

# **NCHRP**

## **SYNTHESIS 343**

**NATIONAL  
COOPERATIVE  
HIGHWAY  
RESEARCH  
PROGRAM**

### **Management of Disadvantaged Business Enterprise Issues in Construction Contracting**

***A Synthesis of Highway Practice***

TRANSPORTATION RESEARCH BOARD  
OF THE NATIONAL ACADEMIES

## **TRANSPORTATION RESEARCH BOARD EXECUTIVE COMMITTEE 2005 (Membership as of February 2005)**

### **OFFICERS**

**Chair:** *Joseph H. Boardman, Commissioner, New York State DOT*

**Vice Chair:** *Michael D. Meyer, Professor, School of Civil and Environmental Engineering, Georgia Institute of Technology*

**Executive Director:** *Robert E. Skinner, Jr., Transportation Research Board*

### **MEMBERS**

MICHAEL W. BEHRENS, *Executive Director, Texas DOT*

LARRY L. BROWN, SR., *Executive Director, Mississippi DOT*

DEBORAH H. BUTLER, *Vice President, Customer Service, Norfolk Southern Corporation and Subsidiaries, Atlanta, GA*

ANNE P. CANBY, *President, Surface Transportation Policy Project, Washington, DC*

JOHN L. CRAIG, *Director, Nebraska Department of Roads*

DOUGLAS G. DUNCAN, *President and CEO, FedEx Freight, Memphis, TN*

NICHOLAS J. GARBER, *Professor of Civil Engineering, University of Virginia, Charlottesville*

ANGELA GITTENS, *Consultant, Miami, FL*

GENEVIEVE GIULIANO, *Director, Metrans Transportation Center, and Professor, School of Policy, Planning, and Development, USC, Los Angeles*

BERNARD S. GROSECLOSE, JR., *President and CEO, South Carolina State Ports Authority*

SUSAN HANSON, *Landry University Professor of Geography, Graduate School of Geography, Clark University*

JAMES R. HERTWIG, *President, CSX Intermodal, Jacksonville, FL*

GLORIA J. JEFF, *Director, Michigan DOT*

ADIB K. KANAFANI, *Cahill Professor of Civil Engineering, University of California, Berkeley*

HERBERT S. LEVINSON, *Principal, Herbert S. Levinson Transportation Consultant, New Haven, CT*

SUE MCNEIL, *Director and Professor, Urban Transportation Center, University of Illinois, Chicago*

MICHAEL MORRIS, *Director of Transportation, North Central Texas Council of Governments*

CAROL A. MURRAY, *Commissioner, New Hampshire DOT*

JOHN E. NJORD, *Executive Director, Utah DOT*

PHILIP A. SHUCET, *Commissioner, Virginia DOT*

MICHAEL S. TOWNES, *President and CEO, Hampton Roads Transit, Hampton, VA*

C. MICHAEL WALTON, *Ernest H. Cockrell Centennial Chair in Engineering, University of Texas, Austin*

LINDA S. WATSON, *Executive Director, LYNX—Central Florida Regional Transportation Authority*

MARION C. BLAKEY, *Federal Aviation Administrator, U.S.DOT (ex officio)*

SAMUEL G. BONASSO, *Acting Administrator, Research and Special Programs Administration, U.S.DOT (ex officio)*

REBECCA M. BREWSTER, *President and COO, American Transportation Research Institute, Smyrna, GA (ex officio)*

GEORGE BUGLIARELLO, *Chancellor, Polytechnic University, and Foreign Secretary, National Academy of Engineering (ex officio)*

THOMAS H. COLLINS (Adm., U.S. Coast Guard), *Commandant, U.S. Coast Guard (ex officio)*

JENNIFER L. DORN, *Federal Transit Administrator, U.S.DOT (ex officio)*

JAMES J. EBERHARDT, *Chief Scientist, Office of FreedomCAR and Vehicle Technologies, U.S. Department of Energy (ex officio)*

EDWARD R. HAMBERGER, *President and CEO, Association of American Railroads (ex officio)*

JOHN C. HORSLEY, *Executive Director, American Association of State Highway and Transportation Officials (ex officio)*

ROBERT D. JAMISON, *Acting Administrator, Federal Railroad Administration, U.S.DOT (ex officio)*

EDWARD JOHNSON, *Director, Applied Science Directorate, National Aeronautics and Space Administration (ex officio)*

RICK KOWALEWSKI, *Deputy Director, Bureau of Transportation Statistics, U.S.DOT (ex officio)*

WILLIAM W. MILLAR, *President, American Public Transportation Association (ex officio)*

MARY E. PETERS, *Federal Highway Administrator, U.S.DOT (ex officio)*

SUZANNE RUDZINSKI, *Director, Transportation and Regional Programs, U.S. Environmental Protection Agency (ex officio)*

JEFFREY W. RUNGE, *National Highway Traffic Safety Administrator, U.S.DOT (ex officio)*

ANNETTE M. SANDBERG, *Federal Motor Carrier Safety Administrator, U.S.DOT (ex officio)*

WILLIAM G. SCHUBERT, *Maritime Administrator, U.S.DOT (ex officio)*

JEFFREY N. SHANE, *Under Secretary for Policy, U.S.DOT (ex officio)*

CARL A. STROCK (Maj. Gen., U.S. Army), *Chief of Engineers and Commanding General, U.S. Army Corps of Engineers (ex officio)*

### **NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM**

#### **Transportation Research Board Executive Committee Subcommittee for NCHRP**

JOSEPH H. BOARDMAN, *New York State DOT (Chair)*

JOHN C. HORSLEY, *American Association of State Highway  
and Transportation Officials*

