNW form.

Commenters that addressed the question of requiring the spouse of an applicant who is not involved in operating the business to submit a PNW form included business owners, UCP recipients, and advocacy group representatives. Ten commenters favored such a requirement, citing the need to review the applicant's claim that his or her PNW statement accurately reflects community property interests and as a check on the transfer of assets as a means to circumvent the eligibility requirements. Twenty commenters opposed requiring a spousal PNW statement, citing paperwork burden concerns and pointing out that the existing regulation enables certifiers to obtain this information on a "case-by-case" basis. Many commenters believed the requirement would be intrusive and unwarranted and would complicate an already burdensome application. A commenter stated that a blanket requirement would be counter-productive and dissuade eligible DBE owners from participating in the program. However, the majority of commenters favored the collection of a PNW statement from a spouse if he or she has some role in the business (e.g., stockholder, corporate director, partner, officer, or key person), has funded or provided financial guarantees, or has transferred or sold the business to the applicant.

All of the commenters that responded to the Department's question of extending the treatment of assets of married couples to domestic partnerships or civil unions recognized under State law supported such an extension as a matter of fairness and equal treatment. Among the commenters was a coalition of nine organizations led by the National Gay & Lesbian Chamber of Commerce, a national not-for-profit advocacy organization dedicated to expanding the economic opportunities and advancements of lesbian, gay, bisexual and transgender-owned businesses across the country.

DOT Response: The Department has decided to finalize its own PNW form largely as proposed, but with certain changes in response to comments that argued that the proposed form was unnecessarily burdensome. We believe a more prudent approach than the proposal to require all persons to submit backup documentation in every instance (including items excluded under the regulations) is for recipients to request this information for any assets or liabilities noted on the PNW form on a case-by-case basis rather than mandatory submission by all applicants. A one-size fits all approach, in which

certifiers attempt to "substantiate" every line item regardless of magnitude or innocuousness is ill advised, administratively burdensome, and unduly restrictive. As argued by many commenters, that approach is unreasonable, onerous to applicants and sometimes excludes eligible firms. The final rule accomplishes two purposes: (1) Preserves recipient flexibility in seeking explanations for specific assets and liabilities and (2) shortens the form from 6 pages to a more manageable 3 pages, thereby streamlining the time it takes to complete it.

The DOT PNW form (attached as Appendix G) is the result of this balance of interests. As we proposed, this new form must be used without modification by certifiers and applicants whose economic disadvantaged status is relied upon for DBE certification. Section 26.67(a)(2)(i) and (ii) are amended to reflect this requirement. This is necessary to ensure that the requirements of this program are applied consistently by all certifying agencies. Language in the existing rule that requires requests for supporting documentation not be unduly lengthy, burdensome, or intrusive remains unchanged. We remind recipients that with regard to personal net worth, we intend for all information collection requests to serve a useful purpose that addresses a specific question regarding a value stated in the form and not in any way operate as authority to collect all possible documentation for each listed asset or a general requirement that business owners obtain appraisals of all assets. We urge recipients to exercise judgment and restraint when requesting reasonable supporting documentation. Personal net worth statements should not be requested for owners that are not claiming social and economic disadvantage. Nor should a personal net worth statement be requested from persons who are not listed as comprising 51% or more of the ownership percentage of the applicant firm.

The style and content of the form were carefully considered by the Department in this rulemaking. We are cognizant of concerns that too radical a departure from a form that certifiers are accustomed to using may cause some temporary confusion and corresponding administrative burdens. However, the Department believes that a standardized DOT PNW form accompanying the standard DBE Certification Application (also revised in this final rule) is a significant step in uniformity of practice. The DOT PNW form is modelled closely on SBA's Form 413, with differences tailored to DBE

program-specific needs, e.g., not to include the 49 CFR 26.67(a)(2)(iii) exclusions for ownership interest in the firm and equity in the primary residence on the front page.

The Department notes that the estimated burden hours contained in the proposed rule were based on the Department's experience in working with DBE and UCP agencies and our intent to produce a DBE-specific PNW form that includes the information typically needed to perform the certification function, but is not overly burdensome. Further, our proposed rule's estimate of 8 hours to complete the proposed PNW form is greater than the 1.5 hours SBA estimates for its form, which was designed to take into account the different purposes between the two programs and the fact that DBE applicants often need to supplement their form with supporting documentation. As discussed above, in response to comments, we have decided to lessen the requirements of the final form in today's final rule and believe that our original estimate, based on the form that will be now finalized, is reduced to 2 hours, slightly more than the SBA estimate for its form.

Another change we proposed and that we finalize today is that the instructions at the top of the form are customized for the DBE and ACDBE programs. Like SBA, we are requiring each owner to list on page 1 all assets (whether solely or jointly held) and specify liabilities. The categories of assets and liabilities we require mirror closely the SBA's categories but have minor differences. The Department's PNW form omits "sources of income and contingent liabilities," which is contained on SBA's form. On page 2, section 4 of the DOT PNW form, owners must report any equity line of credit balances on real estate holdings, how the asset was acquired (e.g. purchase, inherit, divorce, gift), and the source of market valuation. Owners must also detail in section 6, the nature of the personal property or assets, such as automobiles and other vehicles, their household goods, and any accounts receivable, placing a value on such items in the appropriate column. We added a column to this section asking whether any of these assets are insured. We envision recipients (again on a case-by-case basis) may wish to request copies of any insurance valuation on these assets listed as insured and copies of notes or liens. Sections 7 (value of other business investments) and 9 (transfer of assets) are unique to the Department's PNW form and require applicants to list these activities as described.

We have decided not to require submission of the PNW form by the spouse of a disadvantaged owner who is not involved in the operations of the business. We agree that such a requirement is unduly burdensome for the applicant and the certifier, needlessly intrudes into the affairs of individuals who are not participants in the program, and is not necessary since certifiers may request this information as needed on a case-by-case basis, but not as a routine matter.

We also agree with the commenters urging us to extend the treatment of assets held by married couples to include domestic partnerships and civil unions that are legally recognized under State law. To this end, we have added a definition of spouse that includes same-sex or opposite-sex couples that are part of a domestic partnership or civil union recognized under State law.

Concurrent with this final rule and as requested by many commenters, the Departmental Office of Civil Rights is making the final form available for distribution in a screen-fillable portable document (PDF) format, which recipients may post on their Web sites and distribute to applicants as part of the DBE certification application process.

Economic Disadvantage 49 CFR 26.67

Since 2007, the Department has, through guidance, recommended that recipients take account of evidence that indicates assets held by an individual suggest he or she is not economically disadvantaged even though the personal net worth falls below the \$1.32 million threshold that gives rise to a rebuttable presumption of economic disadvantage. The guidance reflects the Department's view that the purpose and intent of the economic disadvantage criteria is to more narrowly tailor the program to only reach those disadvantaged individuals adversely impacted by discrimination and the effects of discrimination and to accomplish the goal of remedying the effects of discrimination. The presumption is by regulation rebutted when the individual's personal net worth exceeds the \$1.32 million cap. We proposed in the NPRM to codify the existing guidance to recognize that the presumption also may be rebutted if the individual's personal net worth falls below the cap, but the individual is, in fact, too wealthy to be considered disadvantaged by any reasonable measure. To illustrate the point, the guidance notes that under some circumstances a person with a very expensive house, a yacht, and extensive real or personal property holdings may

be found not to be economically disadvantaged.

The Department also sought comment on whether a more bright-line approach would be preferable, such as whether someone with an adjusted gross income over one million dollars for two or three years on his or her Federal income tax return should not be presumed to be economically disadvantaged, regardless of their personal net worth (as defined by this program).

The Department received 42 comments on this issue. The difficulties potential applicants and recipients experience regarding economic disadvantage were expressed by many of the commenters and their views were not limited to whether the \$1.32 million personal net worth cap is reasonable. Commenters mentioned several difficulties with both the current rule, the proposed codification of the "accumulation of substantial wealth" guidance, and the alternative bright-line approach tied to the adjusted gross income of the disadvantaged owners. Most commenters comprised of recipients, DBEs, and general contractors opposed amending the regulations to include the ability to accumulate substantial wealth as a basis for rebutting the presumption of economic disadvantage. The opponents viewed the proposal as vague, subjective, and likely to result in arbitrary decisions.

Many of the opponents of this approach believed that, if the Department were to finalize criteria for personal net worth beyond the existing calculation, a measure similar to the bright-line approach with varying adjusted gross income numbers over varying numbers of years would be preferable because it provides a more objective measure of whether an applicant is economically disadvantaged. Several commenters thought that the existing bright line of \$1.32 million in personal net worth is sufficient. One commenter believes a bright-line approach helps certifiers because most are not accountants or tax experts. The Department also received comments specific to the application of the bright-line approach to S Corporations. Two commenters stated that using a bright-line approach was a false indicator for S Corporations in which the firm's income is passed through to DBE shareholders and thus is not a reflection of a shareholder's wealth. As defined by the U.S. Internal Revenue Service, S Corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes. One commenter did not

believe that a bright-line approach was appropriate for S Corporations and Limited Liability Corporations because owners of these entities recoup the profits on their personal returns in proportion to their ownership interests. The commenter went on to say that these entities distribute sufficient cash to their owners to enable them to pay income tax and this distribution does not increase the person's net worth.

DOT Response: As noted in the NPRM, the purpose of this proposed regulatory amendment is to give recipients a tool to exclude from the program someone who, in terms of overall assets is what a reasonable person would consider to be a wealthy individual, even if one with liabilities sufficient to bring his or her personal net worth under \$1.32 million. The Department continues to believe that this kind of tool must be available to ensure that the program truly benefits those for whom it is intended. We have seen in certification appeals upheld by the Federal courts the reasoned application of this standard based on specific facts and circumstances in the entire administrative record that support the decision. See *SRS Technologies v. United States*, 894 F. Supp 8 (D.D.C. 1995); *SRS Technologies v. United States*, 843 F. Supp. 740 (D.D.C. 1994).

We acknowledge the benefits of a bright-line approach (whether it is the adjusted gross income approach proposed in the NPRM or the current bright-line personal net worth cap that exist in the regulations) and the potential for manipulation to fall within the bright-line. The Department strongly believes that recipients must be able to look beyond the individual's personal net worth bottom line and consider his or her overall economic situation in cases where the specific facts suggest the individual is obviously wealthy with resources indicating to a reasonable person that he or she is not economically disadvantaged. Thus, the final rule incorporates the guidance but does not go beyond it as proposed. We have not included as factors "unlimited growth potential" or "has not experienced impediments to obtaining access to financing, markets, and resources." We believe that those additional criteria are unnecessary because the essence of what we intend is captured in the "ability to accumulate substantial wealth" standard as evidenced by the individual's income and the value of the various accumulated personal assets.

The Department, however, is sympathetic to the concerns raised by many commenters that the subjective

standard could lead to arbitrary decisions by recipients. To address this concern, we have included in the final rule specific factors recipients may consider in evaluating the economic disadvantaged status of an applicant or owner in this circumstance. Those factors include (1) whether the average adjusted gross income of the owner over the most recent three-year period exceeds \$350,000; (2) whether the income was unusual and not likely to occur in the future (e.g., inheritance); (3) whether the earnings were offset by losses (e.g., winnings and losses from gambling); (4) whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm; (5) other evidence that income is not indicative of lack of economic disadvantage, and (6) whether the fair market value of all assets exceed \$6 million. Similar factors are used by the Small Business Administration in its application of the economic disadvantage criteria to individuals seeking to participate in its Small Disadvantaged Business and 8(a) programs, which has long recognized the ability to accumulate substantial wealth as a basis for a finding of no economic disadvantage. The Federal courts have upheld consideration of income levels tied to the top 1–2% of high income wage earners in the United States to evaluate the economic disadvantaged status of a small business owner as reasonably based, not the subject of arbitrary decision making. *Id.* *SRS Technologies* cases cited above. As noted by the SBA, ". . . the average income for a small business owner is generally higher than the average income for the population at large and, therefore, what appears to be a high benchmark is merely reflective of the small business community." See preamble to the 2011 SBA Final Rule, 76 FR 8222–01.

We stress that we are not, with this change, requiring that a recipient consider these factors for every disadvantaged owner whose PNW would be below the current regulatory cap. Instead, today's final rule merely provides recipients who have a reasonable basis to believe that a particular owner should not be considered economically disadvantaged, despite their PNW, with the explicit authority to look at evidence beyond the PNW to determine whether that owner is truly economically disadvantaged. Further, the listed factors are simply intended to provide guidance to recipients about the kind of evidence they may look to in making this determination; it is not intended to be

a checklist. An adjusted gross income below \$350,000 may in appropriate circumstances indicate a lack of economic disadvantage. The determination should be based on the totality of the circumstances. Finally, as the final regulatory text clarifies, a recipient can only rebut the presumption of disadvantage under this standard through a proceeding that follows the same procedures as those used to remove a firm's eligibility under § 26.87. The Department believes that this procedural safeguard makes it unlikely that recipients will proceed in attempting to rebut the presumption of disadvantage in all but the most egregious cases.

Transfer of Assets 49 CFR 26.67

Under existing guidance contained in Appendix E, assets that individuals have transferred two years prior to filing their certification application may be counted when calculating their PNW. The Department proposed to codify the guidance by placing it in the rule text at § 26.67. The proposed rule essentially attributes to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to the submission of an application for certification or within two years of a participant's annual program review. This transfer rule would not apply to transfers to, or on behalf of, an immediate family member for that individual's education, medical expenses, or some other form of essential support or transfers to immediate family members that are consistent with the customary recognition of special occasions like birthdays, graduations, anniversaries, and retirements. We also proposed to expand the transfer rule to include transfers from the DBE owner to the applicant firm to ensure that such transfer are not used to enable the DBE owner to qualify for the program.

Most of the commenters, comprised largely of State departments of transportation and transit authorities, supported the proposed rule. Several commenters suggested there be no exception for transfers to a spouse and no exception where it can be demonstrated that the transfer was done to qualify for the program. Other commenters asked for clarification of certain terms (i.e., "transfer" or "essential support") or a narrowing of the exclusions. The few commenters that opposed the proposed rule provided little detail.

DOT Response: The Department is adopting the rule with a minor modification to the text. We see no reason to treat a spouse differently than other immediate family members regarding the exception. We agree with commenters that the exceptions would not apply if there is evidence indicating that a transfer to an immediate family member was in fact designed to enable the disadvantaged owner to evade the PNW threshold and thereby qualify for the program or remain in the program. The burden is on the applicant or the participant to demonstrate that the transfer is covered by the exception. In our experience with the Appendix E guidance, recipients have not had difficulty applying the transfer restrictions. However, we will through guidance provide clarification of terms used in the rule if needed based on specific facts and circumstances presented to the Department.

Certification Application Form

The Department proposed a revised nationwide uniform DBE Certification Application Form to replace the one in use since 2003. In the 2003 proposed rule (68 FR 35542) at that time, we urged commenters to think about what must be contained in the application and what might be reserved for an on-site review. The resulting application reflected the Department's goal of retaining the basic structure originating in the 1999 rule that was manageable and easy to follow for applicants who must fill out the form, while simultaneously being accessible and practical for the many recipients required to accept the form. We acknowledged a concern about keeping the application within reasonable limit, regarding its length and content, to prevent it from becoming too unwieldy and burdensome. We allowed recipients to supplement the form with written consent of the operating administration with a one to two page attachment containing the additional information collection requirements. We also required applicants to submit additional supporting documents not already required by the uniform application. We strongly suggested that the form be streamlined and that additional information should be sought during the on-site review rather than during the application process. As explained in the 2012 NPRM, the 2003 application was designed to be more streamlined and user-friendly, yet comprehensive enough to supply recipients with the necessary information to form their initial line of questioning prior to and during an on-site visit. In addition, the application was designed to further

assist recipients in making determinations as to an applicant's eligibility for the DBE program.

In the Department's view, the above objectives still hold true, especially now that we provide for interstate certification. Pursuant to the January 28, 2011, final rule revision, provisions for interstate certification were added requiring applicants to provide to State B a complete copy of their application form, all supporting documentation, and other information submitted to State A or other States wherein the firm is certified. The application, therefore, must serve the needs of both sets of certifiers by providing a window into a firm's eligibility. As required by 49 CFR 26.73, eligibility determinations are to be based on present circumstances.

The Department's proposed application form as presented in the NPRM was longer in length than the existing form because of extra space added for applicants to write in their answer. We first noticed the need for more room for answers in the course of processing denial and decertification appeals where information was sometimes handwritten and overflowing the strict margins of the old form. However, despite our intention to make the form more amenable for applicants to have the option to fully explain their responses directly on the form, commenters raised concerns about the length of the form.

DOT Response: In response to comments about length and more specific technical comments about various aspects of the proposed form, we have shortened the entry spaces and removed several details that in our experience were not useful to include in the application but may have been more suitable questions to pose during an on-site review, as needed. For example, in the banking information space, we removed the need to insert the bank's phone number and address, but added a space identifying the names of individuals able to sign checks on the account. Similarly, in the bonding entry, we removed the need to specify the binder number, and the contact information of the bonding agent/broker. These items may be useful to a certifier, but we want to limit the amount of things an owner would have to "look up" to complete its application. The new form also removes obsolete material from the roadmap for applicants (page 1) and page 2 (e.g., relating to the long-expired Small Business Administration (SBA)—DOT Memorandum of Understanding). The final application form contains new items that were in the proposed form we believe are important. First, the dates of

any site visits conducted by other UCPs (besides the home State) are important facts that will enable certifiers to determine if any other certifier has assessed the firm's eligibility as a DBE. If an entry here is checked, we encourage certifiers to obtain the site visit report and denial/decertification decisions from their UCP members or fellow certifiers in other States. Second, the new application offers ample space for a firm to provide a concise description of its primary activities, the products and/or services it provides, and the North American Industry Classification System (NAICS) codes it believes apply to the firm. This description will help certifiers prepare for their on-site visit but also assign NAICS codes and list the firm properly in the UCP online directory if certified.

One section of the old form that deserves more explanation as to why it was revised is the area where applicants are asked to specify by name, title, ethnicity, and gender the firm's management personnel who control several key areas, such as financial decisions, estimating and bidding, contract negotiation, field supervision, etc. In crafting the NPRM, we believed then, as we do now, that some of these entries could be reworded or broken down into sub-questions and we have incorporated these changes in the new form. For instance, "sets policy for company direction/scope of operations," "hire and fire field staff or crew," and "attend bid opening and lettings," are new entries that examine more broadly the authority and responsibilities and authority roles of the majority owner vis-à-vis others in the firm. A more descriptive parenthetical is offered for "office management," which now adds billing, accounts receivable/payable, etc. within the entry.

We have also added a feature we modelled after a few certifying agencies who supplemented their form with a chart for applicants to specify the frequency by which owners and key management personnel perform the relevant tasks. Applicants will now circle, in the appropriate rows, how often a person is involved in the functions identified as: "always", "frequently", "seldom", or "never." These types of responses are very common across all certifiers who often ask this question during the on-site review. At least one commenter opposed this addition believing that assessing the amount of time owners and others devote implies that if they do not go into the field and supervise operations they are not in charge of the firm; and small business owners

frequently spend time arranging office-related matters (insurance, banking, accounting, etc.) to keep a business operational. We believe at a minimum, certifiers need to understand who does what, where, and for how long, when they assess owners' control of their firm. It is our intent that this simple breakdown of the frequency of the tasks identified will aid certifiers as they prepare for their on-site review of the owners, enabling them to ask targeted questions concerning the owners' control of their firm. The Department does not intend for certifiers to treat the new frequency chart as independently determinative of a firm's eligibility; rather, it is a tool to narrow the areas of further inquiry.

The application checklist, a vital component of the process to becoming a DBE, has also been simplified and divided into mandatory and optional items. Items from the original checklist have been left largely intact. However, to ease the paperwork burden, some are now no longer mandatory for all applicants (e.g., trust agreements held by any owner claiming disadvantaged status, year-end balance sheets and income statements for the past 3 years (or life of firm, if less than 3 years)). The Department intends for recipients to request and collect only the information necessary to determine eligibility. Smaller businesses with simple structures should not be subjected to unnecessarily burdensome data requests. We re-emphasize here that an owner's affidavit of certification attests to the fact that the information submitted is true and correct. Applicants should not be penalized for not having (or being unable to produce) items from the optional documentation list. Recipients should base eligibility decisions on the information they receive from the applicant.

To help simplify the data collection, we also clarified that the request for all applicants to submit tax returns should be limited to Federal not State returns. Two items identified in the NPRM were added to the checklist—the résumés of key personnel for the firm and any firm requests for current year federal tax return filing extensions. Résumés of key personnel are frequently requested of the applicant or provided voluntarily and should be readily available.

Various miscellaneous comments focused on the role of the Department in the certification process, with commenters suggesting that we host an on-line system for applications. Such a system would be difficult for the Department to manage and not in keeping with the delegation of the certification function to recipients and

others through their UCPs. We will conspicuously post the uniform certification application, instructions, certification affidavit, and checklist on the Departmental Office of Civil Rights Web site, <https://www.civilrights.dot.gov>. A handful of commenters (including a member of Congress) spoke to the idea that newly established firms should only be required to complete a shorter more simplified form. In response, we note that newer firms may not have the level of documentation a larger firm will and can easily enter "n/a" (not applicable) in the entries provided. In the interest of uniformity, it is more beneficial to require all applicants to submit the standardized form. We remind certifiers that a firm lacking certain documentation or a history of providing a particular good or service is, under 49 CFR 26.73(b), not necessarily ineligible for certification.