MICHAEL D. MEYER, *Georgia Institute of Technology*

MARY E. PETERS, *Federal Highway Administration*

ROBERT E. SKINNER, JR., *Transportation Research Board*

MICHAEL S. TOWNES, *Hampton Roads Transit, Hampton, VA*

C. MICHAEL WALTON, *University of Texas, Austin*

---

---

**NCHRP SYNTHESIS 343**

---

---

**Management of Disadvantaged  
Business Enterprise Issues  
in Construction Contracting**

***A Synthesis of Highway Practice***

**CONSULTANT**

GARY SMITH

North Dakota State University

**TOPIC PANEL**

JAMES DOSSETT, *Texas Department of Transportation*

FREDERICK D. HEJL, *Transportation Research Board*

MICHAEL KISSEL, *California Department of Transportation*

SHARON M. TAEGEL, *Missouri Department of Transportation*

DEAN TESTA, *Kansas Department of Transportation*

JAMES S. THIEL, *Wisconsin Department of Transportation*

CHARLES KLEMSTINE, *Federal Highway Administration (Liaison)*

GERALD YAKOWENKO, *Federal Highway Administration (Liaison)*

**SUBJECT AREAS**

Planning and Administration and Materials and Construction

---

Research Sponsored by the American Association of State Highway and Transportation Officials  
in Cooperation with the Federal Highway Administration

---

**TRANSPORTATION RESEARCH BOARD**

WASHINGTON, D.C.

2005

[www.TRB.org](http://www.TRB.org)

## NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Systematic, well-designed research provides the most effective approach to the solution of many problems facing highway administrators and engineers. Often, highway problems are of local interest and can best be studied by highway departments individually or in cooperation with their state universities and others. However, the accelerating growth of highway transportation develops increasingly complex problems of wide interest to highway authorities. These problems are best studied through a coordinated program of cooperative research.

In recognition of these needs, the highway administrators of the American Association of State Highway and Transportation Officials initiated in 1962 an objective national highway research program employing modern scientific techniques. This program is supported on a continuing basis by funds from participating member states of the Association and it receives the full cooperation and support of the Federal Highway Administration, United States Department of Transportation.

The Transportation Research Board of the National Academies was requested by the Association to administer the research program because of the Board's recognized objectivity and understanding of modern research practices. The Board is uniquely suited for this purpose as it maintains an extensive committee structure from which authorities on any highway transportation subject may be drawn; it possesses avenues of communications and cooperation with federal, state, and local governmental agencies, universities, and industry; its relationship to the National Research Council is an insurance of objectivity; it maintains a full-time research correlation staff of specialists in highway transportation matters to bring the findings of research directly to those who are in a position to use them.

The program is developed on the basis of research needs identified by chief administrators of the highway and transportation departments and by committees of AASHTO. Each year, specific areas of research needs to be included in the program are proposed to the National Research Council and the Board by the American Association of State Highway and Transportation Officials. Research projects to fulfill these needs are defined by the Board, and qualified research agencies are selected from those that have submitted proposals. Administration and surveillance of research contracts are the responsibilities of the National Research Council and the Transportation Research Board.

The needs for highway research are many, and the National Cooperative Highway Research Program can make significant contributions to the solution of highway transportation problems of mutual concern to many responsible groups. The program, however, is intended to complement rather than to substitute for or duplicate other highway research programs.

---

**NOTE: The Transportation Research Board of the National Academies, the National Research Council, the Federal Highway Administration, the American Association of State Highway and Transportation Officials, and the individual states participating in the National Cooperative Highway Research Program do not endorse products or manufacturers. Trade or manufacturers' names appear herein solely because they are considered essential to the object of this report.**

## NCHRP SYNTHESIS 343

Project 20-5 FY 2002 (Topic 34-05)  
ISSN 0547-5570  
ISBN 0-309-09745-2  
Library of Congress Control No. 2005920333

© Transportation Research Board

**Price \$18.00**

### NOTICE

The project that is the subject of this report was a part of the National Cooperative Highway Research Program conducted by the Transportation Research Board with the approval of the Governing Board of the National Research Council. Such approval reflects the Governing Board's judgment that the program concerned is of national importance and appropriate with respect to both the purposes and resources of the National Research Council.

The members of the technical committee selected to monitor this project and to review this report were chosen for recognized scholarly competence and with due consideration for the balance of disciplines appropriate to the project. The opinions and conclusions expressed or implied are those of the research agency that performed the research, and, while they have been accepted as appropriate by the technical committee, they are not necessarily those of the Transportation Research Board, the National Research Council, the American Association of State Highway and Transportation Officials, or the Federal Highway Administration, U.S. Department of Transportation.

Each report is reviewed and accepted for publication by the technical committee according to procedures established and monitored by the Transportation Research Board Executive Committee and the Governing Board of the National Research Council.

*Published reports of the*

### **NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM**

*are available from:*

Transportation Research Board  
Business Office  
500 Fifth Street, NW  
Washington, DC 20001

*and can be ordered through the Internet at:*

<http://www.national-academies.org/trb/bookstore>

Printed in the United States of America

# THE NATIONAL ACADEMIES

## *Advisers to the Nation on Science, Engineering, and Medicine*

The **National Academy of Sciences** is a private, nonprofit, self-perpetuating society of distinguished scholars engaged in scientific and engineering research, dedicated to the furtherance of science and technology and to their use for the general welfare. On the authority of the charter granted to it by the Congress in 1863, the Academy has a mandate that requires it to advise the federal government on scientific and technical matters. Dr. Bruce M. Alberts is president of the National Academy of Sciences.

The **National Academy of Engineering** was established in 1964, under the charter of the National Academy of Sciences, as a parallel organization of outstanding engineers. It is autonomous in its administration and in the selection of its members, sharing with the National Academy of Sciences the responsibility for advising the federal government. The National Academy of Engineering also sponsors engineering programs aimed at meeting national needs, encourages education and research, and recognizes the superior achievements of engineers. Dr. William A. Wulf is president of the National Academy of Engineering.

The **Institute of Medicine** was established in 1970 by the National Academy of Sciences to secure the services of eminent members of appropriate professions in the examination of policy matters pertaining to the health of the public. The Institute acts under the responsibility given to the National Academy of Sciences by its congressional charter to be an adviser to the federal government and, on its own initiative, to identify issues of medical care, research, and education. Dr. Harvey V. Fineberg is president of the Institute of Medicine.