Uniform Report of DBE Awards or Commitments and Payments, Appendix B

The Department proposed several changes to the Uniform Report of DBE Awards or Commitments and Payments (Uniform Report) designed to address concerns regarding the absence of data on women-owned DBE participation by race, confusing instructions, the differing needs of the various types of businesses/organizations participating in the program, and the collection of payments to DBEs on a "real time" basis. In response, we proposed to: (1) Create separate forms for general DBE reports and projects reports; (2) clarify the instructions; (3) collect information on minority women-owned DBEs; and (4) collect information on actual payments to DBEs on ongoing contracts performed during the reporting period (i.e., real time). The proposed forms in the NPRM kept the standard format but provided clearer instructions for completing some fields. We also proposed a surrogate for comparing DBE payments to the corresponding DBE commitments to respond to concerns raised by the Government Accountability Office (GAO) in its 2011 report on the adequacy of using DBE commitment data to determine whether a recipient is meeting its overall DBE goal. As we explained in the NPRM, the GAO criticized the existing form because it did not permit DOT to match recipients' DBE commitments in a given year with actual payments made to DBEs on the contracts to which the commitments pertained. The existing form provides information on the funds that are committed to DBEs in contracts let each year. However, the

"achievements" block on the form refers to DBE payments that took place during the current year, including payments relating to contracts let in previous years, but could not include payments relating to contracts let in the current year that will not be made until future years.

Thirty-six (36) commenters addressed some aspect of the proposed changes to the existing Uniform Report. The majority of commenters agreed that the Uniform Report needs changes. Six commenters expressed general support for the proposed revisions and six expressed general opposition. Three commenters asked for simplified reporting requirements.

The collection of data on women-owned DBEs based on race/ethnicity drew comments from four general contractors associations, two of which suggested that the Department is creating additional requirements beyond what Congress intended in MAP-21. One commenter expressed the view that the breakout of DBE participation data by gender and race does nothing to improve the program and serves no purpose. Another commenter stated that prime contractors should not be responsible for gathering and reporting the racial classification of the women-owned DBE firms used on a project and that the data should not be used by the Department to set separate goals for women based on race.

The proposal to collect actual "real time" payment data on ongoing contracts drew a number of comments, many of which were favorable. Supporters viewed the information as a better snapshot of DBE participation and more closely connected to the overall DBE goal in some instances than is obtained through the existing collection of payment data on completed contracts. Proponents of this view include the Transit Vehicle Manufacturers (TVMs) who would like to submit data only on current payments, as well as some recipients that undertake mega projects (e.g., design/build) that may not show DBE activity at the outset. Some opponents thought the opposite, preferring to report payments on completed contracts to payments on ongoing contracts because, in their view, one can make the final comparison between the contract goal and actual payments to DBEs. One opponent was more concerned with the potential for the Department to incorrectly judge the recipients' overall performance, based on the payment data on ongoing contracts since the data would be affected by project schedules, project delays, change orders, and weather, all factors that impact the

schedule of DBE work and therefore payments to DBEs on a project. Another commenter expressed grave concerns about reporting on the current payment status of all active federally-assisted projects, citing the significant resources required and the challenge presented for those with electronic or paper processes. Two commenters suggested that the Department define “ongoing contracts” and one commenter asked for a definition of “completed contract.”

To address concerns raised by the GAO about the lack of a match between DBE commitments in a given year and the actual payments to DBEs on the contracts pertaining to the commitments, the NPRM sought to provide options for connecting work committed to DBEs with actual payments to the committed DBEs that are credited toward the overall goal for a particular year. One option was to collect data in 3–5 year groupings and calculate the average amount of commitments and the average amount of payments, providing a reasonable approximation for comparing the extent to which commitments result in actual payments over a specified period of time. Alternatively, a proposed modification to the existing form that would track payments credited to contracts let over a 5-year period was described in the preamble in an attempt to reach the result the GAO recommended. However, we acknowledged that it would take several years to determine the extent to which commitments resulted in payments that enabled a recipient to meet the relevant overall DBE goal and that the collection and reporting of this data would involve greater resources by recipients that may yield information of limited use for program administration and oversight purposes. We invited the public to offer other ideas that would meet the accountability and program administration objectives of the Department.

Comments on this issue supported the idea but did not think the proposed options would produce current usable information. One commenter indicated that making programmatic changes 3 years after the data is collected seems irrelevant. A State department of transportation objected to the administrative burden of accumulating and reporting data over several years, diverting resources from the “good work” of the DBE program for this purpose. In fact, of the six commenters who registered disapproval, four did so because of the level of effort needed to maintain this data. Two of the opponents did not think the proposals sufficiently addressed the GAO’s

concerns. One commenter suggested that the Department establish a workgroup with external stakeholders to address the GAO’s concern.

DOT Response: The Department has decided to make final the revisions to the Uniform Report and the accompanying instructions to be used by all recipients for general reporting, project reporting, and reporting by TVMs. The proposed “general reporting” and “project reporting” forms published in the NPRM were identical in format and content. The difference between the proposed forms lies in the instructions for completing one part of the form (Section A) when reporting on a project versus general reporting on DBE participation achieved during a specified period of time. Thus, the same form will be used by recipients for the different purposes as is done currently. Recipients will be expected to use the revised form to report on activity in Federal Fiscal Year 2015 (October 1, 2014–September 30, 2015). For example, the first report for FHWA and FTA recipients using the revised form will be due June 1, 2015 for the period beginning October 1, 2014 through March 31, 2015. The second report will be due December 1, 2015 for the period April 1, 2015 through September 30, 2015. Federal Aviation Administration (FAA) recipients will use the revised forms when they submit the annual report that is due December 1, 2015. Each operating administration will provide technical assistance and guidance to their recipients to ensure they understand what is required in each field for general reporting, project reporting, and reporting by TVMs. Collecting data on DBE participation by minority women will enable the Department to more fully respond to Congressional inquiries.

Actual payment data on ongoing contracts collected in Section C of the report applies to work on federally-assisted contracts performed during the reporting period. Payment data collected in Section D on completed contracts applies to contracts that the recipient has determined to be fully performed and thereby completed. No more work is required to be performed under the completed contract. In both instances, the data on payments to DBEs provides a “snap shot” of monies actually paid to DBEs, compared to dollars committed or awarded to DBEs but not yet paid, during the reporting period. The payment data on completed contracts allows recipients and the Department to determine success in meeting contract goals, while the payment data on ongoing contracts, over time, may provide some indication of

how well yearly overall goals are being met.

The Department is sensitive to the concerns raised by commenters about the practicality of the proposals offered in response to the GAO report. The additional payment data for work performed during the reporting period on ongoing contracts may enable us to better assess the adequacy of the existing comparisons used to determine how well annual overall goals are being met through dollars expended with DBEs. Because most DOT-assisted contracts are multi-year contracts, payments made pursuant to those contracts will cross more than one fiscal year. However, in those cases where the yearly overall DBE goal does not change radically from year to year, the on-going payment data may provide a closer match than currently exists. For now, reliance on contractual commitments made during the fiscal year to determine the extent to which overall DBE goals for that fiscal year are met provides a reasonable proxy. The Department will continue to explore ways of addressing the GAO’s concern that are likely to produce “real time,” useful information that does not strain existing recipient resources.

MAP–21 Data Reports

MAP–21 reauthorized the DBE program and included Congressional findings on the continued compelling need for the program. Section 1101(b)(4) of the statute included a long-standing but not yet implemented statutory requirement that States notify the Secretary in writing of the percentage of small business concerns that are controlled by: (1) Women, (2) socially and economically disadvantaged individuals (other than women), and (3) individuals who are women and are otherwise socially and economically disadvantaged individuals. The statute also directs the States to include the location of the aforementioned small businesses. The Department proposed to implement this requirement through the State Unified Certification Programs (UCP) that maintain statewide directories of all small businesses certified as DBEs. The information required by MAP–21 would be submitted to the Departmental Office of Civil Rights, the lead agency in the Office of the Secretary responsible for overseeing DOT implementation of the DBE program. For those firms that fall into more than one of the three categories, we proposed that the UCP agencies include a firm in the category applicable to the owner with the largest stake in the firm who is also involved in controlling the firm. We sought

comment on whether the Uniform Report of DBE Awards or Commitments and Payments should be the vehicle used to report the MAP–21 information.

Five commenters directly addressed this proposal. Only one of the commenters, a DBE contractor advocacy organization, opposed the collection and reporting of this information, stating that it serves no purpose. Four commenters support reporting the MAP–21 information separately from the Uniform Report and the advocacy organization suggested that the information should be submitted near the beginning of the fiscal year (October 15) to be consistent with other MAP–21 reporting requirements, as it would also be helpful for the purposes of those recipients involved in the program to have that information early. One commenter thought it would be more efficient to include it with the Uniform Report and that it could provide useful comparative data.

DOT Response: The Department has decided to require each State department of transportation, on behalf of the UCP, to submit the MAP–21 information to the Departmental Office of Civil Rights each year by January 1st, beginning in 2015. Most State departments of transportation are certifying agencies within the UCP; those who are not certifying agencies are, nonetheless, members of the UCP and share in the responsibility of making sure the UCP complies with DOT requirements. We agree that the information should not be reported on the Uniform Report; instead, it should be reported in a letter to the Director of the Departmental Office of Civil Rights. As indicated in the NPRM, to carry out this requirement, the UCPs would go through their statewide unified DBE directories and count the number of firms controlled, respectively, by: (1) White women, (2) minority or other men, and (3) minority women, and then convert the numbers to percentages, showing the calculations. The information reported would include the location of the firms in the State; it would not include ACDBEs in the numbers.

Certification Provisions

Size Standard 49 CFR 26.65

The Department proposed to adjust the statutory gross receipts cap from \$22.41 million to \$23.98 million for inflation and to clarify that the size standard that applies to a particular firm is the one appropriate to the firm's primary industry classification. To qualify as a small business, the average annual gross receipts of the firm

(including its affiliates) over the previous three fiscal years shall not exceed this cap. Of the 23 comments received from State departments of transportation, UCPs, transit authorities, and representatives of DBEs and general contractors, most supported the increase in the size standard and a few suggested it be made effective immediately. Those that opposed the change (and some of the supporters) asked that the Department clarify what is meant by "primary industry classification."

DOT Response: The Department is amending the gross receipts cap for the financial assistance programs in 49 CFR Part 26 as proposed to \$23.98 million to ensure that the opportunity of small businesses to participate in the DBE program remains unchanged after taking inflation into account. Under MAP–21 Section 1101(b)(2)(A) the Secretary of Transportation is instructed to make the adjustment annually for inflation. With this adjustment, if a firm's gross receipts, averaged over the firm's previous three fiscal years, exceed \$23.98 million, then it exceeds the small business size limit for participation in the DBE program. We remind recipients that firms are not eligible as DBEs if they exceed the relevant NAICS code size limitation for the type(s) of work the firm seeks to perform in DOT-assisted contract, which may be lower than \$23.98 million and may not constitute the primary business of the firm. The term "primary industry classification" is currently defined in the DBE program regulations at 49 CFR 26.5. To avoid any confusion on the application of SBA size standards to the various NAICS codes in which a firm may be certified, we have clarified the text of § 26.65(a) so that it is not limited to the firm's primary industry classification.

Ownership 49 CFR 26.69

The Department proposed several changes to the rules that govern ownership of a DBE to provide greater clarity and specificity to aid recipients in addressing situations in which non-disadvantaged individuals or firms are involved with the DBE and to address concerns raised by the decision of the court in *The Grove, Inc. v. U.S. Department of Transportation*, 578 F. Supp. 2d 37 (D.D.C., 2008).

This discussion focuses on the proposed changes most commented upon. Specifically, the NPRM proposed to explicitly prohibit a non-disadvantaged owner's prior or superior rights to profits (§ 26.69(c)(3)); proposed clarifications relating to funding streams and sources of capital used to acquire an ownership interest in the firm

(§ 26.69(c)(1)); provided further specificity through examples on what constitutes capital contributions not commensurate with the DBE's value (including new examples of arrangements in which ownership fails to meet the "real, substantial, and continuing" requirements in the existing rule) (§ 26.69(c)(2)); and proposed to require that disadvantaged owners be entitled to at least 51% of dividends and other distributions (including liquidations) (§ 26.69(c)(4)). The NPRM further proposed to require that spousal renunciations be contemporaneous with applicable capital contributions or other transfers of marital or joint assets. Finally, the NPRM proposed to require close scrutiny of assets (including ownership interests in applicant firms) that disadvantaged owners obtain or other seller-nonbank financed transactions. This last proposed change would, among other specified conditions, generally require prevailing market (arm's length) terms with full recourse to the disadvantaged owners and/or to assets other than the ownership interest or an interest in the firm's profits.

The ownership proposals drew comments (33 in all) from State departments of transportation, transit authorities, UCPs, associations of minority business owners, other business owners, trade associations, counsel for DBE firms, a former DOT official, and a member of Congress. None expressed specific views on every proposal although several expressed either blanket approval or blanket reservations. Twenty commenters exclusively supported the proposals while thirteen expressed concerns with at least some of the changes.

A clear majority of recipients and UCPs supported most changes as providing clarity and ensuring program integrity. Private parties and trade associations, with some exceptions, expressed concern that the proposals overreached—by being too stringent, subjective, or burdensome to administer. More than a few commenters suggested that the proposals, if adopted, would discourage legitimate DBE participation, lead to inconsistent certification results across jurisdictions, or trap worthy but unsophisticated owners.

A transportation company opined that the "substantial and complex revisions and additions" to § 26.69 would require firm owners to attend "a workshop to understand the criteria;" would require recipients to employ staff with real estate, accounting, business management, and finance expertise; and would require the Department to

conduct nationwide training in a classroom setting. Some State transportation departments similarly objected that the careful scrutiny conditions would increase recipient time spent evaluating financial records and require hiring outside experts at added expense. A former Department official noted that this provision could create unwarranted barriers to program entry because in situations involving non-bank financing, “the list of five items required in the proposed § 26.69(k) could be quite difficult to produce.”

Regarding the proposed change to the spousal renunciation rule, a transit authority proposed that DOT scrap the rule as “unduly burdensome” and allow spousal renunciations that occur at least two years after the use of marital assets to acquire an ownership interest in an applicant firm, provided that “the transfer was not made solely for the purposes of obtaining DBE certification.” DBE firm counsel and at least one State department of transportation objected to the renunciation rule as unduly burdensome, requiring excessive owner sophistication regarding certification standards, and discriminatory against DBEs in community property states. One trade association “enthusiastically” supported the ownership changes, however, particularly the new marital assets rule, and a transportation department urged that DOT provide new guidance regarding when a spouse’s transfer is considered to be for the purpose of obtaining certification. Another transportation department feared that the renunciation rule would lead to fewer women owners qualifying for the DBE program; it requested that DOT generally “explain more specifically what types of documents” are sufficient to substantiate a firm’s capitalization, including the source of funds. Finally, an association of women contractors criticized the renunciation proposal as a Catch-22 (renunciation indicates “forethought to DBE creation”) that may be contrary to State law and current certification rules.

DOT Response: The Department carefully considered, evaluated, and weighed comments on both sides. We adopted some provisions as proposed (e.g., § 26.69(c)) and rejected others due to stakeholder concerns and possible unintended consequences.

We retain the existing marital asset provision of § 26.69(i) as currently written and do not adopt the proposed change to require spousal renunciation contemporaneous with the transfer. To adopt such a change might unnecessarily inhibit applicants from

allocating marital assets in such a way so that a disadvantaged spouse can establish and fund their business using marital funds. The current rule has adequate protections in place to prevent a non-disadvantaged spouse from retaining ownership of marital assets used to acquire ownership of an applicant firm or of an ownership interest in the firm. As long as the non-disadvantaged spouse irrevocably renounces and transfers all rights in the assets/ownership interest in the manner sanctioned by State law in which either spouse or the firm is domiciled (as the rule currently provides), we see no reason to require a renunciation at the time of the transfer. Recipients should not view a firm’s submission of renunciation contemporaneous with its application as precluding eligibility.

Regarding the careful scrutiny conditions in the proposed changes in § 26.69(k), we think it prudent not to finalize the revisions pending further study and review. Our proposal would have required careful scrutiny of situations where the disadvantaged owners of the firm obtain interests in a business or other assets from a seller-financed sale of the firm or in cases where a loan or proceeds from a non-financial institution was used by the owner to purchase the interest. The goal was to guard against seller-financed acquisitions (whether stock or assets) intended to disguise a non-disadvantaged owned business as a DBE firm. We agree with commenters that as written, the proposed language imposing mandatory conditions on transactions would be difficult for recipients to implement and has the potential of unfairly limiting the range of legitimate arrangements.

The Department adopts a revision we proposed to § 26.69(c)(3), which currently requires that a firm’s disadvantaged owners must “share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.” This concept has proven difficult for certifiers to implement because of the tendency to interpret the phrase “profits commensurate with their ownership interests” to mean that the disadvantaged owners must be the highest paid persons in the firm, and to tie in § 26.71(i)’s mandate to “consider remuneration” differences between disadvantaged owners and other participants in the firm. We clarify here in this preamble and in the final rule for ownership purposes of § 26.69, the disadvantaged owners should be entitled to the profits and loss commensurate with their ownership

interests; and any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm’s profits are grounds for denial of certification. This added provision is meant to be broad and is not absolute. There may be circumstances, particularly in franchise situations, where such an arrangement may be acceptable.

Control 49 CFR 26.71

Regarding control, the NPRM proposed clarifications to the rules concerning the involvement of non-disadvantaged individuals in the affairs of the firm by establishing more stringent requirements to ensure the disadvantaged owner(s) is in control of the company. To that end, the Department proposed to delineate some situations, circumstances, or arrangements (through examples) in which the involvement of a non-disadvantaged individual who is a former employer of the disadvantaged owner(s) may indicate a lack of control by the disadvantaged owner(s) and consequently may form the basis for denying certification. The examples included situations where the non-disadvantaged former employer controls the Board of Directors, contrary to existing requirements in 49 CFR 26.71(e); provides critical financial, bonding, or license support that enables the former employer to significantly influence business decisions; and loan arrangements or business relationships that cause dependence that prevents the disadvantaged owner from exercising independent judgment without great economic risk. In such cases, the recipient must determine that the relationship between the non-disadvantaged former employer and the disadvantaged individual or concern does not give the former employer “actual control or the potential to control” the DBE. The NPRM sought comment on whether there should be a presumption that non-disadvantaged owners who ostensibly transfer ownership and/or control to a disadvantaged person and remain involved with the firm in fact continue to control the firm.

Most of the commenters that addressed these proposed changes, many of whom were State departments of transportation, supported the change. Specific control-related comments included a UCP objecting to the proposed § 26.71(e) change as presuming misconduct and discouraging mentor-protégé relationships and spin-offs; and DBE counsel criticizing the proposed presumption as unnecessary and

antithetical to valid business and personal reasons for a non-disadvantaged person remaining associated with a DBE firm. A former DOT official likewise opined that the presumption could create unintentional barriers to entry “for the very firms that are intended to benefit from the program.” That official stated his view that when there is a legitimate business reason for the transfer, the firm should not be ineligible, even if DBE certification “may have been part of the motivation.” A member of Congress recommended that the Department hold “additional stakeholder input sessions,” particularly concerning paperwork and other burdens on DBE firms, applicants, and UCP/recipient staff.

DOT Response: As indicated in the NPRM, control is essential to program integrity designed to ensure that the benefits of the program reach the intended beneficiaries. The Department has decided to finalize the presumption of control by non-disadvantaged owners who remain involved in the company after a transfer. We emphasize that the presumption is rebuttable. Mentor-protégé relationships that conform to the guidance provided at 49 CFR 26.35 would rebut the presumption. Similarly, some of the explanations for continued involvement by the non-disadvantaged previous owner offered by one of the commenters may also rebut the presumption. For example, remaining with the firm to maintain contacts with previous customers, remaining temporarily to assist with the transfer, or maintaining a small ownership interest or minimal participation in the firm with no control of the company may rebut the presumption. Also, we have removed the phrase “actual control or the potential to control” to avoid muddying the concept; “control” is the issue.

We have removed the examples from the final rule because, upon further reflection, we believe they describe conduct that the rule itself prohibits or they are not helpful and may cause more confusion.

Prequalification 49 CFR 26.73

The Department proposed to revise the current provision at 49 CFR 26.73 to disconnect prequalification requirements (e.g., State or local conditions imposed on companies seeking to bid on certain categories of work) from certification requirements. As stated in the NPRM, the proposed change has the effect of not allowing prequalification to be used as a criterion for certification under any circumstances. This change would not prohibit the use of prequalification

requirements that may exist for certain kinds of contracts. However, the prequalification status of a firm would not be relevant to an evaluation of whether the firm meets the requirements for certification as a DBE (e.g., size, social and economic disadvantaged status of the owners, ownership, and control). We noted that prequalification requirements may not exist for doing business in all modes of transportation (e.g., highways versus transit).