The **National Research Council** was organized by the National Academy of Sciences in 1916 to associate the broad community of science and technology with the Academy's purposes of furthering knowledge and advising the federal government. Functioning in accordance with general policies determined by the Academy, the Council has become the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering in providing services to the government, the public, and the scientific and engineering communities. The Council is administered jointly by both the Academies and the Institute of Medicine. Dr. Bruce M. Alberts and Dr. William A. Wulf are chair and vice chair, respectively, of the National Research Council.

The **Transportation Research Board** is a division of the National Research Council, which serves the National Academy of Sciences and the National Academy of Engineering. The Board's mission is to promote innovation and progress in transportation through research. In an objective and interdisciplinary setting, the Board facilitates the sharing of information on transportation practice and policy by researchers and practitioners; stimulates research and offers research management services that promote technical excellence; provides expert advice on transportation policy and programs; and disseminates research results broadly and encourages their implementation. The Board's varied activities annually engage more than 5,000 engineers, scientists, and other transportation researchers and practitioners from the public and private sectors and academia, all of whom contribute their expertise in the public interest. The program is supported by state transportation departments, federal agencies including the component administrations of the U.S. Department of Transportation, and other organizations and individuals interested in the development of transportation. [www.TRB.org](http://www.TRB.org)

[www.national-academies.org](http://www.national-academies.org)

**NCHRP COMMITTEE FOR PROJECT 20-5**

**CHAIR**

GARY D. TAYLOR, *CTE Engineers*

**MEMBERS**

THOMAS R. BOHUSLAV, *Texas DOT*

DONN E. HANCHER, *University of Kentucky*

DWIGHT HORNE, *Federal Highway Administration*

YSELA LLORT, *Florida DOT*

WESLEY S.C. LUM, *California DOT*

JAMES W. MARCH, *Federal Highway Administration*

JOHN M. MASON, JR., *Pennsylvania State University*

LARRY VELASQUEZ, *New Mexico DOT*

PAUL T. WELLS, *New York State DOT*

**FHWA LIAISON**

WILLIAM ZACCAGNINO

**TRB LIAISON**

MARK R. NORMAN

**COOPERATIVE RESEARCH PROGRAM STAFF**

ROBERT J. REILLY, *Director, Cooperative Research Programs*

CRAWFORD F. JENCKS, *Manager, NCHRP*

EILEEN P. DELANEY, *Director of Publications*

**NCHRP SYNTHESIS STAFF**

STEPHEN R. GODWIN, *Director for Studies and Information Services*

JON WILLIAMS, *Manager, Synthesis Studies*

DONNA L. VLASAK, *Senior Program Officer*

DON TIPPMAN, *Editor*

CHERYL KEITH, *Senior Secretary*

## **FOREWORD**

*By Staff  
Transportation  
Research Board*

Highway administrators, engineers, and researchers often face problems for which information already exists, either in documented form or as undocumented experience and practice. This information may be fragmented, scattered, and unevaluated. As a consequence, full knowledge of what has been learned about a problem may not be brought to bear on its solution. Costly research findings may go unused, valuable experience may be overlooked, and due consideration may not be given to recommended practices for solving or alleviating the problem.

There is information on nearly every subject of concern to highway administrators and engineers. Much of it derives from research or from the work of practitioners faced with problems in their day-to-day work. To provide a systematic means for assembling and evaluating such useful information and to make it available to the entire highway community, the American Association of State Highway and Transportation Officials—through the mechanism of the National Cooperative Highway Research Program—authorized the Transportation Research Board to undertake a continuing study. This study, NCHRP Project 20-5, "Synthesis of Information Related to Highway Problems," searches out and synthesizes useful knowledge from all available sources and prepares concise, documented reports on specific topics. Reports from this endeavor constitute an NCHRP report series, *Synthesis of Highway Practice*.

This synthesis series reports on current knowledge and practice, in a compact format, without the detailed directions usually found in handbooks or design manuals. Each report in the series provides a compendium of the best knowledge available on those measures found to be the most successful in resolving specific problems.

## **PREFACE**

This synthesis report will be of interest to state transportation agencies (STAs) and their contractors as they implement Disadvantaged Business Enterprise (DBE) regulations as set forth in the U.S.DOT Final Rule, revised February 2, 1999. The revised Final Rule caused STAs to change the way they do business by prescribing new regulations, but also providing additional flexibility. The resulting different approaches to requirements among STAs are discussed, including bidder's lists; prompt payment provisions; return of retainage provisions; actual achievements, including accounting and reporting procedures; good faith efforts; and compliance, including substitutions, fraud, and commercially useful functions. The synthesis also includes information on construction and construction management contracts, design-build projects, master contracts (indefinite delivery/indefinite quantity, services on demand, and task ordering), pass-through to local agencies, and STA performance measures. The scope of the study applies generally to all DBE programs, but specifically to those in the highway transportation sector.

A survey was distributed to each TRB representative. It was designed to gather information in four general areas: respondent information, general administration practices, pre-contract administration, and contract administration practices. This report also includes a review of the available literature and previous applicable work.

A panel of experts in the subject area guided the work of organizing and evaluating the collected data and reviewed the final synthesis report. A consultant was engaged to collect and synthesize the information and to write the report. Both the consultant and the members of the oversight panel are acknowledged on the title page. This synthesis is an immediately useful document that records the practices that were acceptable within the limitations of the knowledge available at the time of its preparation. As progress in research and practice continues, new knowledge will be added to that now at hand.