Only a few commenters addressed this proposed change, with most in favor because they agree it has no relevance to certification. The opponents of the change (mostly general contractors) read this proposal as eliminating the prequalification requirements imposed under State law (e.g., Pennsylvania) for DBEs while such requirements continue to exist for non-DBEs.

DOT Response: The Department has decided to finalize the rule as proposed. In doing so, we reiterate that this change has no effect on existing State laws that require all contractors and subcontractors performing work on contracts let by State departments of transportation or other government entities to be prequalified. Under the final rule, the certifying entities in a State UCP are not permitted to consider whether a firm seeking certification as a DBE is or is not prequalified. Certifiers are to analyze only the factors relevant to DBE eligibility (Subpart D of the rule) and not incorporate other recipient business requirements like prequalification status in decisions pertaining to the applicant’s eligibility for certification in the DBE program, except as otherwise provided in the rules. Thus, a firm, once certified as a DBE, must satisfy any other applicable requirements imposed by the State on persons doing business with the State or in the State.

Certification Procedures 26.83

The Department proposed a variety of changes to the certification procedures that are set out at 49 CFR 26.83.

Additional Information Requirements

The Department proposed several changes to strengthen the process by which recipients evaluate the eligibility of a firm to be certified as a DBE and remain certified as a DBE. These proposed changes were intended to enable recipients to better assess the extent to which disadvantaged individuals own and control the kind of work the firm is certified to perform by:

- (1) Requiring key personnel be interviewed as part of the mandatory

- on-site review; (2) requiring the on-site visit be performed at the firm’s principal place of business; (3) clarifying what should be covered in a review of the legal structure of a firm; (4) requiring the review of lease and loan agreements, bank signature cards, and payroll records; (5) obtaining information on the amount of work the firm has performed in the various NAICS codes in which the firm seeks certification; (6) clarifying that the applicant (the firm, its affiliates, and the disadvantaged owners) must provide income tax returns (Federal only) for the last three years; and (7) expressly authorizing the certifying agency to request clarification of information contained in the application at any time during the application process.

Most of the commenters (primarily State departments of transportation) supported the idea of interviewing key personnel, though several noted (as did the opponents) the increased administrative burden it may place on agency staff and suggested it be made an optional practice instead of an across-the-board requirement. Opponents questioned the need for such interviews and expressed concern about the focus on the involvement of the disadvantaged owner “in the field,” which is part of the rationale given by the Department for requiring key personnel interviews.

The proposal to request information on the amount of work performed in the NAICS code assignments requested by an applicant generated a fair number of comments opposed to the idea. The reasons for the opposition included concerns about the burden such a requirement would impose, the discriminatory impact it may have, the extent to which it contradicts or conflicts with the requirements of 49 CFR 26.73(b)(2), and the means to be used to determine the “amount” of work. Nearly all those who commented on this provision argued that the proposal to require three years of tax returns should only apply to Federal returns; State returns were viewed as unnecessary or not useful. Lastly, some commenters representing DBEs thought the proposal expressly authorizing certifiers to request clarification of information in the application at any time was too open-ended and needed to be limited.

DOT Response: The Department has decided to modify its proposed amendment to 49 CFR 26.83(c)(1) to leave it to the discretion of recipients whether key personnel identified by the recipient should be interviewed as part of the on-site review, to eliminate the proposal that applicants provide

information about the amount of work the firm has performed in the NAICS codes requested by the firm, and to only require Federal tax returns for the past 3 years. It is not the intent of the Department to create unnecessary administrative burdens for applicants or certifiers. We agree that the focus on the amount of work a DBE performs in a given NAICS code could be misinterpreted and applied in a way that adversely impacts newly formed start-up companies. In the DBE program, there is no requirement that a DBE perform a specific percentage of work for NAICS code assignment purposes. We are adopting the other proposed changes in § 26.83(c)(1).

By finalizing in the rule (§ 26.83(c)(4)) what is currently implied—that certifiers may seek clarification from applicants of any information contained in the application material—we are not conferring *carte blanche* authority to certifiers to request additional information beyond that which is currently allowed and subject to prior approval from the concerned operating administration pursuant to 49 CFR 26.83(c)(7). In the context of this rule change, the word “clarification” is to be given its commonly understood dictionary meaning—to be free of confusion or to make reasonably understandable. In other words, if the application material is unclear, confusing, or conflicting, the certifying agency may ask the applicant to clarify information already provided.

Certification Reviews

Under the current rule, recipients may conduct a certification review of a firm three years from the date of the most recent certification or sooner if appropriate in light of changed circumstances, a complaint, or other information affecting the firm’s eligibility. The Department proposed to remove the reference to three years and instead clarify that a certification review should occur whenever there has been a change in the DBE’s circumstances (i.e., a notice of change filed by the DBE), whenever a recipient becomes aware of information that raises a genuine question about the continued eligibility of a firm, or after a specified number of years set forth in the UCP agreement. The important point here is that a recipient may not, as a matter of course, require all DBEs reapply for certification every three years or go through a recertification process every three years that essentially requires a DBE resubmit a new application and all the accompanying documentation to remain certified. As the rule currently states, “Once you have certified a DBE,

it shall remain certified until and unless you have removed its certification, in whole or in part through the procedures of § 26.87.”

DOT Response: Only a handful of commenters addressed this proposal. They uniformly supported it. The Department is finalizing the change as proposed.

Annual Affidavit of No Change

The Department proposed to require the submission every year of several additional documents to support the annual affidavit of no change DBEs currently file with recipients on the anniversary date of their certification. The additional documentation would include an updated statement of personal net worth, a record of any transfers of assets by the disadvantaged owner for less than fair market value to a family member within the preceding two years, all payments from the firm to the officers, owners, or directors, and the most recent Federal tax return.

Commenters were evenly divided among those who support the proposed change (mostly recipients) and those who oppose the change (mostly DBEs). Some commenters suggested the recipients be given the discretion to request the additional information if questions are raised about a DBE’s status and others thought the Department should develop a uniform affidavit to be used by all.

DOT Response: The Department has decided to retain the existing rule and expressly provide for the submission of updated Federal tax information with the annual affidavit of no change, in addition to other documentation supporting the firm’s size and gross receipts, which is currently required in 49 CFR 26.83(j) (“The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm’s size and gross receipts.”). We are not adopting the proposal to annually require the submission of documentation beyond that which is currently required. We agree that the yearly submission of the additional documentation proposed in the NPRM would be unduly burdensome for DBEs and certifiers alike, is contrary to the basic premise underlying the “no change affidavit,” and begins to look like a reexamination of eligibility. Recipients have sufficient authority under current rules to request information from a DBE in individual cases if there is reason to believe the DBE may no longer be eligible to remain certified. See 49 CFR 26.83(h). With

respect to the affidavit itself, the Department has developed a model affidavit for use by recipients that is posted on the Department’s Web site and sees no need, at this time, to require its use instead of other forms suitable for this purpose developed by recipients.

Certification Denial 49 CFR 26.86

We proposed to clarify the effect of an appeal to the Department of a certification denial decision on the start of the waiting period that limits when an applicant may reapply for certification. The proposed rule adds language that states the appeal of a denial of certification does not extend (or toll the start of) the waiting period. In other words, the waiting period begins to run the day after the final decision at the State level, regardless of whether the firm appeals that decision to the Department.

The Department received comments from State departments of transportation, one State UCP, and representatives of general contractors and DBEs. The opponents of the proposal argued that the appeal process should be allowed to resolve issues concerning applicant eligibility before the applicant is allowed to reapply, so that certifiers are not wasting time or expending resources better spent elsewhere reviewing another application from the same applicant that may present the same issues that are before the Department for decision on appeal. In contrast, supporters of the proposed change simply agreed without further comment, presumably accepting the change as clarifying in nature.

DOT Response: The Department believes that an applicant who appeals the denial of its application for certification should not have to wait until the appeal has been decided before it can reapply at the end of the waiting period. In many instances, the deficiency that is the subject of the appeal may be cured reasonably quickly. There are, further, various cases in which the waiting period expires before the Department can render a decision. There should be no penalty or disincentive to appealing an adverse certifier decision; the Department intends that an appellant be no worse off than an applicant who does not appeal.

Decertification 49 CFR 26.87(f)

The Department proposed revisions to the grounds on which recipients may remove a DBE’s certification to protect the integrity of the DBE program. The NPRM proposed to add three grounds for removal: (1) The certification

decision was clearly erroneous, (2) the DBE has failed to cooperate as required by 49 CFR 26.109, and (3) the DBE has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the program. The second and third grounds for removal are not new; the proposed revision simply places them among the existing list of five grounds for removal. As explained in the NPRM, the first ground revises the existing standard by replacing “factually erroneous” with “clearly erroneous” to address “situations in which a mistake [of fact or law] was committed, in the absence of which the firm would not have been certified.” The Department also sought comment on whether the suspension or debarment of a DBE should result in automatic decertification, should cause an evaluation of the DBE for decertification purposes, or should prompt some other action.

Recipients were universally supportive of the proposal to add additional grounds for removal of a DBE from the program. Representatives of DBEs and general contractors also registered support. An organization representing a caucus of women-owned businesses in Chicago and a DBE from Alabama opposed the changes. The focus of the opposition centered on the appropriateness of allowing removal for failing to timely file an annual no change affidavits or notice of change (i.e., failure to cooperate) or removal for not performing a commercially useful function (i.e., a pattern of conduct). One commenter suggested there be a higher standard of proof (i.e., willful disregard) applied to situations that involve not filing an annual no change affidavit in recognition of the fact that many DBEs have multiple certifications and may inadvertently fail to timely file required documents.

Most of the nineteen commenters on the question concerning the relationship between decertification and suspension and debarment proceedings were recipients (i.e., State Departments of Transportation, transit authorities, organizations that represent State DOTs) that overwhelmingly supported either the automatic decertification of a DBE that is suspended or debarred for any reason or the automatic decertification of a DBE that is suspended or debarred for conduct relevant or related to the DBE program. Five commenters opposed automatic decertification, suggesting instead that suspension and debarment should trigger an immediate evaluation of the DBE or should be a factor considered by the recipient based on the circumstances. One commenter

suggested different treatment for suspensions and debarments: A debarment would result in permanent decertification, while a suspended DBE that is decertified could reapply at the end of the waiting period.

DOT Response: The Department has decided to make final the additional grounds for removal from the program. Two of the changes essentially represent a cross reference to existing regulations that permit removal for failure to cooperate and for a pattern of conduct indicating involvement in attempts to subvert the intent or requirements of the program. In the NPRM preamble discussion of this proposed change, we noted that the failure to cooperate covers such things as failing to send in affidavits of no change or notices of change and accompanying documents when needed. To be clear, the failure to cooperate is triggered when a DBE program participant fails to respond to a legitimate, reasonable request for information. If a DBE is notified by a recipient that it has not submitted the annual no change affidavit as required by the regulations, we would expect the DBE to respond promptly to such a request for information. Its failure to submit the requested information would be grounds for initiating a removal proceeding. Removal proceedings should not be initiated simply because the DBE failed to file the affidavit on its certification anniversary date, even though the information has been provided; nor should removal proceedings be continued once the DBE submits the requested information.

When a DBE is suspended or debarred based on a Federal, State, or local criminal indictment or conviction, or based on agency fact based proceedings, for conduct related to the DBE program (i.e., the DBE or its owners were indicted or convicted for perpetrating a fraud on the program related to the eligibility of the firm to be certified or fraud associated with the use of the DBE as a pass through or front company), the Department believes the DBE should be automatically decertified from the DBE program. Under those circumstances, recipients should not be required to initiate a separate § 26.87 decertification proceeding to remove a DBE. The suspension and debarment process affords the DBE an opportunity to be heard on the evidence of misconduct related to the DBE program that is relied upon to support the denial of bidding privileges. The same evidence would be relied upon to support decertification of the DBE, making further proceedings unnecessary. The Department believes that suspensions or debarments unrelated to the DBE program and

consequently not bringing into question the DBE's size, disadvantage, ownership, control, or pattern of conduct to subvert the requirements of the program should not result in automatic removal from the DBE program. In those cases, recipients are advised to take appropriate action to note in the UCP directory the suspended or debarred status of the DBE. Because suspension or debarment actions are not permanent, we see no reason to make a decertification action permanent. Recipients must accept an application for certification from a previously suspended or debarred firm once the action is over.

Summary Suspension of Certification

The Department proposed to require the automatic or mandatory suspension of a DBE's certification without a hearing when a recipient has reason to believe that one or more of the disadvantaged owners needed to meet the ownership and control requirements is incarcerated or has died. As we indicted in the NPRM, a disadvantaged owner is considered necessary to the firm's eligibility if without that owner the firm would not meet the requirement of 51 percent ownership by disadvantaged individuals or the requirement that disadvantaged owners control the firm. Other material changes affecting the eligibility of the DBE to remain certified—like the sale of the firm to a new owner, the failure to notify the recipient of a material change in circumstances, or the failure to file the annual no change affidavit as currently required—may be the subject of a summary suspension (at the discretion of the recipient) but such action would not be automatic. During the period of suspension, the recipient must take steps to determine whether proceedings to remove the firm's certification should be initiated. While suspended, the DBE may not be counted toward contract goals on new contracts executed after the suspension but could continue to perform and be counted on contracts already underway. The recipient would have 30 days from receipt of information from the DBE challenging the suspension to determine whether to rescind the suspension or commence decertification proceedings through a UCP certifying entity.

Of the comments received from a combination of State departments of transportation, transit and airport authorities, and groups representing DBEs and prime contractors, almost all commenters supported this proposal as a much-needed program improvement. A group representing women-owned small businesses opposed the proposal,

arguing that suspending a DBE jeopardizes contracts that are a part of the assets of the company and consequently affects the valuation of the DBE. The group also suggested that there be some recognition of estate plans that provide for the child of the disadvantaged owner, who also may be a member of a presumptive group, to take over the firm. In such a case, the commenter posits that the DBE should remain certified if the heir submits an application within six months of the death of the disadvantaged owner. A State department of transportation did not agree that incarceration of the disadvantaged owner should result in an automatic suspension; instead, the State DOT believes the DBE should be removed from the program immediately.

There were several commenters that raised questions or suggested further clarification was needed in certain areas. For example, should the length of the period of incarceration or the reason for the incarceration matter in determining whether the DBE is suspended? Should suspended DBEs be entered in the Department's ineligibility database? A commenter also suggested that a failure to file the annual no change affidavit should not be grounds for summary suspension of a DBE, and recipients should be given more time to consider the DBE's response (60–90 days) before lifting the suspension or commencing decertification proceedings. Similarly, a State DOT suggested the automatic suspension include sale of a firm to a non-disadvantaged owner and when a DBE is under investigation by a recipient for dubious practices on its own contracts. A suspension under these circumstances would prevent the DBE from being listed on other contracts pending review or investigation. One commenter asked that we include a hold harmless provision if no decertification proceeding commenced or results.

DOT Response: The Department is adopting the proposed summary suspension provision. The fundamental premise underlying the summary suspension provision is that when a dramatic change in the operation of the DBE occurs that directly affects the status of the company as a DBE, swift action should be taken to address that situation to preserve the integrity of the program without compromising the procedural protections afforded DBEs to safeguard against action by recipients based on ill-founded or mistaken information. A recipient must have sufficient evidence of facts or circumstances that form the basis for its belief that a suspension of certification is in order. In cases where the recipient

learns that a disadvantaged owner whose participation is essential to the continued certification of the firm as a DBE is no longer involved in the company due to incarceration or death, suspending the certification for a short period of time (30 days from the date the DBE receives notice of the suspension) strikes an appropriate balance between program integrity and fairness concerns. It does not matter how long the disadvantaged owner is incarcerated or the reason for the incarceration. What matters is that the company appears to be no longer owned and/or controlled by disadvantaged individuals as determined by the certifying authority. If a recipient determines after hearing from the DBE that the period of incarceration has ended or will end in 30 days, the recipient will lift the suspension (i.e., reinstate the DBE's certification) without initiating removal proceedings. Similarly, when an essential disadvantaged owner dies, his or her heirs who are also members of groups presumed to be disadvantaged are not presumed to be able to demonstrate sufficient ownership or control of the company. DBE certification is not transferable and does not pass to an owner's heirs. A short suspension of the DBE's certification until the heirs submit sufficient evidence to support a continuation of the firms' DBE status seems appropriate. The sooner the evidence of continued eligibility is provided by the DBE, the shorter the period of suspension if the certifying authority agrees that the firm remains eligible.

Under the current rules, disadvantaged owners have an affirmative obligation to notify recipients within 30 days of any material change in circumstances that would affect their continued eligibility to participate in the program and to annually affirm there have been no material changes. The Department does not agree that the authority to suspend one's certification should not be exercised when a DBE fails to abide by these requirements that are essential to ensuring that only eligible DBEs are certified as such and allowed to participate in the program.

Contrary to some of the comments, the summary suspension authority is not and should not be triggered by any violation of DBE program rules by a DBE. The Department also does not believe it appropriate or consistent with fundamental fairness to suspend a DBE while an investigation is pending since it would appear to prejudice the outcome of any investigation, assuming the reasons for the investigation are relevant

to DBE program certification. Likewise, automatic decertification assumes that the likelihood or risk of error is small compared to the interest in protecting the integrity of the program such that there is little to be gained from hearing from the DBE to safeguard against inadvertent errors.

Lastly, suspensions are temporary actions taken until more information is obtained from the affected DBE. Consequently, suspensions should not be entered into the Department's ineligibility database, which is reserved for initial certification denial decisions and decertification actions taken by recipients after the DBE has been accorded a full hearing or an opportunity to be heard. We have taken steps to ensure that suspensions do not interfere with the ability of the DBE to continue working on a contract entered into before the suspension took effect. Thus, in this respect, a suspension is accorded the same treatment as the decertification of a DBE that occurs after a DBE has executed a contract. The same rationale applies. The Department is not persuaded that existing contracts that may be considered company assets will be placed in jeopardy if recipients are granted suspension authority.

Certification Appeals 49 CFR 26.89

The Department proposed clarifying amendments to the regulations governing appeals of certification decisions. The amendment would require appellants include in their letter of appeal a statement that specifies why the certification decision is erroneous, identifies the significant facts that were not considered by the certifying agency, or identifies the regulatory provision that was improperly applied. The amendment also would make clear that the Department's decision on appeal is based on the entire administrative record including the letter of appeal. The Department received a handful of comments on this proposed amendment; all of the comments supported the clarifications. The commenters included a State transportation department, a UCP certifying agency, and several individuals and organizations that represent DBEs and ACDBEs.

DOT Response: The Department is finalizing the substance of the proposal with a slight modification to the rule text. The entire administrative record includes the record compiled by the certifying agency from whom the appeal is taken, the letter of appeal from the appellant that contains the arguments for reversing the decision, and any supplemental material made a part of the record by the Department in its

discretion pursuant to 49 CFR 26.89(e). We hope that this minor, technical, clarifying change will dispel the notion that the Department is not to consider any information outside of the record created by the recipient, including the appellant's letter of appeal which necessarily comes after the recipient has created its record. The purpose of the appeal is to provide the appellant an opportunity to point out to the Department, through facts in the record and/or arguments in the appeal letter, why the certifying agency's decision is not "supported by substantial evidence or inconsistent with the substantive or procedural provisions of [Part 26] concerning certification." It is not an opportunity to add new factual information that was not before the certifying agency. However, it is completely within the discretion of the Department whether to supplement the record with additional, relevant information made available to it by the appellant as provided in the existing rule.

Other Provisions

Program Objectives 49 CFR 26.1

In the NPRM, the Department proposed to add to the list of program objectives: Promoting the use of all types of DBEs. This minor technical modification is intended to make clear that application of the DBE program is not limited to construction contracting; the program covers the various kinds of work covered by federally funded contracts let by DOT recipients (e.g., professional services, supplies, etc.). All of the commenters that addressed this modification supported it.

DOT Response: For the reasons expressed in the NPRM, the Department made this change in the final rule.

Definitions

The Department proposed to add six new definitions to the rule for terms used in existing provisions. The words or phrases to be defined for purposes of the DBE program include "assets;" "business, business concern, or business enterprise;" "contingent liability;" "days;" "liabilities;" and "transit vehicle manufacturer (TVM)." We also proposed to modify the existing definition of "immediate family member," "primary industry classification," "principal place of business," and the definitions of "socially and economically disadvantaged individual," and "Native American" to be in sync with the U.S. Small Business Administration use of those two terms. We invited comment on whether the definition of TVM

should include producers of vehicles to be used for public transportation purposes that receive post-production alterations or retrofitting (e.g., so-called "cutaway" vehicles, vans customized for service to people with disabilities). We also wanted to know if the scope of the existing definition of "immediate family member" is too broad. It currently includes grandchildren.

Most commenters supported all or some of the proposed definitions. We did not include an actual definition of "non-disadvantaged individual" and consequently have not added that term to 49 CFR 26.5. The definitions that generated some opposition or suggested changes were those for TVMs, immediate family member, and Native American. We focus only on these three terms for discussion. One of the few TVMs that provided comments expressed puzzlement over the Department's request for comment on whether producers of "cutaway" vehicles should be included in the TVM definition. According to the commenter, such companies, including its company that performs this type of manufacturing work, are indeed TVMs.