# CONTENTS

- 1 SUMMARY
  
- 3 CHAPTER ONE INTRODUCTION
  - Background, 3
  - Definitions, 3
  - Purpose of Synthesis, 3
  - Scope, 4
  - General Survey Information, 4
  - Organization of Synthesis, 4
  
- 5 CHAPTER TWO BACKGROUND
  - Regulation Objectives, 5
  - Major Rule Changes, 5
  - FHWA Review of Disadvantaged Business Enterprise Plans, 5
  - General Accounting Office Report Summary, 5
  - AASHTO Survey, 6
  - Other Disadvantaged Business Enterprise Regulation Commentary, 6
  - Data Management Systems, 7
  - Websites for Disadvantaged Business Enterprise Program
    - Administration, 7
  - Background Summary, 8
  
- 9 CHAPTER THREE GENERAL ADMINISTRATIVE PRACTICES
  - Organization and Staffing, 9
  - Unified Certification Program, 9
  - Number of Certifications, 10
  - Determination of Ineligibility, 11
  - Goals, 11
  - Counting Second Tier Disadvantaged Business Enterprise
    - Subcontractor Contributions, 11
  - Disadvantaged Business Enterprise Regulation for Local Fund Projects, 12
  - Set-Aside Programs, 12
  - Overconcentration, 12
  - Public Participation, 13
  - Contract Goal-Setting Procedures, 14
  - Disadvantaged Business Enterprise Program Contract Advising, 14
  - Bundled Contracts, 14
  - Disadvantaged Business Enterprise Goals for Other Contracting
    - Methods, 15
  - Design-Build Contracts, 15
  - Prequalification Practices, 16
  - Bidders Lists, 17
  - Bidders List Data Collection, 17
  - Mentor-Protégé Programs, 18

20	CHAPTER FOUR	CONTRACT ADMINISTRATION
		Bidding Patterns, 20
		Disadvantaged Business Enterprise Commitment Submissions, 20
		Good Faith Effort, 20
		Iowa Expedited Good Faith Effort Process, 21
		Minimum Level of Self-Performed Work, 21
		Financial Incentives for Disadvantaged Business Enterprise Use, 21
		Performance Bonds, 22
		Disadvantaged Business Enterprise Bonding Assistance, 23
		Short-Term Loan Program, 23
		Prompt Payment, 24
		Release of Retainage, 24
		Contract Compliance Reviews, 25
		Commercially Useful Function, 25
		Termination of Nonperforming Disadvantaged Business Enterprise Subcontractor, 26
		Tracking Information, 26
		Fraud Investigations, 27
		Program Waivers, 28
29	CHAPTER FIVE	CONCLUSIONS
32	REFERENCES	
33	APPENDIX A	SYNTHESIS QUESTIONNAIRE
44	APPENDIX B	FINAL RULE 49 CFR 26, 2003
91	APPENDIX C	WHAT'S NEW IN THE NEW DOT DISADVANTAGED BUSINESS ENTERPRISE RULE?
93	APPENDIX D	DESIGN-BUILD SPECIAL PROVISION TABLE OF CONTENTS—MINNESOTA
94	APPENDIX E	DETAILS OF OHIO MENTOR-PROTÉGÉ WEBSITE
96	APPENDIX F	GOOD FAITH EFFORT SYSTEMS

# MANAGEMENT OF DISADVANTAGED BUSINESS ENTERPRISE ISSUES IN CONSTRUCTION CONTRACTING

**SUMMARY** The U.S.DOT's February 2, 1999, Final Rule revised the Disadvantaged Business Enterprise (DBE) regulations. The U.S.DOT believed that this change was necessary to remove significant barriers to DBE participation in DOT-assisted contracts. The regulation requirements have caused state transportation agencies (STAs) and contractors to change their way of doing business. Although the regulation prescribes some new requirements, it also provides flexibility by allowing recipients to determine how other provisions are fulfilled. This has resulted in different approaches among the states. This study summarizes the various contract administration procedures and methods that have been implemented by STAs and their contractors to meet the revised DBE regulation requirements. The STA practices listed in this report may not necessarily have been reviewed, approved, acknowledged, or endorsed by the FHWA.

The DBE program has been a work in progress for more than two decades. It has evolved into a program that enables small businesses, owned and controlled by minorities, women, and other disadvantaged individuals, an equal opportunity to compete for contract funds on a wide variety of federal-aid-supported transportation construction projects. Given the difficult environment for all small businesses in the transportation construction industry, the program has been able to provide administrative oversight and various outreach activities through federal-aid-recipient organizations. The overriding finding from the study effort is that, although STAs have a common program definition in 49 CFR 26, they have implemented the requirements in different ways. Thus, the program when viewed at the STA level shows there is not one model to work from. The three main improvements from the regulation revisions noted most frequently by the STAs were:

- The DBE certification process has been redefined under the unified certification program. Before the unified program, DBE firms were required to provide certification information to individual agencies. This duplication of effort was unnecessary and could potentially lead to different determinations of eligibility. The unified certification process allows for reciprocity among all agencies within a state.
- The prompt payment provisions have benefited non-DBE and DBE subcontractors with respect to obtaining payment faster. Variation in the time used to define "prompt" was evident in the data. Many STAs in this study implemented their prompt payment provisions after the 1999 regulation revision.
- The changes in the goal setting process and change to race-neutral (includes gender-neutral) goals has enabled STAs to better match their program goals to the market.

The respondent STAs also noted that their key indicators of program performance were DBE firm growth and graduation, along with the number of firms obtaining STA contracts. This was supported through feedback obtained from surveys, focus groups, and town meetings.

Barriers to the DBE program were also identified in the responses. The greatest barrier to DBE utilization was reported to be the lack of resources (financial, bonding, insurances, etc.) available to the DBE contractors.

The DBE program's evolution, resulting in the recent regulation, has created many new requirements for DBE contractors, non-DBE contractors, and STA administrators. The data

from this study suggest that STAs have, in most instances, adapted their programs or are in the process of addressing the new requirements. The study data show the following:

- State goals are no longer 10% across the board. The variation ranges from 5% to 17%. Goal accomplishment was mixed for 2002, with equal proportions exceeding their goals and not meeting their goals.
- Certified DBEs and ready, willing, and able contractors wanting to work in construction are not the same. States need to track the bidders on their contracts to determine ready, willing, and able DBEs.
- Bonding assistance and financial assistance for DBEs remain predominately U.S.DOT office of programs. One STA local assistance program was identified.
- Mentor–protégé programs have been developed in one-third of the surveyed STAs, with some variations in their structure and format. Their use is not mandatory, but was noted several times as being effective.
- A recommended race-neutral strategy was to break contracts into smaller pieces; however, 50% of the STAs noted that they were experiencing an increase in bundled contracts. The impact of design–build remains unknown at this time.
- A few STAs have been successful at establishing and accomplishing their goals in a race-neutral program. Split goals are predominate among the STA data in this study.
- Good faith efforts are approved nearly 80% of the time, including those that achieve or exceed the contract goal as well as those accepted after evaluation.
- Overconcentration is predominately a complaint-driven process. Not all STAs have a method to evaluate or rate overconcentration. No summary can be given on overconcentration correction strategies because little overconcentration has been reported.
- Waivers on program elements can be submitted to the U.S.DOT. Nearly as many STAs indicated they had been instructed not to submit waivers as those who had submitted waivers. It was unclear, from the questionnaire, if any had been approved.
- Recipients must collect data about bidders on their contracts and subcontracts for later use in calculating overall goals. Data collection was not uniform and not all record keeping is being implemented in accordance with the regulation.