One commenter suggested we remove the word "immediate" from the term "family member" so that recipients may determine on a case-by-case basis whether an individual is considered an immediate family member. Another commenter thought grandparents and in-laws should be excluded, while a different commenter suggested we include "sons and daughters-in-law." We also were asked to include "live-in significant others" to recognize domestic partnerships or civil unions. Regarding the definition of Native American, one commenter did not think it should be limited to recognized tribes.

DOT Response: The Department has modified the definition of TVM to include companies that cutaway, retrofit, or customize vehicles to be used for public transportation purposes. We do not think a change to the current approach of specifying in the rule who is considered an "immediate family member" in favor of leaving that determination to the certifying agency to decide case-by-case is the right policy choice. However, the Department has decided to modify the existing definition of "immediate family member" to keep it in sync with the existing definition of that term in Part 23. The revised definition includes brother-in-law, sister-in-law, or registered domestic partner and civil unions recognized under State law. In addition, we are including a definition for the term "spouse" that covers domestic partnerships and civil unions

because we agree such relationships should be recognized in the DBE program.

We are finalizing the changes to the definition of Native American to incorporate the requirement that an American Indian be an enrolled member of a federally or State-recognized Indian tribe to make it consistent with the SBA definition. By statute, the term "socially and economically disadvantaged individuals" has the meaning given the term in section 8(d) of the Small Business Act and relevant subcontracting regulations issued pursuant to that Act. As explained in the SBA final rule:

This final rule clarifies that an individual must be an enrolled member of a Federally or State recognized Indian Tribe in order to be considered an American Indian for purposes of the presumptive social disadvantage. This definition is consistent with the majority of other Federal programs defining the term Indian. An individual who is not an enrolled member of a Federally or State recognized Indian Tribe will not receive the presumption of social disadvantage as an American Indian. Nevertheless, if that individual has been identified as an American Indian, he or she may establish his or her individual social disadvantage by a preponderance of the evidence, and be admitted to the [DBE program] on that basis. (76 FR 8222-01)

Record Keeping Requirements 49 CFR 26.11

The Department proposed to establish record retention requirements for certification related records to ensure that recipients maintain documents needed to conduct certification reviews when necessary. All records documenting a firm's compliance with Part 26 must be retained in accord with the record retention requirements in the recipient's financial assistance agreement. Only six commenters expressed a view about this proposed change. Three of the commenters supported the change, two commenters requested clarification on the kind of records to be retained and for how long, and one commenter was neutral.

DOT Response: The regulatory text of the final rule identifies the minimal records that must be retained. They include the application package for all certified DBEs, affidavits of no change, notices of change, and on-site reviews. Recipients are encouraged to retain any other documents that may be relevant in the event of a compliance review. The uniform administrative rules for Federal grants and cooperative agreements and sub-awards to State, local and Indian tribal governments establish a three-year record retention requirement subject to exceptions set out at 49 CFR 18.42. We

have modified the final rule to include a three year retention period as a default for records other than the minimal records specified in the rule. The 3 year retention period applied to other records may be modified as provided by applicable Federal regulations or the grant agreement, whichever is longer.

DBE Program Requirement

The current rule regarding the application of the DBE program requirement to recipients of the various operating administrations of DOT has been the source of confusion for some. The Department proposed modifications to the rule to eliminate the confusion so that recipients will be clear about their obligation to establish a program and the corresponding obligation to establish an overall DBE participation goal. For FTA and FAA recipients, you must have a DBE program if in any Federal fiscal year the cumulative value of DBE program eligible contracts you will award will exceed \$250,000 in Federal funds. In other words, when you add all the eligible Federally funded contracts you expect to award with Federal funds, the aggregate of total Federal funds to be expended will exceed \$250,000. For FHWA, the proposed modification makes clear that under FHWA's financial assistance program, its direct, primary recipients must have an approved DBE program plan, and sub-recipients are expected to operate under the primary recipient's FHWA-approved DBE program plans.

Comments generally were supportive of the proposed changes, particularly those related to the FTA and FAA clarification of the \$250,000 threshold requirement. Some of the State departments of transportation that commented requested further clarification of the FTA and FAA requirements and had questions about the proposed change applicable to FHWA recipients. For example, a State department of transportation asked that we identify or define what is an eligible contract and that we specify whether the \$250,000 threshold applies to the total Federal dollars spent in contracts or the total Federal dollars received in a fiscal year. One commenter also asked that we reconsider requiring subrecipients of FHWA funds operate under the primary recipient's approved DBE program. Lastly, in situations where funding on a project is provided by more than one operating administration, a commenter suggested that the Department specify how that situation will be handled rather than direct recipients to consult the relevant DOT agencies for guidance.

DOT Response: The Department has finalized the proposed revisions. Where more than one operating administration is providing funding for a project or a contract, recipients should consult the OA providing the most funding for the project or contract and the OA, in turn, will coordinate with the DOT agencies involved to determine how to proceed. The final rule applies the \$250,000 amount to the total Federal dollars to be expended by an FTA or FAA recipient in contracts funded in whole or in part with Federal assistance during the fiscal year. The rule expressly excludes from this calculation expenditures for transit vehicle purchases.

The following examples illustrate how this provision works:

A. The Hypothetical Area Transit System (HATS) receives \$500,000 in FTA assistance. It spends \$300,000 of this amount on bus purchases. It is spending \$800,000 in local funds plus the remaining \$200,000 in FTA funds to build an addition to its bus garage. Because HATS is spending less than \$250,000 in FTA funds on contracting, exclusive of transit vehicle purchases, HATS is not responsible for having a DBE program.

B. The Your County Regional Airport receives \$400,000 in FAA financial assistance. It uses \$100,000 to purchase land and expends \$300,000 of the FAA funds for contracts concerning a runway improvement project, as well as \$500,000 in local funds. The airport must have a DBE program.

In the first example, even though HATS does not have to have a DBE program, it still must comply with Subpart A requirements of 49 CFR Part 26, such as nondiscrimination (§ 26.7) and assurances (§ 26.13). Compliance with these requirements, like compliance with Title VI of the Civil Rights Act is triggered by the receipt of any amount of DOT financial assistance. In both examples, eligible contracts are federally funded prime contracts.

The requirement that subrecipients of funds from FHWA operate under the direct recipients' approved DBE program is consistent with the way FHWA administers its financial assistance program regarding other Federal requirements imposed as a condition of receiving financial assistance. Through official guidance, the Department describes how subrecipients would administer contract goals on their contracts under the umbrella of the primary recipient's DBE program and overall goals. The continued validity of that guidance is not affected by this rule change.

Overall Goal Setting 49 CFR 26.45

The Department proposed several changes to the regulations governing overall goal setting. They include: (1) Codifying the elements of a bidders list that must be documented and supported when a bidders list is used to establish the base figure for DBE availability under Step One in the goal setting analysis; (2) disallowing the use of prequalification or plan holders lists (and other such lists) as a means of determining the base figure and consider extending the prohibition to bidders lists; (3) establishing a standard for when Step Two adjustments to the base figure should not be made; (4) specifying that in reviewing recipient's overall goal submission, the operating administrations are to be guided by the goal setting principles and best practices identified by the Department; (5) clarifying that project goals may reflect a percentage of the value of the entire project or a percentage of the Federal share; and (6) strengthening and streamlining the public participation requirements for goal setting.

The overwhelming majority of the comments received on the proposed changes to 49 CFR 26.45 were directed at the proposal to disallow use of prequalification lists and other such lists, including the bidders list, to establish the relative availability of DBEs (Step One of the goal setting analysis). Over 100 commenters, many of them general contractors who submitted form letters of objection, representatives of general contractors, and a few State departments of transportation, expressed the view that both prequalification lists and bidders lists are viable data sources for identifying qualified DBEs that are ready, willing, and able to perform on federally funded transportation contracts and that disallowing the use of these data sources would produce unrealistic overall goals that are not narrowly tailored as required by the United States Supreme Court to satisfy constitutional standards. Supporters of the proposal expressed the view that such lists underestimate availability and the true continuing effects of discrimination, represent the most conservative approach, and limit DBE opportunities by restricting consideration of all available DBEs. Other commenters, recognizing the limitations and the benefits of such lists, suggested that the lists should not be the exclusive source of data relied upon to capture the pool of available DBEs. One commenter supported retaining use of the prequalification list but supported getting rid of the bidders list which it

believed is worse than the prequalification list.

Commenters opposed to identifying the elements of a true bidders list (including successful and unsuccessful DBE and non-DBE prime contractors and subcontractors) suggested it might be difficult to compile such a list (i.e., capturing the unsuccessful firms—both DBEs and non-DBEs—bidding or submitting quotes on projects). Despite that concern, of the few commenters that addressed this proposal, most commenters supported it, which reflects the longstanding view of the Department, as set forth in the official tips on goal setting, of what a true bidders list should contain. With regard to the Step Two adjustment, nine of the twelve commenters opposed the change out of a belief that it effectively eliminates adjustments based on past participation by DBEs.

Commenters were almost evenly divided over the proposal to eliminate from the public participation process the requirement that the proposed overall goal be published in general circulation media for a 45-day comment period. Those objecting to this change were mostly representatives of general contractors and some State departments of transportation who viewed this process as more valuable than the stakeholder consultation process. There was universal support among the commenters for posting the proposed and final overall DBE goal on the recipient's Web site.

DOT Response: The Department is retaining the bidders list as one of the approaches recipients may use to establish the annual overall DBE participation goal. To be acceptable, the bidders list must conform to the elements that we finalize in this final rule by capturing the data that identifies the firms that bid or quote on federally assisted contracts. This includes successful and unsuccessful prime contractors, subcontractors, suppliers, truckers, other service providers, etc. that are interested in competing for contracts or work. Recipients that use this method must demonstrate and document to the satisfaction of the concerned operating administration the mechanism used to capture and compile the bidders list. If the bidders list does not capture all available firms that bid or quote, it must be used in combination with other data sources to ensure that it meets the standard in the existing regulations that applies to alternative methods used to derive a base figure for the DBE availability estimate (e.g., it is “designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.”).

Prequalification lists and other such lists (i.e., plan holders lists) may be used but must be supplemented by other data sources on DBE availability not reflected in the lists. Looking only to prequalified contractors lists or similar lists to determine availability may serve only to perpetuate the effects of discrimination rather than attempt to remediate such discrimination. Thus, to summarize, a recipient may use a bidders list that meets the requirements of the final rule as the sole source in deriving its Step One base figure. However, if its bidders list does not meet these requirements, that list can still be used in determining the overall goal, but must be used in conjunction with other sources. Under no circumstances, though, may a recipient use a prequalification or plan holders list as the sole source used to derive the overall goal.

The purpose of the Step Two analysis in overall goal setting is to consider other available evidence of discrimination or its effects that may impact availability and based on that evidence consider making an appropriate adjustment to derive an overall goal that reflects the level of DBE participation one would expect in the absence of discrimination. The amendment made to the regulations through this final rule does not eliminate the discretion recipients have to make a Step Two adjustment based on past DBE participation or other evidence like econometric data that quantifies the “but for discrimination” effects on DBE availability. It recognizes, however, that where there are circumstances that indicate an adjustment is not necessary because, for example, the base figure and the level of past DBE participation are close or the DBE participation level reflects the effects of past or current noncompliance with DBE program regulations, then the evidence would not support making the adjustment. That said, it is incumbent upon recipients to explain to the operating administration why the adjustment is appropriate.

Instead of mandating publication of the proposed overall goal for a 45-day comment period, the Department decided to leave that decision to the discretion of the recipient. The proposal to eliminate this aspect of the existing public participation requirement was designed to reduce the administrative burden, expense, and delay associated with the publication requirement that is borne by recipients and often leads to few, if any, comments (i.e., not much value added). To the extent that some recipients view this as a worthwhile exercise, we see no reason to restrict

their ability to allow additional comment through this process. In response to one commenter, we have reduced the comment period from 45 days to 30 days. Those recipients that choose to publish their overall goal for comment, in addition to engaging in the required consultation with stakeholders, must complete their process well before the deadline for submitting the overall goal documentation to the operating administration for review. As stated in the NPRM, the Department believes meaningful consultation with stakeholders is an important, cost-effective means of obtaining relevant information from the public concerning the methodology, data, and analysis that support the overall DBE goal. Once again, all public participation must be completed before the overall goal submission is provided to the operating administration. Failure to complete the publication process by those recipients that choose to conduct such a process should not delay review by the operating administration.

Transit Vehicle Manufacturers 49 CFR 26.49

The Department proposed to clear up confusion that exist about the goal setting and reporting requirements that apply to Transit Vehicle Manufacturers (TVMs). Specifically, the proposed rule clarifies how TVMs are to determine their annual overall DBE goals, when TVMs must report DBE awards and achievements data, and which portion of the DBE regulations apply to TVMs. Under the proposed rule, the goal setting methodology used by TVMs must include all federally funded domestic contracting opportunities made available to non-DBEs, not just those that apply to DBEs, and only the portion of the Federal share of a procurement that is available for contracts to outside firms is to be included. In other words, the DBE goal represents a percentage of the work the TVM will contract to others and not perform in house since work performed in-house is not truly a contracting opportunity available to the DBEs or non-DBEs. The Department sought comment on whether and how the Department should encourage more of the manufacturing process to be opened to DBEs and other small businesses.

With respect to reporting awards and achievements, the Department proposed to require TVMs continuously report their contracting activity in the Uniform Reports of DBE Awards/Commitments and Payments. In addition, the Department removed any doubt that the TVMs are responsible for implementing regulatory requirements similar to DOT

recipients. There is one notable exception: TVMs do not participate in the certification process (i.e., TVMs do not perform certification functions required of recipients and are not required to be a member of a UCP), and post-award requirements need not be followed in those years when a TVM is not awarded or performing as a transit vehicle provider. Lastly, the NPRM included a provision requiring recipients to document that only certified TVMs were allowed to bid and submit the name of the successful bidder consistent with the grant agreement.

Only 12 commenters addressed various aspects of the proposed changes to the TVM provisions. Three recipients supported the proposals as a whole, while others raised questions about the recommended changes and/or questioned existing requirements for which no change was proposed (e.g., suggested requiring the application of TVM provisions to all kinds of highway contracts or opposed the requirement that only certified TVMs are permitted to bid). One commenter rejected specific areas of the proposed changes. There was an additional comment submitted by the owner of a TVM who commented that it needed the services that the DBE program provides, rather than being forced into being a provider of those services.

DOT Response: The Department is confident that the proposed changes will strengthen compliance with TVM provisions and oversight of TVMs by exempting manufacturers from those regulations that are not applicable to this industry. Many of the proposed changes simply clarify the intent and practical application of existing TVM provisions. For example, the existing regulations require compliance, prior to bidding, to confirm a TVM's commitment to the DBE program before it is awarded a federally-assisted vehicle procurement. This is a long-standing requirement. The proposal introduces measures that help ensure pre-bid compliance (e.g., viewing the FTA certified TVM list and submitting the successful bidder to FTA after the award). The proposed changes also confirm that TVM regulatory requirements are nearly identical to that of transit recipients. For this reason, the FTA requires DBE goals from both transit recipients and TVMs as a condition of receiving Federal funds in the case of recipients and as a condition of being authorized to submit a bid or proposal on FTA-assisted transit vehicle procurements, in the case of TVMs.

In order to provide appropriate flexibility in implementing this

provision, we must emphasize, to FTA recipients in particular, that overly prescriptive contract specifications on transit vehicle procurements—which, in effect, eliminate opportunities for DBEs in vehicle manufacturing—counter the intent of the DBE program and unduly restrict competition. Moreover, after request for proposals (RFPs) are released, FTA recipients should allow TVMs a reasonable timeframe to submit bids. To do otherwise limits the TVMs' ability to locate and utilize ready, willing, and able DBEs on FTA-assisted vehicle procurements. To lessen any administrative burdens, the FTA will continue posting a list of certified (i.e., compliant) TVMs to the FTA TVM Web page. Recipients may also request verification that a TVM has complied with the regulatory requirement by contacting the appropriate FTA Regional Civil Rights Officer—via email. FTA will respond to this request within 5 business days—via email.

Means Used To Meet Overall Goals 49 CFR 26.51

In the NPRM, we proposed to modify the rule that sets forth examples of what constitutes race-neutral DBE participation to remove as one of the examples “selection of a DBE subcontractor by a prime contractor that did not consider the DBE's status in making the award (e.g., a prime contractor that uses a strict low-bid system to award subcontracts).” We explained that it is impossible for recipients to determine if a prime contractor uses a strict low-bid system, and moreover, that such a system conflicts with the good faith efforts guidance in Appendix A that instructs prime contractors not to reject a DBE's quote over a non-DBE quote if the price difference is not unreasonable. Although not stated explicitly in the preamble, the proposed regulatory text made clear that the Department's proposal was simply to eliminate the statement “*or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts)*” from the regulatory text (emphasis added). Thus, as proposed, the Department only intended to remove this example for contracts that had a DBE goal.

Commenters, including general contractors and State departments of transportation, overwhelmingly opposed the proposed change for a variety of reasons. General contractors and organizations that represent contractors viewed this proposal as a major policy shift away from the use of

race-neutral measures to obtain DBE participation, contrary to existing regulations and relevant court decisions. One commenter actually referred to the proposal as eliminating the use of race and gender means of obtaining DBE participation through the elimination of this one example. One commenter questioned the impact this change would have in those States where DBE contract goals are not established because the overall goal can be met through race-neutral means alone. Another commenter mistakenly thought the proposed change would not allow DBE participation that exceeds a contract goal to be considered race-neutral participation as currently provided in Departmental guidance. Supporters of the proposal agreed with the explanation provided by the Department.

DOT Response: The Department believes that most of the opposition to this proposal stems from a misunderstanding of what the Department intended to change. The intent of the Department in the NPRM was to remove the proposed example only for contracts that had a DBE goal, not for contracts that were race-neutral. Thus, the Department did not propose nor is finalizing removing the other two examples of race-neutral DBE participation or to remove the third example for race-neutral contracts. The Department understands how the preamble to the NPRM could have led to this confusion, as it was not explicit. Certainly, had the Department proposed to remove, as an example of race-neutral participation, the “selection of a DBE subcontractor by a prime contractor that did not consider the DBE's status in making the award” in contracts that had no DBE goals, the Department would have, effectively, been eliminating the very concept of race-neutral participation.

Thus, instead of the drastic change that concerned many commenters, the revised final rule simply removes as an example of race-neutral DBE participation in contracts that have DBE goals the use of a strict low bid system to award subcontracts. The Department continues to believe that it is difficult for recipients to determine if a prime contractor uses a strict low bid system and that use of such a system when contract goals are set runs counter to the Department's good faith effort guidance in Appendix A.

However, this final rule does not mean DBE participation obtained in excess of a contract goal may never be considered race-neutral DBE participation. When DBE participation is obtained as a prime contractor

through customary competitive procurement procedures, is obtained as a subcontractor on a contract without a DBE goal, or is obtained in excess of a contract or project goal, the use of a DBE under those circumstances properly may be characterized as race-neutral DBE participation. This revision to our rule does not represent a policy shift from the existing requirement that recipients meet the maximum feasible portion of the overall goal through the use of race-neutral means of facilitating DBE participation. Indeed, if a recipient is able to meet its overall DBE participation goal without using race-conscious measures (i.e., setting contract goals), the recipient is obligated to do so under the existing regulations. The revision to 49 CFR 26.51(a) does not change that requirement.

Good Faith Efforts To Meet Contract Goals 49 CFR 26.53

Responsiveness vs. Responsibility

The NPRM proposed eliminating the “responsiveness vs. responsibility” distinction for when good faith efforts (GFE) documentation, which includes specific information about DBE participation, must be submitted on solicitations with DBE contract goals. The “responsiveness” approach requires all bidders or offerors to submit the DBE participation information and other GFE documentation required by 49 CFR 26.53(b)(2) at the time of bid submission. By contrast, the “responsibility” approach allows all bidders or offerors to submit the required information at some point before a commitment to perform the contract is made to a particular bidder or offeror (e.g., before contract award). The proposed change to the rule would have removed the current discretion recipients have to choose between the two approaches and require, with one exception, the submission of all information about DBEs that will participate on the contract and the evidence of GFE made to obtain DBE participation on the contract when the bid or offer is presented.

The NPRM also put forward an alternative approach that would allow a short period of time (e.g., 24 hours) after the bid submission deadline during which the apparent successful bidder or offeror would submit its GFE documentation. Under the alternative, the GFE documentation would have to relate to the pre-bid submission efforts; no post-bid efforts would be acceptable. The Department also asked for comment as to whether the one-day period should be extended to three days.

The exception to the across-the-board responsiveness approach or the alternative approach (all of which apply to sealed bid procurements) would be in a negotiated procurement, where in the initial submission the bidders or offerors may make a contractually binding commitment to meet the DBE contract goal and provide specific DBE information and GFE documentation before final selection for the contract is made. Negotiated procurement would include alternate procurement practices such as Design Build procurements in which it is not always possible to commit to specific DBEs at the time of bid submission or contract award.