This study represents one of the few published reports on the DBE program. (There is a 2001 General Accounting Office report on the program.) This is a significant contract administration area that needs further data collection and analysis to truly identify best practices and effective solutions. Using technology transfer, best practices and effective solutions discovered could be quickly disseminated to STAs.

## INTRODUCTION

### BACKGROUND

The Disadvantaged Business Enterprise (DBE) program was designed to ensure that small businesses owned and controlled by minorities, women, and other disadvantaged individuals have an equal opportunity to compete for contract funds on FHWA-, FAA-, and FTA-funded projects. The DBE program continues to serve as a mechanism to remedy the effects of current and past discrimination in transportation contracting practices.

The program began in 1980 as a minority/women's business enterprise program established by Title VI of the Civil Rights Act of 1964. Since that time, the program has undergone many changes. Key time line elements related to the evolution of the DBE regulation are as follows:

- 1983—First statutory DBE provision enacted and signed.
- 1987—Program expanded to include airports and women-owned firms.
- 1991—Reauthorization of the expanded program (highway and transit).
- 1992—Reauthorization of the expanded program (airports).
- 1992—Notice of proposed rule: a major rewrite of the program.
- 1995—Adarand versus Peña Supreme Court decision.
- 1997—Further changes resulted in Supplemental Notice of Proposed Rule Making.
- 1998—Transportation Equity Act for the 21st Century (TEA-21): reauthorization through 2003.
- 1999—Final Rule for 49 CFR Parts 23 and 26.
- 2000—Interim Final Rule corrections.
- 2001—Proposed Rule Making 49 CFR 26—Uniform Reporting and Certification Forms Memorandum of Understanding with Small Business Administration; among other issues, the proposed rule redefined personal net worth, retainage, and contract size.
- June 2003—Final Rule published: 49 CFR Part 26.

This study began with the 1999 Final Rule and interim modifications as the guiding regulations. Subsequently, the DBE program Final Rule was published on June 16, 2003, in the *Federal Register*. The 2003 Final Rule has been used as the point of reference in the document.

### DEFINITIONS

This study will apply the regulation definitions of a DBE and race-neutral as defined here (49 CFR 26.5, 2003).

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.

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.

### PURPOSE OF SYNTHESIS

The U.S.DOT's February 2, 1999, Final Rule revised the DBE regulations. The U.S.DOT believed that this change was necessary to remove significant barriers to DBE participation in DOT-assisted contracts. The regulation required state transportation agencies (STAs) and contractors to change their way of doing business. Although the regulation prescribes some requirements, it also provides a measure of flexibility by allowing recipients to determine how other provisions are achieved. This has resulted in different approaches among the states. This study summarizes the various contract administration procedures and methods that have been implemented by STAs and their contractors to meet the revised DBE regulations. Different approaches will be examined for various program requirements, including

- Bidders list information;
- Prompt payment;
- Retainage;
- Good faith effort analysis;
- Approaches for alternate contracting methods (construction management, design-build, etc.);
- Measurement of commitments and actual achievement; and
- Compliance issues related to fraud, substitutions, and commercially useful function.

This study focuses on post-contract award administration issues, but necessarily includes those pre-award issues that

shape or define elements of post-award administration. The administrative approaches to the DBE program are different and some STAs will have progressed further in the implementation of some techniques and methods than others. Internal studies and other relevant documents from the STAs were requested to support the review process. Where appropriate, the study also included detailed information and data provided by STAs to illustrate specific issues and practices.

## **SCOPE**

This report includes a review of the available literature and a survey of STAs to identify the various post-award contract administration procedures and methods that have been implemented to meet the regulation requirements. In defining the scope of the work, STAs were chosen as the primary focus for questionnaire distribution. The study discusses certification, but excludes details about certification procedures and overall goal-setting requirements. The scope of the study applies generally to all DBE programs, but specifically to those in the highway transportation sector.

## **GENERAL SURVEY INFORMATION**

A survey was developed for distribution to each state TRB representative. Guidance was provided to the TRB representative to direct the survey within the STA to the appropriate respondent group (DBE program, Civil Rights, Contracts

Division, etc.). The survey was designed to gather data in four general areas:

1. Respondent information,
2. General administration practices,
3. Pre-contract administration practices, and
4. Contract administration practices.

The questionnaire was prepared from the study scope definition. Information specific to FTA or FAA DBE implementation activities by the STA was not differentiated in the questionnaire. Transit or airport authorities and agencies working at the state, regional, or local level were not included in the survey. This limits the interpretation primarily to those activities governed by federal highway DBE administration. Thirty-six STAs responded to the request for information. A copy of the final questionnaire is provided in Appendix A.

## **ORGANIZATION OF SYNTHESIS**

The report contains five chapters. Chapter one establishes the basic scope and purpose of the synthesis. Chapter two is a review of literature and previous work applicable to the survey issues. Chapter three provides a broad picture on the scope of various state DBE programs. Chapter four examines the transition activities for awarding contracts through post-contract administration practices. Chapter five covers several general impact questions, a summary of findings, suggestions for research, and conclusions.