The Department received many comments on this proposal. The majority of the responses opposing the revisions were submitted by prime contractors, prime contractor associations and some State departments of transportation. Over one hundred form letters of opposition from contractors were received. Those opposing the revision cited the nature of the construction industry and recipient procurement processes as a main reason for opposition. The majority of these comments concentrated on the administrative burden of providing GFE documentation that includes DBE commitments at the time of bid. Commenters stated that because of the nature of bidding on construction contracts, such as hectic timeframes, fixed deadlines, and electronic bidding forms, it was not possible to submit DBE commitments and other GFE documentation at the time of bid. Other reasons given for disapproval included the belief that the proposed rule would limit the use of DBEs on contracts, and it would be difficult for DBEs to negotiate with multiple bidders as opposed to only the identified lowest bidder. In addition, some commenters believed it would not be possible to implement the “responsiveness” approach on “design build projects” because the design and scope of work for the project is not known at the time of bid.

The Department received comments in favor of the proposal, primarily from minority and women advocacy organizations, regional transit authorities, and some State departments of transportation that already required DBE documentation as a matter of responsiveness. Those in support of the revision primarily stated that the current practice of allowing each recipient to decide whether DBE information should be collected as a matter of responsiveness or responsibility has led to abuses of the DBE program, such as facilitating “bid

shopping” practices. A member of Congress supported this proposal stating that the current practice of allowing each recipient to decide whether DBE information should be collected as a matter of responsiveness or responsibility has led to abuses of the DBE program, without more specifics.

There were alternatives suggested by some organizations. Most of the suggestions can be grouped into three general categories: (1) Leave the “responsiveness/responsibility” distinction as is; (2) allow a short time frame for GFE documentation that includes DBE information to be submitted (1–3 days); and (3) allow a longer time frame for that information to be submitted (3–14 days). Many who opposed eliminating the “responsive/responsibility” distinction had less opposition if good faith efforts documentation could be submitted by the apparent low bidder sometime after bid submission. Most opponents expressed a need for a longer timeframe to review the quotes. In addition, general contractor organizations overwhelmingly stated that the good faith efforts documentation should only be submitted by the apparent successful bidder. There were additional comments that opposed the proposal, but they did not offer any suggestions for a different timeframe.

After the Department reopened the comment period in September 2013 and convened a listening session on December 5, 2013, to hear directly from stakeholders about the specific costs and benefits of this proposed regulatory change, general contractors overwhelmingly continued to express strong opposition to the proposal. According to the contractors, the problems presented by the proposal include, among others: (1) A failure of the Department to understand the complexities and challenges of the bidding process; (2) increased burdens placed on the limited resources available to DBEs to develop multiple quotes and engage in time-consuming negotiations before bids are due; (3) adverse impact on the willingness of general contractors to consider new, unfamiliar DBEs because of limited vetting time; (4) increased risk to prime contractors from incomplete or inaccurate DBE quotes likely to result in less DBE participation; (5) a reduction in, or elimination of, second tier subcontracting opportunities for DBEs; and (6) a deterrent to the use of DBEs in creative methods due to concerns about disclosure of confidential, proprietary information. Moreover, the American Road & Transportation Builders Association (ARTBA) and the

Associated General Contractors of America (AGC) challenged the claim of “bid shopping” as the basis for the proposed change, demanding a full explanation of the problem (if it exists) and the data relied upon to justify the proposal.

Based on a survey of 300 ARTBA members, 42% of the contractors indicated they would bid on less Federal-aid work if this (and other) proposed change is made permanent; that they would have to increase bid prices to cover additional costs (\$25,000–\$100,000 per bid); that they would have to add staff; and that the estimated cost of complying annually across the industry is in the range of \$2.5 million–\$11 billion. Forty-three percent (43%) of the members indicated that DBE plans (i.e., DBE commitments) currently are required by their State departments of transportation at the time of bid; and 37% currently submit good faith efforts documentation with their bid. The AGC acknowledged that some States currently require listing DBEs at the time of bid, but it asserts that those contacted universally responded that the bidding process is costly, burdensome, and results in lower DBE utilization.

The few State departments of transportation that submitted written comments during the reopened comment period supported allowing recipients the flexibility to permit submission of good faith efforts documentation at least 7–10 days after bids are due. Those with electronic bidding systems cited costs associated with modifying those systems to conform to changes in the rules as one more burden straining already limited resources. One State department of transportation supported the proposed change requiring good faith efforts documentation at bid opening.

A few DBEs submitted a form expressing support for the requirement that good faith efforts documentation be submitted with the bid, while others saw the change as creating an unnecessary burden that would tax resources and may result in shutting out DBEs. Before adopting an across-the-board approach, one commenter urged the Department to look carefully at other States that follow the “responsiveness” approach to assess whether it creates opportunities or closes doors. Given prime contractor opposition, the commenter thought there should be more of a factual predicate to support this proposed change.

DOT Response: For years the Department has been concerned about claims of “bid shopping” engaged in by some prime contractors to the detriment

of DBE and non-DBE subcontractors, suppliers, truckers, etc. and the adverse impact it has on the principle of fair competition. The meaning and practice of bid shopping is well understood within the construction industry and among public contracting entities. It occurs when a general contractor discloses the bid price of one subcontractor to a competing subcontractor in an attempt to obtain a lower bid than the one on which the general contractor based its bid to the owner. Variations include “reverse auctions” (where the subcontractors compete for the job by lowering prices) and “bid peddling” (subcontractors offering to reduce their bid to induce the contractor to substitute the subcontractor after award).

In 1992, when the Department proposed a similar change in the DBE program regulations, it believed then, as it does now, that requiring the submission of good faith efforts documentation that includes DBE information at the time bids are due (as a matter of responsiveness) is a reasonable means of reducing the bid shopping problem. Contrary to the current claims made by general contractors, the Department’s interest in revisiting this issue represents neither a “startling” change in direction for the DBE program nor a lack of understanding of the procurement process for transportation construction projects. At the same time, the Department acknowledged later in 1997 and 1999 when we finalized that proposed rulemaking, as it does now, that the responsiveness approach may be more difficult administratively for prime contractors and recipients, even though that approach was, and is, being used in some places.

One of the hallmarks of the DBE program is the flexibility afforded recipients to tailor implementation of some aspects of the program to respond to local conditions or circumstances. Indeed, the DBE program regulations cite among the objectives, the desire “to provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.” 49 CFR 26.1(g). Flexibility is recognized in many ways: For recipients, overall and contract goals are set based on local conditions, taking into account circumstances specific to a particular recipient or a particular contract; and for prime contractors, they cannot be penalized or denied a contract for failing to meet the goal, as long as documented good faith efforts are made. At what point in the procurement process the good faith efforts documentation must be

submitted is yet another example of the flexibility that the Department should not undo without more information.

To the extent that bid shopping exists, it works to the detriment of all subcontractors, DBEs and non-DBEs alike, and drives up the cost of projects to the taxpaying public. However, absent sufficient data regarding the impact of each approach on deterring bid shopping and its effects or data on the costs/benefits of each approach when implemented consistent with the rule, as well as the potential burdens argued by those opposed to the change, the Department is not prepared, at this time, to finalize the proposal to adopt an across-the-board approach. Before taking that step, we think it prudent to examine closely the “responsiveness” approach used by many recipients to determine its impact on mitigating bid shopping and on providing greater or lesser opportunities for DBE participation. We intend to undertake such a review which may lead to proposed regulatory action in the future.

While we are retaining the discretion of recipients to choose between a responsiveness or responsibility approach, we think there should be some limit to how long after bid opening bidders or offerors are allowed to submit GFE documentation that includes specific DBE information to reduce the opportunity to bid shop where it exists. This would have the effect of reducing the burden on prime contractors and recipients who use a responsibility approach from the burden allegedly caused by the proposal, while at the same time minimizing opportunities for bid shopping by restricting the amount of time truly needed to gather the necessary information. From the comments, the time period permitted by recipients that use the responsibility approach can run the gamut from 3 to 30 days. These comments present timelines similar to those found in a review the Department recently conducted of the DBE Program Plans for all 50 states, Puerto Rico and the District of Columbia.¹ The results of this analysis are available in the docket for this rulemaking.² This analysis shows that: (1) 30 of the State departments of transportation report that they use the responsiveness approach, although the Department notes that some variations on the responsiveness approach—a combination of responsiveness and responsibility—may actually be used by

¹ For purposes of this discussion, Puerto Rico and the District of Columbia are considered “States,” thus the totals add up to 52.

² See DOT Docket ID Number OST–2012–0147.

some of these recipients; (2) 20 State departments of transportation used the responsibility approach; and (3) two State departments of transportation (Puerto Rico and Florida) have completely race-neutral programs and thus do not set DBE contract goals. Of the 20 responsibility States, 17 States have a set period of time bidders or offerors are given to submit the required information, which ranges from 3 to 15 days, while three States have no set time for all contracts.³ The results of this review are generally consistent with the survey conducted by ARTBA indicating that 43% of the 300 members responding stated that their State departments of transportation required submission of DBE utilization plans with the bid. We note that the term "DBE utilization plan" is not used anywhere in the DBE program regulations.

We think it reasonable ultimately to limit the time to a maximum of 5 calendar days to protect program beneficiaries and overall program integrity.⁴ The Department believes 5 calendar days is reasonable because it is more than or equal to the time permitted by five of the responsibility states and, by definition, all of the responsiveness states. Moreover, many of the DOT recipients that commented on establishing a time limit recommended between one (1) to 7 days. Allowing a longer time frame, such as between 7 and 14 days, is too long; it increases opportunities for bid shopping to occur. However, in the final rule we have provided some time for recipients that use this revised responsibility approach to transition to the shorter time frame by January 1, 2017. The transition period is intended to provide time to put in place any necessary system modifications. Until then, recipients will be permitted up to 7 calendar days to require the submission of DBE documentation after bid opening when using a responsibility approach. The Department believes this will allow for a smoother transition to the new approach, while seemingly without encountering the administrative difficulties and added costs pointed to by some of the commenters opposed to the proposed change.

Based on the comments, there is some confusion about how the document

requirements of § 26.53(b) apply to design-build contracts. It bears repeating what the Department said in 1999 on this subject, because it remains the case today:

On design-build contracts, the normal process for setting contract goals does not fit the contract award process well. At the time of the award of the master contract, neither the recipient nor the master contractor knows in detail what the project will look like or exactly what contracting opportunities there will be, let alone the identity of DBEs who may subsequently be involved. In these situations, the recipient may alter the normal process, setting a project goal to which the master contractor commits. Later, when the master contractor is letting subcontracts, it will set contract goals as appropriate, standing in the shoes of the recipient. The recipient will exercise oversight of this process.

(64 FR 5115). The proposed change would not have applied to design-build contracts.

NAICS Codes

The Department proposed changes to the information to be included with bids or offers by requiring the bidders or offerors to provide the recipient with information showing that each DBE signed up by the bidder or offeror is certified in the NAICS code(s) for the kind of work the DBE will be performing. This proposed change was intended to help bidders or offerors identify firms that can qualify for DBE credit in the work area involved in the contract. This information would be submitted with the bidder's or offeror's DBE participation data.

The Department received 26 comments regarding the NAICS codes, 15 against the proposal and nine in favor of it. The comments submitted included State departments of transportation, prime contractors and contractor associations. The opponents of this proposal included mostly prime contractors and contractor associations, and a few State departments of transportation. The opponents' comments focused on a concern that the legal risk associated with including a DBE who could not perform a commercially useful function would fall on the prime contractor, meaning that the prime contractor could be the subject of investigations and charges brought by the DOT Inspector General and others, when it is the certifying agencies that should bear this responsibility. Other comments indicated that adding NAICS codes would not add any value to the process. The proponents of the proposal included advocacy groups and some State departments of transportation. Proponents believe that the NAICS code

requirement will add clarification to the process and ensure that the recipient can complete the work.

DOT Response: Under existing regulations, DBEs must be certified in the type of work the firm can perform as described by the most specific available NAICS code for that type of work. Certifiers (i.e., recipients or other agencies that perform the certification function) also may apply a descriptor from a classification scheme of equivalent detail and specificity that reflects the goods and services provided by the DBE (49 CFR 26.71(n)). It is the responsibility of the DBE to provide the certifier with the information needed to make an appropriate NAICS code assignment. In the new certification application form, firms are asked to describe their primary activities and the product(s) or services(s) they provide and to list applicable NAICS codes they seek. If the firm enters into new areas of work since it was first certified, it is the firm's responsibility to provide the certifier the evidence of how they qualify for the new NAICS codes. It is then incumbent upon the certifying agency to determine that the NAICS code to be assigned adequately describes the kind of work the disadvantaged owners have demonstrated they can control and it is the responsibility of the recipient of DOT funds to determine that the DBE's participation on a particular contract can be counted because the DBE is certified to perform the kind of work to be performed on that contract.

The Department has decided to make final this proposed rule change. In doing so, the Department does not intend to shift responsibility for the accuracy of NAICS code assignments from the certifier to the contractor. When a DBE submits a bid to a recipient as a prime contractor or a quote to a general contractor as a subcontractor, it is the responsibility of the DBE to ensure that the bid or quote shows that the NAICS code in which the DBE is certified corresponds to the work to be performed by the DBE on that contract. It would be in the best interest of the contractor to also have this information when it is considering DBEs interested in competing for contract opportunities where a contract goal has been set. This enables the contractor to make a reasonable determination whether it has made good faith efforts to meet the goal through the DBEs listed. Ultimately, the recipient is responsible for ensuring the DBE is certified to do the kind of work covered by the contract before DBE participation can be counted. Including this information in the bid documents should assist all parties concerned in

³ Under 49 CFR 26.53(c), all GFE documentation must be submitted before committing to the performance of the contract by the bidder or offeror (i.e., before contract award).

⁴ Due to the definition of "days" adopted in this final rule, bidders or offerors will have 5 calendar days (i.e., not business days) to submit the necessary information. Thus, if a bid is submitted on Thursday, the apparent low bidder would have until Tuesday to submit the information.

complying with DBE program requirements. Thus, it is the responsibility of the certifier to ensure that DBEs are certified only in the appropriate NAICS codes; it is the responsibility of the DBE to provide that NAICS code to the prime while the prime is putting together a bid; and it is the responsibility of the prime to provide those codes to the recipient when providing the other DBE information. It is not the responsibility of the prime to vouch for the accuracy of that certification.

Replacement of a DBE

The NPRM proposed that in the event that it is necessary to replace a DBE listed on a contract, a contractor must document the GFE taken to obtain a replacement and may be required to take specific steps to demonstrate GFE. The specific steps would include: (1) A statement of efforts made to negotiate with DBEs for specific work or supplies, including the names, address, telephone numbers, and emails of those DBEs that were contacted; (2) the time and date each DBE was contacted; (3) a description of the information provided to DBEs regarding the plans and specifications for portions of the work to be performed or the materials supplied; and (4) an explanation of why an agreement between the prime contractor and a DBE was not reached. The prime contractor would have to submit this information within 7 days of the recipient's agreement to permit the original DBE to be replaced, and the recipient must provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated. Failure to comply with the GFE requirements in the rule would constitute a material breach of contract, subject to termination and other remedies provided in the contract.

Twenty-eight commenters opposed this modification to the rules. They included prime contractors, State departments of transportation, and contractor associations. Essentially, the opponents were of the view that prime contractors should not be responsible for looking beyond the original commitment for DBE replacements. Others felt that the 7 day timeframe to replace a DBE is not long enough. Some opponents suggested changing the proposal so that it is desirable to replace a DBE with a DBE, but not mandatory. Some prime contractors also stated that there is a need to be compensated for the delays to replace a DBE. Those in favor of the proposal included five commenters representing State departments of transportation, transit authorities, and DBE advocacy groups.

These commenters felt that contractors should make efforts to replace a DBE and failure to carry out the requirement to do so is a breach of contract.

DOT Response: When the Department amended the regulations in 2011 (the first phase of its recent focus on program improvements), we required prime contractors that terminate DBEs make GFE to find a replacement to perform at least the same amount of work under the contract to meet the contract goal established for the procurement. Thus, this GFE obligation currently exists and is not new. We agree that the GFE guidance in Appendix A used by recipients to assess the efforts made by bidders and offerors before contract award can also be used to evaluate efforts made by the contractor to replace a DBE after contract award. There is no need to separately identify steps that a recipient may require when a contractor is replacing a DBE. However, there is nothing that prevents a contractor from taking any of the steps included in the proposed amendment to the rules. Indeed, recipients may consider, as part of their evaluation of the efforts made by the contractor, whether DBEs were notified of subcontracting opportunities, whether new items of work were made available for subcontracting, what information was made available to DBEs, and what efforts were made to negotiate with DBEs.

The GFEs made by the contractor to obtain a replacement DBE should be documented and submitted to the recipient within a reasonable time after obtaining approval to terminate an existing DBE. To avoid needless delay and ensure timely action, we think 7 days is reasonable, but we have modified the rule to allow recipients to extend the time if necessary at the request of the contractor.

The existing regulations currently require a contract clause be included in prime contracts and subcontracts that make the failure by the contractor to carry out applicable requirements of 49 CFR Part 26 a material breach of contract, which may result in the termination of the contract or such other remedy as the recipient deems appropriate. See 49 CFR 26.13(b). Consequently, a contractor that fails to comply with the requirements for terminating or replacing a DBE would be in breach of contract, subject to contract sanctions that include termination of the contract. We need not replicate the provisions of § 26.13. We also will not prescribe what the appropriate contract sanctions or administrative remedies must be. However, we have revised § 26.13 to

incorporate the list of remedies we proposed as other possible contract remedies recipients should consider. Many of the suggestions are sanctions currently used by some recipients. They include withholding progress payments, liquidated damages, disqualifying the contractor from future bidding, and assessing monetary penalties.

Copies of Quotes and Subcontracts

The Department proposed to require the apparent successful bidder/offeror, as part of its GFE documentation, provide copies of each DBE and non-DBE subcontractor quote it received in situations where the bidder/offeror selected a non-DBE firm to do work sought by a DBE. This information would help the recipient determine whether there is validity to any claims by a bidder/offeror that a DBE was rejected because its quote was too high. The contractor who is awarded the contract also would be required to submit copies of all DBE subcontracts.

There were 15 organizations that commented on the proposal regarding quotes and 19 commenters on the proposal regarding subcontracts. Commenters were almost evenly divided in their support for, or opposition to, requiring the submission of quotes under the limited circumstances set out in the proposed rule. A State department of transportation noted that the submission of quotes was already being implemented in its program. One supporter suggested this requirement should apply only when the DBE contract goal is not met. Opponents raised concerns about the burden imposed and questioned the benefit to be derived since the comparison of quotes is not viewed as a useful exercise. Regarding the submission of subcontracts, the commenters overwhelming opposed making this a requirement because of the burden. One commenter suggested that the proposal appears to duplicate an existing requirement of the Federal Highway Administration (FHWA) and another commenter questioned the steps that would be taken to protect confidential or proprietary information.

DOT Response: The GFE guidance in Appendix A, in its current form, instructs prime contractors to consider a number of factors when negotiating with a DBE and states that the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Thus, the reasonableness of a DBE's quote as compared to a non-DBE's quote is often

an issue cited by a prime contractor in selecting a non-DBE over a DBE. The Department believes that requiring a bidder/offeror to provide, as part of the GFE documentation, subcontractor quotes received by the bidder/offeror in those instances where a DBE's quote was rejected over a non-DBE's quote will assist recipients in determining the validity of claims made by the bidder/offeror that the DBE's quote was too high or unreasonable and has therefore decided to finalize this proposal. Further, we stress that only the quote would need to be submitted in these situations, not any additional information and only in instances where a non-DBE was selected over a DBE, thus limiting the burden of this requirement.

The Department recognizes that requiring the submission of DBE subcontracts may pose unnecessary burdens on contractors and recipients. Thus, the Department has decided to modify its proposal to only require that DBE subcontracts be made available to recipients upon request when needed to ensure compliance with the requirements of 49 CFR Part 26.

Good Faith Efforts Applied to Race-Neutral DBE Participation

We sought comment on whether some of the good faith efforts provisions of the rule concerning contracts with DBE goals should apply to DBEs on contracts that do not have a DBE goal. For example, the rules that restrict termination of DBEs and that impose good faith efforts obligations to replace DBEs that are dropped from a contract or project would apply regardless of whether the DBE's participation resulted from race-conscious or race-neutral measures.

Of the 28 commenters that responded to this question, only 3 expressed support and all three supporters were DBEs or organizations representing DBEs. Three commenters also were conflicted, unsure of whether the proposal would result in benefits to DBEs. The general contracting community, many State departments of transportation, and some transit agencies expressed opposition because they believe DBEs should be treated no different than non-DBEs on contracts with no DBE goals (the primary means of obtaining measurable DBE participation through race- and gender-neutral measures), and to do otherwise is to essentially convert what began as race-neutral conduct into race-conscious conduct.

DOT Response: The Department agrees with the points raised by the commenters opposing this change

(specifically, that no distinction should be made between DBEs and non-DBEs when race-neutral measures are used to obtain participation) and has decided to maintain the status quo. The restrictions on terminating and replacing a DBE selected by a bidder or offeror to meet a contract goal are intended to hold the contractor to the good faith efforts commitment made to win the contract. No comparable commitment is made when DBE contract goals are not set.