## BACKGROUND

### REGULATION OBJECTIVES

The rule in force at the start of the study was the February 2, 1999, Final Rule with interim revisions. During the project a revised final rule was published on June 13, 2003, in the *Federal Register*. Because this latest final rule is the most current regulation, it was integrated into the study and analysis elements. Specific sections of the final rule are referenced periodically in this report. Appendix B contains the complete 49 CFR 26, 2003, Final Rule. The objectives stated for the DBE program are (49 CFR 26.1, 2003):

- 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.

### MAJOR RULE CHANGES

Some significant changes were implemented in the new rule. Many of these changes influence the overall DBE program administration as well as the portion detailing contract administration. The focus here will be on those changes likely to affect contract administration processes. The U.S.DOT Office of Small and Disadvantaged Business Utilization (OSDBU) prepared a document, "What's New in the New DBE Rule," that provides a detailed analysis of the changes. This document is provided in Appendix C and available at <http://osdbuweb.dot.gov/business/Dbe/Summary.html>. The content is summarized as follows:

- The rule explicitly prohibits the use of quotas. Set-aside programs are also prohibited, except in extreme cases to remedy severe problems.
- The new rule views the national 10% goal as an aspirational goal, which does not require federal-aid recipients to set their goals at 10% or any other particular level.
- Recipients are to set their goals to represent a "level playing field"—the amount of DBE participation they

could realistically expect in the absence of discrimination. Goals must be based on demonstrable evidence of the availability of ready, willing, and able DBE firms.

- Recipients must obtain as much DBE participation as possible through race-neutral means. Race-neutral measures include training, bonding assistance, mentor-protégé programs, and breaking contracts into smaller pieces.
- Contract goals, or other race-conscious measures, must be used only to obtain the DBE participation needed to meet overall goals that cannot be attained under race-neutral measures.
- When there is a contract goal, bidders must make a good faith effort to meet it.
- If it is determined that DBE firms are overconcentrated in a certain type of work, appropriate measures to address overconcentration should be taken.
- Waivers on program elements can be submitted to the U.S.DOT.
- Recipients must collect data about bidders on their contracts and subcontracts for later use in calculating overall goals.

Many of these revisions have been incrementally introduced, and the STAs have had the opportunity to modify their processes and program elements to address the new requirements. The revisions of particular interest to this study are changes that directly affect contract administration and data collection in the post-award administration activities.

### FHWA REVIEW OF DISADVANTAGED BUSINESS ENTERPRISE PLANS

In 1999, the FHWA conducted a review of 52 DBE plans. A spreadsheet was generated on specific program elements (G. Yakowenko, personal communication, Nov. 6, 2002). In addition to collecting data on goals, the spreadsheet summarizes information on prompt payment and retainage payment, when signed DBE commitments were submitted, the method of compiling the bidders list, and the method for monitoring performance.

### GENERAL ACCOUNTING OFFICE REPORT SUMMARY

TEA-21 was enacted on June 9, 1998, as Public Law 105-178. TEA-21 authorized the federal surface transportation

programs for highways, highway safety, and transit for the 6-year period (1998–2003) and it provided technical corrections to the original law (“TEA-21 . . .” 2001). The reauthorization required that the General Accounting Office (GAO) conduct a review of the program throughout the United States (*Disadvantaged Business Enterprises . . .* 2001). GAO conducted a survey in October 2000, distributing copies to 52 transportation agencies (50 STAs, Puerto Rico, and the District of Columbia) and the 36 largest transit authorities. The following selected results, based on the 1999 regulation requirements, are significant to the scope of this study:

- Approximately three-fourths of the states and transit authorities reported that the 1999 regulations have made it more difficult to administer the DBE program. Half indicated that the 1999 regulations made it more difficult for DBEs to apply to the program.
- The GAO could not calculate the total number of certified DBEs nationwide because of duplication in state and transit authority directories.
- Using anecdotal information, a number of factors or barriers were identified that may limit DBE ability to participate, such as inadequate working capital and limited access to bonding.
- The report recommended that the U.S.DOT (1) enhance the collection of data so that more and better information will be available to evaluate the impact of the DBE program and (2) help states and transit authorities set DBE participation goals that reflect the availability of ready, willing, and able DBEs in the relevant market.

Some specific results from the 2000 GAO survey identified where STA implementation had progressed at that time on several key issues.

- Ninety-two percent had not submitted a unified certification plan to the U.S.DOT.
- Only 27% of the respondents had a bidders list fully developed and implemented.
- Fifty-seven percent did not have a computer database to track and monitor information identified in the new regulation.

#### AASHTO SURVEY

In November 2001, the AASHTO Subcommittee on Construction, Contract Administration Task Force, conducted a survey on the effect of 1999 DBE regulations on retainage (“AASHTO . . .” 2001). The 1999 regulations require that prime contractors pay subcontractors in full on completion of the subcontractor’s work. Therefore, holding retainage until the project is accepted by the state was possible but not realistic. When these data were summarized, 19 of 47 respondents indicated that they were using a zero-retainage practice. Problems noted in the survey with respect to zero retainage included

- Contractors slow in providing close-out documentation,
- Contractors losing interest in completing punchlist items,
- Overpayment recovery being more difficult, and
- Difficulty for prime contractors to get subcontractors back for repair or cleanup.

Of the states with a zero-retainage policy in 2001, only 7 were zero retainage before the revision of the DBE regulation, and 12 had changed their regulations to comply.

#### OTHER DISADVANTAGED BUSINESS ENTERPRISE REGULATION COMMENTARY

A wide variety of publications have commented on the changes proposed in the 1999 regulation and how it would affect implementation of the program. A good summary of contract issues is represented by Parvin’s “Top Ten Issues on Certification for DBE Contractors” (1999) and provided here.

1. The USDOT has given the states broad discretion in establishing their DBE programs, including the opportunity to request a “waiver” of the regulations on goal setting, good faith efforts, and counting. In essence, state DOTs could fashion their own program, with the help of the contracting industry. Quotas and set-asides are specifically excluded. The DBE goal of 10 percent is an aspirational goal. It does not require a state DOT or a contractor to have 10 percent DBE participation or any other percentage.
2. Guidance and interpretations of the regulations are binding only if over the signature of the Secretary of Transportation and only if there is included a statement that the USDOT General Counsel has reviewed the document and approved it as consistent with the language and intent of 49 CFR Part 26.
3. Section 26.29 establishes a prompt payment provision that could create problems both in subcontractor relations and cash flow. Under that section, state DOTs must establish a prime contract clause which requires prime contractors to pay subcontractors within a specified number of days from receipt of payment from the DOT. The clause must also require prime contractors to pay retainage within a specified number of days after the subcontractor’s work is satisfactorily completed. There is no requirement that the DOTs must release retainage for that work. The DOT may also require that subcontracts include an Alternative Dispute Resolution provision for disputes or may provide a clause in the prime contract that prime contractors will not be paid for work done by subcontractors unless and until the prime contractor insures that subcontractors are promptly paid. DBE credit may not be given until the prime contractor pays the DBE.
4. State DOTs will be required to address overconcentration of DBEs in specialty subcontracting fields. The measures may include the use of incentives, technical assistance, business development programs, and mentor/protégé programs. Business development and mentor/protégé programs could become prevalent.
5. State DOTs must set DBE goals based on demonstrable evidence of the availability of “ready, willing, and able” DBE firms. Legitimate disparity studies can be used as one means of making such a determination.
6. State DOTs must meet the maximum feasible portion of their overall goal by using race-neutral means (without using DBE Contract goals). This is a new, important requirement. The balance of the goal can be done by DBE Contract goals.
7. Good Faith Efforts must be taken seriously by State DOTs. In other words, they can no longer state that contracts will be awarded on the basis of Good Faith Efforts and then

ignore such efforts. Additional cost is not in itself reason for rejecting a DBE's subcontract quote. However, prime contractors need not accept excessive or unreasonable DBE quotes. There is no definition of excessive or unreasonable. Prime contractors must still use Good Faith Efforts to replace a DBE whose contract is terminated.

8. The counting rules have changed, particularly in the area of trucking. When a DBE subcontracts any portion of the work to a non-DBE, that portion does not count toward the Contract DBE goal. Materials and supplies obtained by the DBE do count toward the DBE goal, but the DBE MUST negotiate the price, determine quantity and quality, order the materials, install the materials, and pay for them. A DBE trucker must own and operate at least one fully licensed, insured, and operational truck used on the contract. DBE credit is given for trucks owned, insured, and operated by the DBE using drivers it employs. When a DBE leases trucks from a non-DBE, credit is only given for the amount of the fee or commission kept by the DBE. The DBE must have exclusive use and control of such trucks and the leased trucks must display the name and identification number of the DBE.
9. If a DBE firm is decertified after entering into a subcontract, the prime contractor may still count the firm's participation towards the DBE goal. If the firm is decertified before execution of a subcontract, then the prime contractor will be required to replace the firm.
10. Prime contractors may be subject to debarment and/or criminal prosecution for using or attempting to use on the basis of false, fraudulent, or deceitful statements a firm that does not meet the DBE requirements. While this section in the new regulations does not expressly cover commercially useful function, most of the problems faced by prime contractors since inception of the DBE program have resulted from the federal government coming in after the fact and challenging DBE participation. Prime contractors would be well served by having DBE Compliance Manuals for their managers.

Parvin (2003) also commented on the 2003 regulation retainage provision, identifying three possible approaches for STAs with respect to retainage. These are summarized as follows:

1. An STA could eliminate retainage entirely, neither retaining funds from prime contractors nor permitting prime contractors to hold retainage from subcontractors.
2. An STA could decide not to retain funds from prime contractors, but give prime contractors discretion to hold retainage from subcontractors (the STA would require prime contractors to pay subcontractors in full after satisfactory completion of the subcontractor's work)
3. An STA could hold retainage on prime contractors, but make incremental inspections and approvals of the prime contractor's work at various stages of the project and pay the prime contractor the portion of the retainage based on these approvals and require the prime to promptly pay all retainage owed to the subcontractor for satisfactory completion of the approved work.

#### **DATA MANAGEMENT SYSTEMS**

To manage the data generated for certification lists, bidder's lists, and other reporting requirements of the regulation, computer-aided tracking systems have been developed internally

by STAs or as proprietary software. From the Washington and Rice LLC website ("Solving the Equal Opportunity Puzzle" [www.washingtonrice.com](http://www.washingtonrice.com)), the STAs were identified as having implemented (Massachusetts, Nevada, New Mexico, New York, and Rhode Island) or in process of implementing (Alabama, California, and Missouri) Champ, a software system for managing contract compliance. Reference to any such proprietary item is done only for informational purposes in demonstrating the available technology.

The Champ agency module has seven function areas.

1. Vendor (contractor) management,
2. Contract information management,
3. Champ-CM/Champ-SM interface,
4. Bid/quote disparate impact analysis,
5. OJT marketplace analysis,
6. Procurement disparity analysis, and
7. Query builder.

The agency module assists in procurement analysis for subcontracting, prime contracting, quoting (bidding module), and negotiated contracts. In addition to the agency module, Champ has a contractor module that handles workforce utilization, on-the-job training, DBE monitoring, and reporting elements. The subcontractor module, Champ-SM, has reporting and employee data systems. Each module has data exchange capability, reducing the need for multiple entries of the same data.

There are other systems developed for or by SHAs that also support the data management.

#### **WEBSITES FOR DISADVANTAGED BUSINESS ENTERPRISE PROGRAM ADMINISTRATION**

Two websites were identified that contain information relevant to the administration of DBE programs. The first is published through the U.S.DOT OSDDBU (<http://osdbuweb.dot.gov>). This is a primary source for regulatory changes in the DBE program and other information and links to DBE regulatory activities. The second is published by the FHWA for the purpose of collaboration among DBE program administrators. The website states that

This site allows people with common interests, goals, or expertise to share their experiences and knowledge, collaborate on work, identify and exchange best practices, and advance the state-of-the-art in their field. Our goal is a transfer of knowledge within and throughout our organization to promote better decision-making, spark innovation, and improve the quality of service to our customers and partners (<http://knowledge.fhwa.dot.gov/cops/dbex.nsf/home>).