Trucking 49 CFR 26.55(d)

The Department proposed to change the counting rule for trucking to allow 100% of a DBE's trucking services to be counted when the DBE uses its own employees as drivers but leases trucks from a non-DBE truck leasing company. This proposed change gives DBEs the same ability as non-DBEs to use their own drivers and supplement their fleets with leased trucks without sacrificing any loss of DBE credit because the trucks may be leased from a non-DBE leasing company. Consistent with the current prohibition on counting materials, supplies, equipment, etc., obtained from the prime contractor or its affiliates (49 CFR 26.55(a)(1)), trucks leased from the prime contractor would not be counted. As noted in the NPRM, this proposed rule change applies to counting only; it would not immunize companies from scrutiny due to potentially improper relationships between DBEs and non-DBEs that raise certification eligibility or fraud concerns.

More than 25 comments were received on this proposed change, mostly in favor of the modification. There were several commenters that believed the proposed rule would invite more fraud for an area that is one of the top means of obtaining DBE participation on Federal-aid contracts. Additional comments included expanding the definition of "employees" to expressly include those drivers that are hired by DBEs from the union hall on an as-needed basis to fulfill contracts, clarifying what constitutes ownership of trucks, eliminating the current option allowed under the rule that permits credit for trucks and drivers leased from non-DBEs, eliminating the need to obtain written consent from the operating administrations on the option chosen by the recipient; and reinforcing the restriction on not allowing a DBE to count trucks purchased or leased from the prime contractor.

DOT Response: The Department did not propose any changes in the NPRM to the existing rule that allows a DBE that leases trucks (and also leases the

drivers) from a non-DBE firm to receive credit for the value of transportation services provided by the non-DBE firm up to the amount of credit provided by trucks owned by DBEs that are used on the contract. This option was added to the DBE program rules in 2003 (68 Fed. Reg. 35542-02) to recognize the practical reality of leasing in the trucking business and to respond to concerns about reduced opportunities for DBEs caused by the 1999 version of the counting rule. As indicated in the 2003 final rule, a recipient may choose the one-for-one option to credit trucks and drivers leased from non-DBEs or it may limit credit to fees and commissions for work done with non-DBE lessees, consistent with the 1999 version of the rule. If a recipient chooses to count the use of trucks and drivers leased from a non-DBE firm, as provided in the existing rule, the recipient's choice should be reflected in the recipient's DBE program plan, which is subject to approval by the cognizant operating administration (OA) to ensure appropriate safeguards are taken by the recipient to prevent fraud. Contrary to the way some commenters are reading the existing rule, it does not contemplate obtaining OA consent on a transaction-by-transaction basis.

The modification to the rule that the Department makes final today simply clarifies that trucks that are leased by a DBE from a non-DBE for use by the DBE's employees should be treated no differently than other equipment a DBE may lease to conduct its business. The value of the transportation services provided by the DBE would not be adversely impacted by the fact that the equipment used by the DBE's employees is leased instead of owned. This is consistent with the existing counting rule and with the basic principle that DBE participation should be counted for work performed with a DBE firm's own forces. The term "employee" is to be given its commonly understood dictionary meaning, and "ownership" includes the purchase of a truck or trucks through conventional financing arrangements.

Regular Dealer 49 CFR 26.55(e)

The Department proposed to codify guidance issued in 2011 on how to treat the services provided by a DBE acting as a regular dealer or a transaction expeditor/broker for counting purposes (i.e., crediting the work of the DBE toward the goal). The guidance makes clear that counting decisions involving a DBE acting as a regular dealer are made on a contract-by-contract basis and not based on a general description or designation of a DBE as a regular

dealer. The Department also invited an open discussion of the regular dealer concept in light of changes in the way business is conducted. Specifically, we sought comment on: (1) How, if at all, changes in the way business is conducted should result in changes in the way DBE credit is counted in supply situations?; (2) what is the appropriate measure of the value added by a DBE that does not play a traditional regular dealer/middleman role in a transaction?; and (3) do the policy considerations for the current 60% regular dealer credit actually influence more use of DBEs as contractors that receive 100% credit?

The Department received over 50 comments from prime contractors, DBEs, and recipients, many of which emphasized the need for additional clarification of, or changes to, the terminology used to describe regular dealers, middlemen, transaction expeditors, and brokers. The comments were evenly divided over whether the guidance should be codified in the regulations. Those in support agreed that the determination of whether or not a DBE is functioning as a regular dealer as defined in the existing rule should be based on the role performed by the DBE on the contract, which may vary from contract to contract. Those opposed to the contract-by-contract approach, represented mostly, but not exclusively, by prime contractors, argued that the approach reflected in the guidance is burdensome and that once a recipient determines at certification that a DBE is a supplier, a wholesaler, a manufacturer, a transaction expeditor, a middleman, or a broker, the credit allowed under the rules should be applied. To do otherwise creates inconsistency, uncertainty, and exposes the prime and the DBE to risks associated with fraud investigations in this area. It is the responsibility of the certifier, they argue, to ensure that a DBE certified as a supplier, for example (and thereby acting as a regular dealer), is, in fact, a supplier and not a transaction expeditor. Indeed, several commenters expressed the view that certifiers should be allowed to certify a DBE as a "regular dealer." Followed to its logical conclusion, once certified, how the work to be performed by the DBE is counted would be automatic without regard to what the DBE is actually doing on the contract.

Many comments addressed the changing business environment where the best method of delivering supplies ordered from a non-DBE manufacturer may in fact be drop-ship rather than delivery by the DBE regular dealer using its own trucks. One commenter stated that the requirement that a DBE own

and operate its own distribution equipment directly conflicts with industry practice and creates a greater burden and challenge to DBEs. Similarly, some maintain the requirement for an inventory or store front is outdated. The way business is conducted today, they argue, services provided by wholesalers or e-Commerce businesses do not require an inventory or a store open to the public. Several commenters indicated that they would be comfortable with the elimination of the distinct categories and only have a single distinction of a goods supplier from a non-DBE manufacturer with a set percentage of dollars that could be counted or only using fees and commissions as the amount that can be counted as done currently for transaction expeditors and brokers. To encourage greater use of DBE contractors to meet contract goals, one commenter suggested placing a cap (e.g., no more than 50%) on how much of a contract goal could be met using DBE suppliers.

There were suggestions that the Department eliminate altogether regular dealers and brokers from the rule. Others countered that any proposal to eliminate counting regular dealer participation toward contract goals would severely reduce the pool of ready, willing, and able DBEs given how often the regular dealer credit is used to meet contract goals; such a proposal, they maintain, should result in a corresponding reduction in goals. Other commenters believe that it is important to keep the regular dealer concept and consider increasing the counting percentage due to the value added services they provide. Still others thought a complete overhaul of the regular dealer provisions in the rule is needed to recognize decades of changes in the construction industry, and no modifications to the rule should be made until further analysis is done.

DOT Response: The Department has decided to codify the guidance on the treatment of counting decisions that involve DBEs functioning as regular dealers. This guidance is consistent with the basic counting principles set out in the rule that apply regardless of the kind of work performed by the DBE. Specifically, the counting rules apply to a specific contract in which a DBE participates based on the value of work actually performed by the DBE that involves a commercially useful function on that contract. Throughout 49 CFR 26.55 there are numerous references to "a contract," "the contract," or "that contract." In other words, counting is by definition a "contract-by-contract" determination made by recipients after

evaluating the work to be performed by the DBE on a particular contract.

The Department appreciates the thought that went into the varied comments received on the questions we posed and the overall interest in the subject. In the context of this discussion, it is important to reiterate that certification and counting are separate concepts in the DBE rule. This applies regardless of the type of work the DBE is certified to perform. It is also important to note that DBEs must be certified in the most specific NAICS code(s) for the type of work they perform and that there is no regular dealer NAICS code. Regular dealer is a term of art used in the context of the DBE program. That said, the Department believes that more analysis and discussion is needed to make informed policy decisions about appropriate modifications to the regulations governing regular dealers, transaction expeditors, and brokers. We think it more appropriate at this point to develop additional guidance to address different business scenarios rather than promulgate regulatory requirements or restrictions beyond those that currently exist. We will continue the conversation through future stakeholder meetings.

Ethics and Conflicts of Interest

The Department sought comment on whether Part 26 should be amended (or guidance issued) to add provisions concerning ethics and conflicts of interest to help play a constructive role in empowering DBE officials in resisting inappropriate political pressures. At the same time, the Department questioned whether such a provision would be effectual and whether the provision could be drafted so as not to be overly detailed. The Department also welcomed suggestions about ethics and conflicts of interest.

Less than 25 commenters elected to address this subject; the significant majority of commenters expressed support for adding ethics and conflict of interest provisions to enable DBE certification officials and others to resist inappropriate pressures. An advocacy group commended the Department for initiating a discussion about ethics. A State transportation department suggested including applicable penalties and offering protection via the Whistleblower Protection Act. An airport sponsor supported adding provisions that clarify the roles of staff who administer the selection process.

A State transit authority did not believe that effective guidance could be provided in the regulation without being overly detailed and burdensome. Moreover, the commenter recognized

that while adding such provisions would play a constructive role, they would not totally eradicate inappropriate pressure. A State transportation department directed the Department to professional codes of conduct for the fields of law and engineering as examples. An advocacy group and a DBE noted that a code of ethics might provide recipients with a “safety net” when responding to undue pressure. Another State transportation department supports the provision if DOT takes quick action against known abusers of ethics. A DBE commenter recommended a workgroup approach be utilized to prepare draft language.

DOT Response: There was general support among the commenters for establishing a code of ethics of some kind to insulate or protect DBE program administrators from undue pressure to take actions inconsistent with the intent and language of the DBE program rules. However, very few of the commenters made suggestions on the details of such a code or on the kind of provisions that might be added to address specific concerns. As indicated in the NPRM, recipients and their staffs are subject to State and local codes of ethics that govern public employees and officials in the performance of their official duties and responsibilities, including the responsibilities they carry out in administering the DBE program as a condition of receiving Federal financial assistance. Of course, grant recipients are subject to the common grant rules which prohibit participating in the selection, award, or administration of a contract supported by Federal funds if a conflict of interest would be involved. Because we lack sufficient information, at this point, to determine the extent to which widespread problems exist or how best to approach the issue—through regulations or guidance—the Department thinks it best to hold off on adopting ethics rules for the DBE program to supplement existing State and local ethics codes. Instead, the Department may engage stakeholders in a further discussion to aid in identifying appropriate next steps.

Appendix A—Good Faith Efforts Guidance

The Department proposed several revisions to Appendix A to Part 26—Guidance Concerning Good Faith Efforts to clarify and reinforce the GFE obligation of bidders/offerors and to provide additional guidance to recipients. We proposed to add more examples of the types of actions recipients may consider when evaluating the bidders’/offerors’ GFE to obtain DBE participation. The proposed

examples included conducting market research to identify small business contractors and suppliers and establishing flexible timeframes for performance and delivery schedules that encourage and facilitate DBE participation. We reinforced concepts that we have emphasized in communicating with recipients over the years: Namely, that a contractor’s desire to perform work with its own forces is not a basis for not making GFE and rejecting a replacement DBE that submits a reasonable quote; and reviewing the performance of other bidders should be a part of the GFE evaluation. The Department also proposed to add language specifying that the rejection of a DBE simply because it was not the low bidder is not a practice considered to be a good faith effort.

There were 25 comments collected that opposed the suggestion that flexible timeframes and schedules be established to facilitate DBE participation. The comments received were submitted by prime contractors, contractor associations, and State departments of transportation. These organizations stated that a “flexible timeframe” was unrealistic and went against the nature of the construction industry. Other organizations stated the need to further quantify what constitutes an “unreasonable quote” when making GFE to replace a DBE. There were two organizations that supported these provisions. U.S. Representative Judy Chu agreed that there can be no definitive checklist, but suggested that best practices be collected and disseminated to clarify the issue. One State department of transportation agreed that the bidder cannot reject a DBE simply due to price.

In the NPRM, we also proposed in Appendix A that DOT operating administrations may change recipients’ good faith efforts decisions. There were a few comments regarding this proposal, all in opposition. The commenters included a DBE, prime contractor, a State department of transportation, and a contractors association. The prime contractor noted that operating administrations should be involved throughout the good faith efforts review process and not after the recipient has made a decision. There were no comments in support of this proposal.

DOT Response: It is important to reiterate and reinforce that Appendix A is guidance to be used by recipients in considering the good faith efforts of bidders/offerors. It does not constitute a mandatory, exclusive, or exhaustive checklist. Rather, a good faith efforts evaluation looks at the “quality,

quantity, and intensity of the different kinds of efforts that the bidder has made.” The proposed revisions to the guidance made by the Department are based on experience gained since the development of the guidance in 1999 and are intended to incorporate clarifications and additional examples of the different kinds of activities to consider. We have modified the final guidance in keeping with the existing purpose and intent. The guidance also seeks to indicate what reasonably may not be viewed as a demonstration of good faith efforts. In this regard, rejecting a DBE only because it was not the low bidder is not consistent with the longstanding idea that a bidder/offeror should consider a variety of factors when negotiating with a DBE, including the fact that there may be additional costs involved in finding and using DBEs, as currently stated in the existing guidance. Similarly, the inability to find a replacement DBE at the original price is not, without more, sufficient to demonstrate GFE were made to replace the original DBE. As currently stated under the existing guidance, a firm’s price is one of many factors to consider in negotiating in good faith with interested DBEs.

The Department has decided to make no change to the current role of the operating administrations with respect to the GFE determinations made by recipients. It is the responsibility of recipients to administer the DBE program consistent with the requirements of 49 CFR Part 26, and it is the responsibility of the operating administrations to oversee recipients’ program administration to ensure compliance through appropriate enforcement action if necessary. Such action includes refusing to approve or provide funding for a contract awarded in violation of 49 CFR 26.53(a). The proposed change may confuse the relative roles and responsibilities of the recipients and the operating administrations and consequently has been removed from the final rule.

Technical Corrections

The Department is amending the following provisions in 49 CFR Part 26 to correct technical errors:

1. Section 26.3(a)—Include a reference to the Highway and Transit funds authorized under SAFETEA-LU and MAP-21.
2. Section 26.83(c)(7)—Remove the reference to the DOT/SBA MOU since the MOU has lapsed.
3. Section 26.89(a)—Amend to recognize that the DOT/SBA MOU has lapsed.

Regulatory Analyses and Notices

Executive Orders 12866 and 13563 (Regulatory Planning and Review)

This final rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Order. It does not create significant cost burdens, does not affect the economy adversely, does not interfere or cause a serious inconsistency with any action or plan of another agency, does not materially alter the impact of entitlements, grants, user fees or loan programs; and does not raise novel legal or policy issues. The final rule is essentially a streamlining of the provisions for implementing an existing program, clarifying existing provisions and improving existing forms. To the extent that clearer certification requirements and improved documentation can forestall DBE fraud, the rule will result in significant savings to State and local governments. This final rule does not contain significant policy-level initiatives, but rather focuses on administrative changes to improve program implementation. The Department notes that several commenters, particularly general contractors and their representatives, argued that the NPRM should have been designated as “significant.” Although the Department continues to believe that the designation of the NPRM was correct based on the intent of this rulemaking, we note that, as discussed above, we have decided to not finalize at this time many of the provisions that those commenters argued were significant changes to the DBE program.

Executive Order 12372 (Intergovernmental Review)

The final rule is a product of a process, going back to 2007, of stakeholder meetings and written comment that generated significant input from State and local officials and agencies involved with the DBE program in transit, highway, and airport programs.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), we have evaluated the effects of this final rule on small entities and anticipate that this action will not have a significant economic impact on a substantial number of small entities. The underlying DBE rule does deal with small entities: All DBEs are, by definition, small businesses. Also, some FAA and FTA recipients that implement

the program are small entities. However, the changes to the rule are primarily technical modifications to existing requirements (e.g., improved forms, refinements of certification provisions) that will have little to no economic impact on program participants. Therefore, the changes will not create significant economic effects on anyone. In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), I certify that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 (Federalism)

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. As noted above, there is no substantial compliance cost imposed on State and local agencies, who will continue to implement the underlying program with administrative improvements proposed in the rule. The proposed rule does not involve preemption of State law. Consequently, we have analyzed this proposed rule under the Order and have determined that it does not have implications for federalism.

National Environmental Policy Act (NEPA)

The Department has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency’s NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 3.c.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway Administration’s implementing procedures, “[p]romulgation of rules, regulations, and directives.” 23 CFR 771.117(c)(20). The purpose of this

rulemaking is to make technical improvements to the Department’s DBE program, including modifications to the forms used by program and certification-related changes. While this rule has implications for eligibility for the program—and therefore may change who is eligible for participation in the DBE program—it does not change the underlying programs and projects being carried out with DOT funds. Those programs and projects remain subject to separate environmental review requirements, including review under NEPA. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

Paperwork Reduction Act

According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. This action contains additional amendments to the existing information collection requirements previously approved under OMB Control Number 2105–0510. As required by the Paperwork Reduction Act, the Department has submitted these information collection amendments to OMB for its review. The Department will announce the finalization of this information collection request in a separate **Federal Register** notice following OMB approval. The NPRM contained estimates of the burden associated with the additional collection requirements proposed in that document. Various commenters stated that the Department understated the proposed burden for the collections associated with the application form and personal net worth form. As discussed above in the relevant portions of the preamble, the Department is sensitive to those concerns and has revised those collections to minimize what information must be submitted and to simplify other aspects of the forms. For each of these information collections, the title, a description of the entity to which it applies, and an estimate of the annual recordkeeping and periodic reporting burden are set forth below.

1. Application Form

Today’s final rule modifies the application form for the DBE program. In the NPRM, the Department explained that its estimate of 8 total burden hours per applicant to complete its DBE or

ACDBE certification application with supporting documentation was based on discussions the Department has had with DBEs in the past. The comments and the Department's response to those comments are discussed above in the preamble.

The number of new applications received each year by Unified Certification Program members is difficult to estimate. There is no central repository for DBE certification applications and we predict that the frequency of submissions at times vary according to construction season (high applications when the season is over), the contracting opportunities available in the marketplace, and the number of new transportation-related business formations or expansions. To get some estimate however, the Department contacted recipients during the process of developing the NPRM. The agencies we contacted reported receiving between 1–2 applications per month, 5–10 per month, or on the high end 80–100 per month. There are likely several reasons for the variance. Jurisdictions that are geographically contiguous to other states (such as Maryland) and/or have a high DBE applicant pool may receive a higher number whereas jurisdictions in remote areas of the country with smaller numbers of firms may have lower applicant requests for DBE certification. These rough numbers likely do not include requests for expansion of work categories for existing firms that are already certified.

Frequency: Once during initial DBE or ACDBE certification.

Estimated Average Burden per Response: 8 hours.

Number of Respondents: 9,000–9,500 applicants each year.

Estimated Total Annual Burden Hours: 72,000–76,000 hours per year.

2. PNW Form

A small business seeking to participate in the DBE and ACDBE programs must be owned and controlled by a socially and economically disadvantaged individual. When a recipient determines that an individual's net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is said to have been conclusively rebutted. In order to make this determination, the current rule requires recipients to obtain a signed and notarized statement of personal net worth from all persons who claim to own and control a firm applying for DBE or ACDBE certification and whose ownership and control are relied upon for the certification. These personal net worth statements must be accompanied by appropriate supporting

documentation (e.g., tax returns). The form finalized in this rule would replace use of an SBA form suggested in current regulations.

As discussed above in the preamble, we estimate that compiling information for and filling out this form would take approximately 2 hours, slightly longer than that for the SBA form currently in use. As explained in further detail in the above preamble, the Department has chosen not to finalize its proposal to require a PNW form with each annual affidavit of no change. Thus, the number of respondents who must submit a PNW form is the same as the number of applications.

Frequency: Once during initial DBE certification. For the DBE/ACDBE programs, information regarding the assets and liabilities of individual owners is necessary for recipients of grants from the Federal Transit Administration, the Federal Aviation Administration, and the Federal Highway Administration, to make responsible decisions concerning an applicant's economic disadvantage under the rule. All persons who claim to own and control a firm applying for DBE or ACDBE certification and whose ownership and control are relied upon for the certification will complete the form.

Estimated Average Burden per Response: 2 hours.

Number of Respondents: 9,000–9,500 applicants each year.

Estimated Burden: 18,000–19,000 hours per year for applications.

3. Material With Annual Affidavits of No Change

Each year, a certified firm must submit an affidavit of no change. Although the Department proposed that DBE would need to submit various additional documentation with the affidavit (e.g., an updated PNW statement and records of transfers) today's final rule only requires that the owner and the firm's (including affiliates) most recent completed IRS tax return, IRS Form 4506 (Request for Copy or Transcript of Tax Return) be submitted with the affidavit. Collection and submission of these items during the annual affidavit is estimated to take approximately 1.5 hours.

Estimated Average Burden per Response: 1.5 hours.

Respondents: The approximately 30,000 certified DBE firms.

Burden: Approximately 45,000 hours per year.

4. Reporting Requirement for Percentages of DBEs in Various Categories

The final rule implements a statutory requirement calling on UCPs to annually report the percentages of white women, minority men, and minority women who control DBE firms. To carry out this requirement, the 52 UCPs would read their existing Directories, noting which firms fell into each of these three categories. The UCPs would then calculate the percentages and email their results to the Departmental Office of Civil Rights. It would take each UCP an estimated 3 hours to comb through their Directories, and another three minutes to calculate the percentages and send an email to DBE@DOT.GOV.

Estimated Average Burden per Response: 3 hours, 3 minutes.

Respondents: 52.

Burden: Approximately 158.5 hours.

5. Uniform Report of DBE Commitments/Awards and Payments

As part of this rulemaking, the Department is reinstating the information collection entitled, "Uniform Report of DBE Commitments/Awards and Payments," OMB Control No. 2105–0510, consistent with the changes proposed in this final rule. This collection requires that DOT Form 4630 be submitted once or twice per year by each recipient having an approved DBE program. The report form is collected from recipients by FHWA, FTA, and FAA, and is used to enable DOT to conduct program oversight of recipients' DBE programs and to identify trends or problem areas in the program. This collection is necessary for the Department to carry out its oversight responsibilities of the DBE program, since it allows the Department to obtain information from the recipients about the DBE participation they obtain in their programs.

In this final rule, the Department modified certain aspects of this collection in response to issues raised by stakeholders: (1) Creating separate forms for routine DBE reporting and for transit vehicle manufacturers (TVMs) and mega projects; (2) amending and clarifying the report's instructions to better explain how to fill out the forms; and (3) changing the forms to better capture the desired DBE data on a more continuous basis, which should also assist with recipients' post-award oversight responsibilities.

Frequency: Once or twice per year.

Estimated Average Burden per Response: 5 hours per response.

Number of Respondents: 1,250. The Department estimates that

approximately 550 of these respondents prepare two reports per year, while approximately 700 prepare one report per year.

Estimated Burden: 9,000 hours.

List of Subjects in 49 CFR Part 26

Administrative practice and procedure, Airports, Civil Rights, Government contracts, Grant-programs—transportation; Mass transportation, Minority Businesses, Reporting and recordkeeping requirements.

Issued this 19th day of September 2014, at Washington, DC.

Anthony R. Foxx,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department of Transportation amends 49 CFR part 26 as follows:

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

1. The authority citation for part 26 continues to read as follows:

Authority: 23 U.S.C. 304 and 324; 49 U.S.C. 2000d, et seq., 49 U.S.C. 47107, 47113, 47123; Section 1101(b) and divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405, and 23 U.S.C. 403.

2. In § 26.1, redesignate paragraphs (f) and (g) as paragraphs (g) and (h), and add new paragraph (f) to read as follows:

§ 26.1 What are the objectives of this part?

* * * * *

(f) To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients.

* * * * *

3. In § 26.3, amend paragraphs (a)(1) and (2) by adding a sentence to the end of each to read as follows:

§ 26.3 To whom does this part apply?

(a) * * *

(1) * * * Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405.

(2) * * * Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B

of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405.

* * * * *

4. Amend § 26.5 by:

a. Adding in alphabetical order definitions for “Assets”, “Business, business concern or business enterprise”, “Contingent Liability”, and “Days”;

b. Removing the definition of “DOT/SBA Memorandum of Understanding”;

c. Revising the definition of “immediate family member”;

d. Adding in alphabetical order definition for “Liabilities”

e. Revising the definitions of “primary industry classification”, “principal place of business”, and “socially and economically disadvantaged individual”; and

f. Adding in alphabetical order definitions for “Spouse” and “Transit vehicle manufacturer (TVM)”.

The additions and revisions read as follows:

§ 26.5 What do the terms used in this part mean?

* * * * *

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

* * * * *

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

* * * * *

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

* * * * *

Days mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal

holiday. Similarly, in circumstances where the recipient’s offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

* * * * *

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

* * * * *

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

* * * * *

Primary industry classification means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site:

http://www.census.gov/eos/www/naics/.

* * * * *

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

* * * * *

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

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(j) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

(3) Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

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

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

* * * * *

■ 5. In § 26.11, add paragraphs (d) and (e) to read as follows:

§ 26.11 What records do recipients keep and report?

* * * * *

(d) You must maintain records documenting a firm's compliance with the requirements of this part. At a minimum, you must keep a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. These records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement. Other certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient's financial assistance agreement, whichever is longer.

(e) The State department of transportation in each UCP established pursuant to § 26.81 of this part must report to the Department of Transportation's Office of Civil Rights, by January 1, 2015, and each year thereafter, the percentage and location in the State of certified DBE firms in the UCP Directory controlled by the following:

(1) Women;

(2) Socially and economically disadvantaged individuals (other than women); and

(3) Individuals who are women and are otherwise socially and economically disadvantaged individuals.

■ 6. Revise § 26.13, to read as follows:

§ 26.13 What assurances must recipients and contractors make?

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance: The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to

the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance: The contractor, 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, which may include, but is not limited to:

(1) Withholding monthly progress payments;

(2) Assessing sanctions;

(3) Liquidated damages; and/or

(4) Disqualifying the contractor from future bidding as non-responsible.

§ 26.21 [Amended]

■ 7. In § 26.21, paragraph (a)(1) add the word "primary" before the word "recipients", and in paragraphs (a)(2) and (3), remove the word "exceeding" and add in its place the words "the cumulative total value of which exceeds".

■ 8. In § 26.45, revise paragraphs (c)(2), (c)(5); (d) introductory text, (e)(3), (f)(4), and (g) to read as follows:

§ 26.45. How do recipients set overall goals?

* * * * *

(c) * * *

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted (successful and unsuccessful) on your DOT-assisted prime contracts or subcontracts in the past three years. Determine the number of all businesses that have bid or quoted (successful and unsuccessful) on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all businesses to derive a base figure for the relative availability of DBEs in your market. When using this approach, you must establish a mechanism (documented in your goal submission) to directly capture data on DBE and non-DBE prime and

subcontractors that submitted bids or quotes on your DOT-assisted contracts.

* * * * *

(5) *Alternative methods.* Except as otherwise provided in this paragraph, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market. The exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of paragraph (c)(2) of this section, is not an acceptable alternative means of determining the availability of DBEs.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at your overall goal. If the evidence does not suggest an adjustment is necessary, then no adjustment shall be made.

* * * * *

(e) * * *

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.

(i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.

(ii) A project goal covers the entire length of the project to which it applies.

(iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.

(iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

(f) * * *

(4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated or that your method for calculating goals is inadequate, the operating administration may, after

consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you. In evaluating the adequacy or soundness of the methodology used to derive the overall goal, the operating administration will be guided by goal setting principles and best practices identified by the Department in guidance issued pursuant to § 26.9.

* * * * *

(g)(1) In establishing an overall goal, you must provide for consultation and publication. This includes:

(i) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before you are required to submit your methodology to the operating administration for review pursuant to paragraph (f) of this section. You must document in your goal submission the consultation process you engaged in. Notwithstanding paragraph (f)(4) of this section, you may not implement your proposed goal until you have complied with this requirement.

(ii) A published notice announcing your proposed overall goal before submission to the operating administration on August 1st. The notice must be posted on your official Internet Web site and may be posted in any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the operating administration, the revised goal must be posted on your official Internet Web site.

(2) At your discretion, you may inform the public that the proposed overall goal and its rationale are available for inspection during normal business hours at your principal office and for a 30-day comment period. Notice of the comment period must include addresses to which comments may be sent. The public comment period will not extend the August 1st deadline set in paragraph (f) of this section.

* * * * *

§ 26.49 How are overall goals established for transit vehicle manufacturers?

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(1) Only those transit vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufacturers, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved, at the time of solicitation are eligible to bid.

(2) A TVM's failure to implement the DBE Program in the manner as prescribed in this section and throughout 49 CFR part 26 will be deemed as non-compliance, which will result in removal from FTA's certified TVMs list, resulting in that manufacturer becoming ineligible to bid.

(3) FTA recipient's failure to comply with the requirements set forth in paragraph (a) of this section may result in formal enforcement action or appropriate sanction as determined by FTA (e.g., FTA declining to participate in the vehicle procurement).

(4) FTA recipients are required to submit within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract in the manner prescribed in the grant agreement.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal.

(1) In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will bid on during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by the transit vehicle manufacturer's own forces.

(i) You must consider and include in your base figure all domestic contracting opportunities made available to non-DBE firms; and

(ii) You must exclude from this base figure funds attributable to work performed outside the United States and its territories, possessions, and commonwealths.

(iii) In establishing an overall goal, the transit vehicle manufacturer must

■ 9. Revise § 26.49 to read as follows:

provide for public participation. This includes consultation with interested parties consistent with § 26.45(g).

(2) The requirements of this part with respect to submission and approval of overall goals apply to you as they do to recipients.

(c) Transit vehicle manufacturers awarded must comply with the reporting requirements of § 26.11 of this part including the requirement to submit the Uniform Report of Awards or Commitments and Payments, in order to remain eligible to bid on FTA assisted transit vehicle procurements.

(d) Transit vehicle manufacturers must implement all other applicable requirements of this part, except those relating to UCPs and DBE certification procedures.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

(f) As a recipient you may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

■ 10. In § 26.51, revise paragraph (a) to read as follows:

§ 26.51 What means do recipients use to meet overall goals?

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

* * * * *

■ 11. In § 26.53, revise paragraph (b), redesignate paragraph (f)(1) as (f)(1)(i) and add paragraph (f)(1)(ii), revise paragraphs (g) and (h), and add paragraph (j) to read as follows:

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

* * * * *

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders or offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and

(v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and

(3)(i) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(A) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(B) No later than 7 days after bid opening as a matter of responsibility. The 7 days shall be reduced to 5 days beginning January 1, 2017.

(ii) Provided that, in a negotiated procurement, including a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient.

* * * * *

(f)(1) * * *

(ii) You must include in each prime contract a provision stating:

(A) That the contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the

contractor obtains your written consent as provided in this paragraph (f); and

(B) That, unless your consent is provided under this paragraph (f), the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

* * * * *

(g) When a DBE subcontractor is terminated as provided in paragraph (f) of this section, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement. The good faith efforts shall be documented by the contractor. If the recipient requests documentation under this provision, the contractor shall submit the documentation within 7 days, which may be extended for an additional 7 days if necessary at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

(h) You must include in each prime contract the contract clause required by § 26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth in that section you deem appropriate if the prime contractor fails to comply with the requirements of this section.

* * * * *

(j) You must require the contractor awarded the contract to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions.

■ 12. In § 26.55, revise paragraph (d)(5), redesignate paragraph (d)(6) as (d)(7), and add new paragraph (d)(6) and paragraph (e)(4) to read as follows:

§ 26.55 How is DBE participation counted toward goals?

* * * * *

(d) * * *

(5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases

trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT operating administration.

Example to paragraph (d)(5): DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks equipped with drivers from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

(6) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

Example to paragraph (d)(6): DBE Firm X uses two of its own trucks on a contract. It leases two additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four trucks.

* * * * *

(e) * * *

(4) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expeditor) on a contract-by-contract basis.

* * * * *

■ 13. In § 26.65, revise paragraph (a), and in paragraph (b), remove “in excess of \$22.41 million” and add in its place “in excess of \$23.98 million”.

The revision reads as follows:

§ 26.65 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size

standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant.

* * * * *

■ 14. Revise § 26.67 to read as follows:

§ 26.67 What rules determine social and economic disadvantage?

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

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

(ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. To meet this requirement, you must use the DOT personal net worth form provided in appendix G to this part without change or revision. Where necessary to accurately determine an individual's personal net worth, you may, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner's spouse is involved in the operation of the company). Requests for additional information shall not be unduly burdensome or intrusive.

(iii) In determining an individual's net worth, you must observe the following requirements:

(A) Exclude an individual's ownership interest in the applicant firm;

(B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included

in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(C) Do not use a contingent liability to reduce an individual's net worth.

(D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(iv) Notwithstanding any provision of Federal or State law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other State to which the individual's firm has applied for certification under § 26.85 of this part.

(b) *Rebuttal of presumption of disadvantage.* (1) An individual's presumption of economic disadvantage may be rebutted in two ways.

(i) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

Example to paragraph (b)(1)(i): An individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than \$1.32 million. However, the person's assets collectively (e.g., high income level, a very expensive house, a yacht, extensive real or personal property holdings) may lead a reasonable person to conclude that he or she is not economically disadvantaged. The recipient may rebut the individual's presumption of economic disadvantage under these circumstances, as provided in this section, even though the individual's PNW is less than \$1.32 million.

(ii)(A) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section

demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination, as a certifying agency, you may consider factors that include, but are not limited to, the following:

(1) Whether the average adjusted gross income of the owner over the most recent three year period exceeds \$350,000;

(2) Whether the income was unusual and not likely to occur in the future;

(3) Whether the earnings were offset by losses;

(4) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;

(5) Other evidence that income is not indicative of lack of economic disadvantage; and

(6) Whether the total fair market value of the owner's assets exceed \$6 million.

(B) You must have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of § 26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage, so long as his or her PNW remains above that amount.

(c) *Transfers within two years.* (1) Except as set forth in paragraph (c)(2) of this section, recipients must attribute to an individual claiming disadvantaged

status any assets which that individual has transferred to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of recipient's review of the firm's annual affidavit, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients must not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of appendix E of this part.

■ 15. In § 26.69, revise paragraphs (a) and (c) to read as follows:

§ 26.69 What rules govern determinations of ownership?

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or

transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.

* * * * *

(c)(1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

(3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

(4) Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

Examples to paragraph (c): (i) An individual pays \$100 to acquire a majority interest in a firm worth \$1 million. The individual's contribution to capital would not be viewed as substantial.

(ii) A 51% disadvantaged owner and a non-disadvantaged 49% owner contribute \$100 and \$10,000, respectively, to acquire a firm grossing \$1 million. This may be indicative of a pro forma arrangement that does not meet the requirements of (c)(1).

(iii) The disadvantaged owner of a DBE applicant firm spends \$250 to file articles of incorporation and obtains a \$100,000 loan, but makes only nominal or sporadic payments to repay the loan. This type of contribution is not of a continuing nature.

* * * * *

■ 16. In § 26.71, revise paragraphs (e) and (l) to read as follows:

§ 26.71 What rules govern determinations concerning control?

* * * * *

(e) Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(1) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the nondisadvantaged individual remains involved with the firm in any capacity, there is a rebuttable presumption of control by the non-disadvantaged individual unless the disadvantaged individual now owning the firm demonstrates to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned and/or controlled the firm.

§ 26.73 [Amended]

■ 17. In § 26.73, in paragraph (g), remove the words “unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified” and in paragraph (h), remove “26.35” and add in its place “26.65”.

■ 18. In § 26.83, revise paragraphs (c), (h), and (j), to read as follows:

§ 26.83 What procedures do recipients follow in making certification decisions?

(c)(1) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(i) Perform an on-site visit to the firm’s principal place of business. You must interview the principal officers and review their résumés and/or work histories. You may interview key personnel of the firm if necessary. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely

upon the site visit report of any other recipient with respect to a firm applying for certification;

(ii) Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing

(iii) Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank account signature cards;

(iv) Determine the work history of the firm, including contracts it has received, work it has completed; and payroll records;

(v) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any.

(vi) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(vii) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 3 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.

(viii) Require potential DBEs to complete and submit an appropriate application form, except as otherwise provided in § 26.85 of this part.

(2) You must use the application form provided in Appendix F to this part without change or revision. However, you may provide in your DBE program, with the written approval of the concerned operating administration, for supplementing the form by requesting specified additional information not inconsistent with this part.

(3) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by State law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(4) You must review all information on the form prior to making a decision about the eligibility of the firm. You may request clarification of information

contained in the application at any time in the application process.

(h)(1) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of § 26.87 of this part, except as provided in § 26.67(b)(1) of this part.

(2) You may not require DBEs to reapply for certification or undergo a recertification process. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section or relating to suspension of certification under § 26.88), a complaint, or other information concerning the firm’s eligibility. If information comes to your attention that leads you to question the firm’s eligibility, you may conduct an on-site review on an unannounced basis, at the firm’s offices and job sites.

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm’s owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm’s circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm’s size and gross receipts (e.g., submission of Federal tax returns). If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under § 26.109(c).

■ 19. In § 26.86, remove and reserve paragraph (b) and add a sentence to the end of paragraph (c) to read as follows:

§ 26.86 What rules govern recipients’ denials of initial requests for certification?

(c) * * * An applicant’s appeal of your decision to the Department

pursuant to § 26.89 does not extend this period.

* * * * *

■ 20. In § 26.87, revise paragraphs (f) and (g) to read as follows:

§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?

* * * * *

(f) *Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information relevant to eligibility that has been concealed or misrepresented by the firm;

(4) A change in the certification standards or requirements of the Department since you certified the firm;

(5) Your decision to certify the firm was clearly erroneous;

(6) The firm has failed to cooperate with you (see § 26.109(c));

(7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see § 26.73(a)(2)); or

(8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.

* * * * *

■ 21. Add § 26.88 to read as follows:

§ 26.88 Summary suspension of certification.

(a) A recipient shall immediately suspend a DBE's certification without adhering to the requirements in § 26.87(d) of this part when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

(b)(1) A recipient may immediately suspend a DBE's certification without adhering to the requirements in § 26.87(d) when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by § 26.83(i) of this part or fails to timely file an affidavit of no change under § 26.83(j).

(2) In determining the adequacy of the evidence to issue a suspension under paragraph (b)(1) of this section, the recipient shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

(c) The concerned operating administration may direct the recipient to take action pursuant to paragraph (a) or (b) of this section if it determines that information available to it is sufficient to warrant immediate suspension.

(d) When a firm is suspended pursuant to paragraph (a) or (b) of this section, the recipient shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

(e) Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under § 26.87 of this part to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

(f) While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward a recipient's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long

as the DBE is performing a commercially useful function under the existing contract.

(g) Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide to the recipient information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the recipient must either lift the suspension and reinstate the firm's certification or commence a decertification action under § 26.87 of this part. If the recipient commences a decertification proceeding, the suspension remains in effect during the proceeding.

(h) The decision to immediately suspend a DBE under paragraph (a) or (b) of this section is not appealable to the US Department of Transportation. The failure of a recipient to either lift the suspension and reinstate the firm or commence a decertification proceeding, as required by paragraph (g) of this section, is appealable to the U.S. Department of Transportation under § 26.89 of this part, as a constructive decertification.

■ 22. In § 26.89, revise paragraphs (a)(1) and (3), (c), and (e) to read as follows:

§ 26.89 What is the process for certification appeals to the Department of Transportation?

(a)(1) If you are a firm that is denied certification or whose eligibility is removed by a recipient, including SBA-certified firms, you may make an administrative appeal to the Department.

* * * * *

(3) Send appeals to the following address: U.S. Department of Transportation, Departmental Office of Civil Rights, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.

* * * * *

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late

filing of the appeal or in the interest of justice.

* * * * *

(e) The Department makes its decision based solely on the entire administrative record as supplemented by the appeal. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may also supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, State, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

* * * * *

■ 23. Revise appendix A to part 26 to read as follows:

Appendix A to Part 26—Guidance Concerning Good Faith Efforts

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make sufficient good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix.

The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an

adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. (1) Conducting market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.

(2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional Agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract

goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. (1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

(2) A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in § 26.53(b)(2)(vi), you must also require the

contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

VI. A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.

■ 24. Revise appendix B to part 26 to read as follows:

**Appendix B to 49 CFR Part 26—
Uniform Report of DBE Awards or
Commitments and Payments Form**

**INSTRUCTIONS FOR COMPLETING THE
UNIFORM REPORT OF DBE AWARDS/
COMMITMENTS AND PAYMENTS**

Recipients of Department of Transportation (DOT) funds are expected to keep accurate data regarding the contracting opportunities available to firms paid for with DOT dollars. Failure to submit contracting data relative to the DBE program will result in noncompliance with Part 26. All dollar values listed on this form should represent the DOT share attributable to the Operating Administration (OA): Federal Highway Administration (FHWA), Federal Aviation Administration (FAA) or Federal Transit Administration (FTA) to which this report will be submitted.

1. Indicate the DOT (OA) that provides your Federal financial assistance. If assistance comes from more than one OA, use separate reporting forms for each OA. If you are an FTA recipient, indicate your Vendor Number in the space provided.

2. If you are an FAA recipient, indicate the relevant AIP Numbers covered by this report. If you are an FTA recipient, indicate the Grant/Project numbers covered by this report. If more than ten attach a separate sheet.

3. Specify the Federal fiscal year (i.e., October 1–September 30) in which the covered reporting period falls.

4. State the date of submission of this report.

5. Check the appropriate box that indicates the reporting period that the data provided in this report covers. For FHWA and FTA recipients, if this report is due June 1, data should cover October 1–March 31. If this report is due December 1, data should cover April 1–September 30. If the report is due to the FAA, data should cover the entire year.

6. Provide the name and address of the recipient.

7. State your overall DBE goal(s) established for the Federal fiscal year of the report being submitted to and approved by the relevant OA. Your overall goal is to be reported as well as the breakdown for specific Race Conscious and Race Neutral projections (both of which include gender-conscious/neutral projections). The Race Conscious projection should be based on measures that focus on and provide benefits only for DBEs. The use of contract goals is

a primary example of a race conscious measure. The Race Neutral projection should include measures that, while benefiting DBEs, are not solely focused on DBE firms. For example, a small business outreach program, technical assistance, and prompt payment clauses can assist a wide variety of businesses in addition to helping DBE firms.

**Section A: Awards and Commitments Made
During This Period**

The amounts in items 8(A)–10(I) should include all types of prime contracts awarded and all types of subcontracts awarded or committed, including: professional or consultant services, construction, purchase of materials or supplies, lease or purchase of equipment and any other types of services. All dollar amounts are to reflect only the Federal share of such contracts and should be rounded to the nearest dollar.

Line 8: Prime contracts awarded this period: The items on this line should correspond to the contracts directly between the recipient and a supply or service contractor, with no intermediaries between the two.

8(A). Provide the *total dollar amount* for all prime contracts assisted with DOT funds and awarded during this reporting period. This value should include the entire Federal share of the contracts without removing any amounts associated with resulting subcontracts.

8(B). Provide the *total number* of all prime contracts assisted with DOT funds and awarded during this reporting period.

8(C). From the total dollar amount awarded in item 8(A), provide the *dollar amount* awarded in prime contracts to certified DBE firms during this reporting period. This amount should not include the amounts sub contracted to other firms.

8(D). From the total number of prime contracts awarded in item 8(B), specify the *number* of prime contracts awarded to certified DBE firms during this reporting period.

8(E&F). This field is closed for data entry. Except for the very rare case of DBE-set asides permitted under 49 CFR part 26, all prime contracts awarded to DBEs are regarded as race-neutral.

8(G). From the total dollar amount awarded in item 8(C), provide the *dollar amount* awarded to certified DBEs through the use of Race Neutral methods. See the definition of Race Neutral in item 7 and the explanation in item 8 of project types to include.

8(H). From the total number of prime contracts awarded in 8(D), specify the *number* awarded to DBEs through Race Neutral methods.

8(I). Of all prime contracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the dollar amount in item 8(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.

Line 9: Subcontracts awarded/committed this period: Items 9(A)–9(I) are derived in the same way as items 8(A)–8(I), except that these calculations should be based on subcontracts rather than prime contracts. Unlike prime contracts, which may only be awarded, subcontracts may be either awarded or committed.

9(A). If filling out the form for general reporting, provide the total dollar amount of subcontracts assisted with DOT funds awarded or committed during this period. This value should be a subset of the total dollars awarded in prime contracts in 8(A), and therefore should never be greater than the amount awarded in prime contracts. If filling out the form for project reporting, provide the total dollar amount of subcontracts assisted with DOT funds awarded or committed during this period. This value should be a subset of the total dollars awarded or previously in prime contracts in 8(A). The sum of all subcontract amounts in consecutive periods should never exceed the sum of all prime contract amounts awarded in those periods.

9(B). Provide the total number of all subcontracts assisted with DOT funds that were awarded or committed during this reporting period.

9(C). From the total dollar amount of subcontracts awarded/committed this period in item 9(A), provide the total dollar amount awarded in sub contracts to DBEs.

9(D). From the total number of subcontracts awarded or committed in item 9(B), specify the number of sub contracts awarded or committed to DBEs.

9(E). From the total dollar amount of subcontracts awarded or committed to DBEs this period, provide the amount in dollars to DBEs using Race Conscious measures.

9(F). From the total number of subcontracts awarded or committed to DBEs this period, provide the number of sub contracts awarded or committed to DBEs using Race Conscious measures.

9(G). From the total dollar amount of subcontracts awarded/committed to DBEs this period, provide the amount in dollars to DBEs using Race Neutral measures.

9(H). From the total number of subcontracts awarded/committed to DBEs this period, provide the number of sub contracts awarded to DBEs using Race Neutral measures.

9(I). Of all subcontracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the dollar amount in item 9(C) by the dollar amount in item 9(A) to derive this percentage. Round percentage to the nearest tenth.

Line 10: Total contracts awarded or committed this period. These fields should be used to show the total dollar value and number of contracts awarded to DBEs and to calculate the overall percentage of dollars awarded to DBEs.

10(A)–10(B). These fields are unavailable for data entry.

10(C)–10(H). Combine the total values listed on the prime contracts line (Line 8) with the corresponding values on the subcontracts line (Line 9).

10(I). Of all contracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the total dollars awarded to DBEs in item 10(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.

Section B: Breakdown by Ethnicity & Gender of Contracts Awarded to DBEs This Period

11–17. Further breakdown the contracting activity with DBE involvement. The Total Dollar Amount to DBEs in 17(C) should equal the Total Dollar Amount to DBEs in 10(C). Likewise the total number of contracts to DBEs in 17(F) should equal the Total Number of Contracts to DBEs in 10(D).

Line 16: The “Non-Minority” category is reserved for any firms whose owners are not members of the presumptively disadvantaged groups already listed, but who are either “women” OR eligible for the DBE program on an individual basis. All DBE firms must be certified by the Unified Certification Program to be counted in this report.

Section C: Payments on Ongoing Contracts

Line 18(A–E). Submit information on contracts that are currently in progress. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.

18(A). Provide the total dollar amount paid to all firms performing work on contracts.

18(B). Provide the total number of contracts where work was performed during the reporting period.

18(C). From the total number of contracts provided in 18(A) provide the total number of contracts that are currently being performed by DBE firms for which payments have been made.

18(D). From the total dollar amount paid to all firms in 18(A), provide the total dollar

value paid to DBE firms currently performing work during this period.

18(E). Provide the total number of DBE firms that received payment during this reporting period. For example, while 3 contracts may be active during this period, one DBE firm may be providing supplies or services on all three contracts. This field should only list the number of DBE firms performing work.

18(F). Of all payments made during this period, calculate the percentage going to DBEs. Divide the total dollar value to DBEs in item 18(D) by the total dollars of all payments in 18(B). Round percentage to the nearest tenth.

Section D: Actual Payments on Contracts Completed This Reporting Period

This section should provide information only on contracts that are closed during this period. All dollar amounts are to reflect the entire Federal share of such contracts, and should be rounded to the nearest dollar.

19(A). Provide the total number of contracts completed during this reporting period that used Race Conscious measures. Race Conscious contracts are those with contract goals or another race conscious measure.

19(B). Provide the total dollar value of prime contracts completed this reporting period that had race conscious measures.

19(C). From the total dollar value of prime contracts completed this period in 19(B), provide the total dollar amount of dollars awarded or committed to DBE firms in order

to meet the contract goals. This applies only to Race Conscious contracts.

19(D). Provide the actual total DBE participation in dollars on the race conscious contracts completed this reporting period.

19(E). Of all the contracts completed this reporting period using Race Conscious measures, calculate the percentage of DBE participation. Divide the total dollar amount to DBEs in item 19(D) by the total dollar value provided in 19(B) to derive this percentage. Round to the nearest tenth.

20(A)–20(E). Items 21(A)–21(E) are derived in the same manner as items 19(A)–19(E), except these figures should be based on contracts completed using Race Neutral measures.

20(C). This field is closed.

21(A)–21(D). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above. 21(C). This field is closed.

21(E). Calculate the overall percentage of dollars to DBEs on completed contracts. Divide the Total DBE participation dollar value in 21(D) by the Total Dollar Value of Contracts Completed in 21(B) to derive this percentage. Round to the nearest tenth.

23. Name of the Authorized Representative preparing this form.

24. Signature of the Authorized Representative.

25. Phone number of the Authorized Representative.

**Submit your completed report to your Regional or Division Office.

BILLING CODE 4910-9X-P

UNIFORM REPORT OF DBE COMMITMENTS AWARDS AND PAYMENTS									
Please refer to the Instructions about the data items on filing of this form.									
1. FTA Number: <input type="text"/>									
2. Submitting Firm (only one)									
3. FTA Number (FAA Use Only): <input type="text"/>									
4. Reporting Period: <input type="text"/>									
5. Name and address of Reporting Firm: <input type="text"/>									
6. Award DBE Goal(s): <input type="text"/>									
7. Name of Contract Project: <input type="text"/>									
8. Overall Goal: <input type="text"/>									
Awards/Commitments this Reporting Period									
A	B	C	D	E	F	G	H	I	J
Awards/Commitments Made During this Reporting Period (Total contracts and commitments submitted during the reporting period)	Total Dollars	Total Number	Total to DBE (dollars)	Total to DBE (Number)	Total to DBE (Percentage)	Total to DBE (Rate)	Total to DBE (Rate)	Total to DBE (Rate)	Percentage of Total Dollars to DBE
1. Total									
2. Breakdown by Ethnicity									
3. Breakdown by Gender									
B. Breakdown by Ethnicity									
Total to DBE (Dollar amount)									
1. Black American									
2. Hispanic American									
3. Native American									
4. Asian Pacific American									
5. Subcontinent Asian American									
6. Non-Minority									
TOTAL									
B. Breakdown by Gender									
Total to DBE (Number)									
1. Women									
2. Men									
TOTAL									
C. Contracts Awarded to DBE this Period									
Total to DBE (Dollar amount)									
1. Women									
2. Men									
TOTAL									
D. Payments Made this Period									
Total Dollars Paid									
Total Number of Contracts with DBE									
Total Payments to DBE Firms									
Total Number of DBE Firms Paid									
Percent to DBE									
E. Total Payments on Contracts Completed this Reporting Period									
Number of Contracts Completed									
Total Dollar Value of Contracts Completed									
DBE Participation Needed to Meet Goal (Dollar)									
Total DBE Participation (Dollar)									
Percent to DBE									
23. Submitted By: <input type="text"/>									
24. Signature: <input type="text"/>									
25. Phone Number: <input type="text"/>									

25. Revise appendix F to part 26 to read as follows:



Appendix F

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

Roadmap for Applicants

1. Should I apply?

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

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

2. How do I apply?

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

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

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

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

5. Where can I find more information?

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

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

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

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



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

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

Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information

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

B. Prior/Other Certifications and Applications

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

Section 2: GENERAL INFORMATION

A. Business profile:

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

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

B. Relationships and Dealings with Other Businesses

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



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

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

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

Section 3: MAJORITY OWNER INFORMATION

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

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

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

B. Additional Owner Information

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

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

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

Section 4: CONTROL

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

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



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

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

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

C. Inventory: Indicate firm inventory in these categories:

(1) Equipment and Vehicles

State the make and model, and current dollar value of each piece of equipment and motor vehicle held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm or owner, whether it is used as collateral, and where this item is stored.

(2) Office Space

State the street address of each office space held and/or used by your firm. Indicate whether your firm or owner owns or leases the office space and the current dollar value of that property or its lease.

(3) Storage Space

State the street address of each storage space held and/or used by your firm. Indicate whether your firm or owner owns or leases the storage space and the current dollar value of that property or its lease. Provide a signed lease agreement for each property.

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

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

E. Financial Banking Information

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

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

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

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

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

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

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

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

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

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

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

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

AIRPORT CONCESSION (ACDBE) APPLICANTS

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

AFFIDAVIT & SIGNATURE

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



Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information

(1) Contact person and Title: _____ (2) Legal name of firm: _____
(3) Phone #: (____) _____ - _____ (4) Other Phone #: (____) _____ - _____ (5) Fax #: (____) _____ - _____
(6) E-mail: _____ (7) Firm Websites: _____
(8) Street address of firm (No P.O. Box): _____ City: _____ County/Parish: _____ State: _____ Zip: _____
(9) Mailing address of firm (if different): _____ City: _____ County/Parish: _____ State: _____ Zip: _____

B. Prior/Other Certifications and Applications

(10) Is your firm currently certified for any of the following U.S. DOT programs?
 DBE ACDBE Names of certifying agencies: _____

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

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

Date ____/____/____ State/UCP Member: _____ Date ____/____/____ State/UCP Member: _____

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

- (a) Denied certification or decertified as a DBE, ACDBE, 8(a), SDB, MBE/WBE firm? Yes No
(b) Withdrawn an application for these programs, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or Federal entity? Yes No

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

Section 2: GENERAL INFORMATION

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

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

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

(5) Method of acquisition (Check all that apply):
 Started new business Bought existing business Inherited business Secured concession
 Merger or consolidation Other (explain) _____



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

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

- Sole Proprietorship
- Partnership
- Limited Liability Company
- Applying as an ACDBE
- Limited Liability Partnership
- Corporation
- Joint Venture (Identify all JV partners _____)
- Other. Describe _____

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

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

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

B. Relationships and Dealings with Other Businesses

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

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

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

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



Section 3: MAJORITY OWNER INFORMATION

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

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

(5) Gender: Male Female
 (6) Ethnic group membership (Check all that apply):
 Black Hispanic
 Asian Pacific Native American
 Subcontinent Asian
 Other (specify) _____
 (7) U.S. Citizenship:
 U.S. Citizen
 Lawfully Admitted Permanent Resident
 (8) Number of years as owner: _____
 (9) Percentage owned: _____ %
 Class of stock owned: _____
 Date acquired _____
 (10) Initial investment to acquire ownership interest in firm:

Type	Dollar Value
Cash	\$ _____
Real Estate	\$ _____
Equipment	\$ _____
Other	\$ _____

 Describe how you acquired your business:
 Started business myself
 It was a gift from: _____
 I bought it from: _____
 I inherited it from: _____
 Other _____
 (Attach documentation substantiating your investment)

B. Additional Owner Information

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

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

 (b) Does this owner work for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week? If yes, identify this activity: _____
 (4)(a) What is the personal net worth of this disadvantaged owner applying for certification? \$ _____
 (b) Has any trust been created for the benefit of this disadvantaged owner(s)? Yes No
 (If Yes, you may be asked to provide a copy of the trust instrument).
 (5) Do any of your immediate family members, managers, or employees own, manage, or are associated with another company? Yes No If Yes, provide their name, relationship, company, type of business, and indicate whether they own or manage the company: (Please attach extra sheets, if needed): _____



Section 3: 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: Male Female
 (6) Ethnic group membership (Check all that apply)
 Black Hispanic
 Asian Pacific Native American
 Subcontinent Asian
 Other (specify) _____
 (7) U.S. Citizenship:
 U.S. Citizen
 Lawfully Admitted Permanent Resident

(8) Number of years as owner: _____
 (9) Percentage owned: _____ %
 Class of stock owned: _____
 Date acquired: _____
 (10) Initial investment to acquire ownership interest in firm:

Type	Dollar Value
Cash	\$ _____
Real Estate	\$ _____
Equipment	\$ _____
Other	\$ _____

Describe how you acquired your business:
 Started business myself
 It was a gift from: _____
 I bought it from: _____
 I inherited it from: _____
 Other _____
 (Attach documentation substantiating your investment)

B. Additional Owner Information

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

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

 (b) Does this owner work for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week? If yes, identify this activity: _____
 (4)(a) What is the personal net worth of this disadvantaged owner applying for certification? \$ _____
 (b) Has any trust been created for the benefit of this disadvantaged owner(s)? Yes No
 (If Yes, you may be asked to provide a copy of the trust instrument).
 (5) Do any of your immediate family members, managers, or employees own, manage, or are associated with another company? Yes No If Yes, provide their name, relationship, company, type of business, and indicate whether they own or manage: (Please attach extra sheets, if needed): _____



Section 4: CONTROL

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

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

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

Yes No If Yes, identify for each:

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

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

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

Yes No If Yes, identify for each:

Firm Name: _____ Person: _____

Nature of Business Relationship: _____

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

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

A= Always F = Frequently	S = Seldom N = Never	Majority Owner (51% or more)				Minority Owner (49% or less)			
		Name: _____ Title: _____ Percent Owned: _____				Name: _____ Title: _____ Percent Owned: _____			
Sets policy for company direction scope of operations		A	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				Officer Director Manager Key Personnel			
	Name: _____				Name: _____			
	Title: _____				Title: _____			
	Race and Gender: _____				Race and Gender: _____			
	Percent Owned: _____				Percent Owned: _____			
Sets policy for company direction scope of operations	A	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

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

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

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

1. Equipment and Vehicles

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

2. Office Space

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



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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

AIRPORT CONCESSION (ACDBE) APPLICANTS ONLY MUST COMPLETE THIS SECTION

Identify the following information concerning the ACDBE applicant firm:

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

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

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



AFFIDAVIT OF CERTIFICATION

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

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

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

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

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

I agree to submit to government audit, examination and review of books, records, documents and files, in whatever form they exist, of the named firm and its affiliates, inspection of its 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, subcontract, concession lease or sublease, I agree to promptly and directly provide the prime contractor, if any, and the Department, recipient agency, or federal funding agency on an ongoing basis, current, complete and accurate information regarding (1) work performed on the project; (2) payments; and (3) proposed changes, if any, to the foregoing arrangements.

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

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

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

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

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

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

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

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

NOTARY CERTIFICATE



UNIFORM CERTIFICATION APPLICATION SUPPORTING DOCUMENTS CHECKLIST

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

Required Documents for All Applicants

- 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 Sta), SDB, MBE WBE certifications, denials, and or decertifications, if applicable, and any U.S. DOT appeal decisions on these actions.
- Bank authorization and signatory cards
- Schedule of salaries (or other remuneration) paid to all officers, managers, owners, and or directors of the firm
- List of all employees, job titles, and dates of employment.
- Proof of warehouse storage facility ownership or lease arrangements

Partnership or Joint Venture

- Original and any amended Partnership or Joint Venture Agreements

Corporation or LLC

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

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

Optional Documents to Be Provided on Request

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


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

Suppliers

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

■ 26. Add appendix G to part 26 to read as follows:

Appendix G to Part 26—Personal Net Worth Statement

	U.S. Department of Transportation	Personal Net Worth Statement For DBE/ACDBE Program Eligibility As of _____	OMB APPROVAL NO: EXPIRATION DATE:		
This form is used by all participants in the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) Programs. Each individual owner of a firm applying to participate as a DBE or ACDBE, whose ownership and control are relied upon for DBE certification must complete this form. Each person signing this form authorizes the Unified Certification Program (UCP) recipient to make inquiries as necessary to verify the accuracy of the statements made. The agency you apply to will use the information provided to determine whether an owner is economically disadvantaged as defined in the DBE program regulations 49 C.F.R. Parts 23 and 26. Return form to appropriate UCP certifying member, not U.S. DOT.					
Name		Business Phone			
Residence Address (As reported to the IRS) City, State and Zip Code		Residence Phone			
Business Name of Applicant Firm					
Spouse's Full Name (Marital Status: Single, Married, Divorced, Union)					
ASSETS		LIABILITIES			
(Omit Cents)		(Omit Cents)			
Cash and Cash Equivalents	\$	Loan on Life Insurance (Complete Section 5)	\$		
Retirement Accounts (IRAs, 401Ks, 403Bs, Pensions, etc.) (Report full value minus tax and interest penalties that would apply if assets were distributed today) (Complete Section 3)	\$	Mortgages on Real Estate Excluding Primary Residence Debt (Complete Section 4)	\$		
Brokerage, Investment Accounts	\$	Notes, Obligations on Personal Property (Complete Section 6)	\$		
Assets Held in Trust	\$	Notes & Accounts Payable to Banks and Others (Complete Section 2)	\$		
Loans to Shareholders & Other Receivables (Complete section 6)	\$	Other Liabilities (Complete Section 8)	\$		
Real Estate Excluding Primary Residence (Complete Section 4)	\$	Unpaid Taxes (Complete Section 8)	\$		
Life Insurance (Cash Surrender Value Only) (Complete Section 5)	\$				
Other Personal Property and Assets (Complete Section 6)	\$				
Business Interests Other Than the Applicant Firm (Complete Section 7)	\$				
Total Assets	\$	Total Liabilities	\$		
		NET WORTH			
Section 2. Notes Payable to Banks and Others					
Name of Noteholder(s)	Original Balance	Current Balance	Payment Amount	Frequency (monthly, etc.)	How Secured or Endorsed Type of Collateral

Section 6. Other Personal Property and Assets (Use attachments as necessary)				
Type of Property or Asset	Total Present Value	Amount of Liability (Balance)	Is this asset insured?	Lien or Note amount and Terms of Payment
Automobiles and Vehicles (including recreation vehicles, motorcycles, boats, etc.) Include personally owned vehicles that are leased or rented to businesses or other individuals.				
Household Goods / Jewelry				
Other (List)				
Accounts and Notes Receivables				

Section 7. Value of Other Business Investments, Other Businesses Owned (excluding applicant firm)
Sole Proprietorships, General Partners, Joint Ventures, Limited Liability Companies, Closely-held and Public Traded Corporations

Section 8. Other Liabilities and Unpaid Taxes (Describe)

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

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

NOTARY CERTIFICATE:
(Insert applicable state acknowledgment, affirmation, or oath)

Signature (DBE/ACDBE Owner) _____ Date _____

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



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

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

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

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

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

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

Assets

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

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

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

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

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

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

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

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

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

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

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

Liabilities

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

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

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

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

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

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

Transfers of Assets:

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

Affidavit

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