Essentially, it is a discussion board site allowing DBE program personnel to inquire about practices in other states. A wide variety of subjects are maintained as active discussion threads.

**BACKGROUND SUMMARY**

The GAO 2000 report was the most comprehensive publication that relied on data collected from transportation organizations to form a basis for its conclusions. The AASHTO survey was very narrowly focused but informative; however, the data collected by the FHWA was not previously published. The articles in trade magazines and journals were predominately the opinion of a single author and additional commentary can be found published with the Final Rule.

Champ was the only comprehensive software system identified in the background search that was specific to DBE reporting and data collection. The websites represent current information and sources for subject matter content, but they do not represent traditional archival documents. They contain contemporary information. Traditional research studies and detailed journal articles covering issues or topics in the DBE program relevant to the current regulation were not found. No surveys, studies, or reports on FTA or FAA DBE programs were identified in the background investigation.

## GENERAL ADMINISTRATIVE PRACTICES

### ORGANIZATION AND STAFFING

The synthesis questionnaire collected general organizational information of individual DBE program functions and sizes. The responses to these questions showed a marked variation in individual agency approaches to how an organization should manage its DBE program. From an organizational perspective, 3 of the 36 responding STAs placed the DBE program within their construction contract administration groups, whereas the remaining DBE organizations were located administratively within Equal Employment Opportunity (EEO)/Civil Rights administrative units. In 58% (21 of 36) of the responding STAs, the DBE program staff had complete responsibility for all aspects of the program. In 36%, the central office staff was assisted by resident engineers or other district-level personnel performing a variety of tasks, including

- Reviewing overall contract compliance issues for EEO/DBE requirements,
- Conducting field audits for DBE certifications,
- Providing commercially useful function determination through project observations, and
- Conducting a preconstruction conference on EEO/DBE.

The approach to managing the DBE program did not have any apparent relationship to staff size. Staff sizes reported in the survey varied significantly. A few STAs reported staffing levels of 50 or more full-time employees, whereas others reported one or even no full-time employees. Other factors identified in comments provided by STAs that could influence office staffing levels included

- Frequency of certification/recertification,
- Number of contracts with contract goals,
- Method of contracting (size, complexity, etc.), and
- Services (i.e., training) provided by staff versus contracted consultants.

### UNIFIED CERTIFICATION PROGRAM

The requirements for implementing a unified certification program (UCP) were described in the 1999 revision to the regulations and retained in the 2003 Final Rule. The revision required each state to develop a UCP. The certification process had been a problem for DBEs before the UCP program, when a DBE would have to file applications for certification with

each recipient agency it wished to work with. Much of the information was redundant; however, the formats and submission details would often be different. With the UCP in place, a DBE can be certified in one agency and have their certification recognized by all agencies within that UCP. The UCP section of the regulation requires that specific information and updates be provided to contractors and the public on request.

Once the UCP is established, there are a number of activities and responsibilities that are required by the regulation (49 CFR 26.81, 2003), which are paraphrased as follows:

- Certification decisions by the UCP shall be binding on all recipients within the state.
- 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.
- Subject to U.S.DOT approval, the recipients in two or more states may form a regional UCP. The UCP may also enter into written reciprocity agreements with other UCPs.
- Pending the establishment of the UCP, STAs can enter into agreements with other recipients, on a regional or interjurisdictional basis, to perform certification functions, and they can approve reciprocity to other recipient’s certification decisions.
- Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP, the information required by Section 26.31. The UCP shall make the directory available to the public 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.

One of the key elements of the UCP section is the requirement for an electronically accessible directory of firms. Section 26.31 of the regulation requires that specific information (addresses, phone numbers, and types of work the firm has been certified to perform as a DBE) be maintained in the DBE directory.

The requirements also state that the directory must be updated annually. The information available on the certification lists reported in the questionnaire was very consistent with the directory requirement. All respondents published the company and/or owner name, address, telephone, fax, and

work types. Three STAs published the standard industrial classification code and age of the firm. E-mail addresses, Internet home pages, contact person’s name, SB 8A status, and certification dates were also noted as information available on the DBE certification lists. The questionnaire did not request data on updating or publication frequency.

The study questionnaire asked if the STA maintained a website with a list of certified DBE firms. The response was unanimous that the status information of DBEs was available through STA websites. In addition, some comments from the web page listing were of interest.

- DBEs view the listing as similar to a “yellow pages” directory, without having to pay for advertising. Prime contractors can access and see their listing. This was noted as an “excellent marketing tool.”
- Usefulness to prime contractors ranged from “no, they use the information we release with bidding documents” to the directory being an essential tool for locating and identifying subcontractors for bidding specific projects.
- One state commented that contractors must contact two-thirds of certified DBEs in a work area to be in compliance with good faith effort requirements. Its directory listing was the most current and provides prime contractors with the most up-to-date information available for bidding.
- One STA has made their web page searchable by work scope. It is “one of the most frequently visited sites on our webpage.”

The STAs in many states are the primary source of DBE contracting opportunities; 92% of those surveyed (33 STAs) replied that their agency was responsible for coordination of the UCP. Three were not the lead agency for certifications, but participated in a separate entity that was established to perform the UCP function. Respondents were also asked to examine their past year’s data and identify if they had experienced an increase, decrease, or no change in new firm certifications. Figure 1 shows the trends in new firm certifications reported from the questionnaire.

The three most frequent reasons for increased certifications were

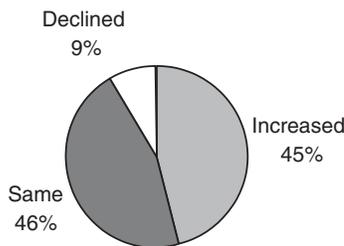


FIGURE 1 STA new certification experiences.

- Increased outreach (7),
- UCP (2), and
- Major local project announcements (2).

Only one notation was provided on factors contributing to a decline in certification. The decline was attributed to the change in personal net worth reporting requirements. This was supported by another question about trends in firms requesting removal from DBE certification and if reasons for the change were known. Five STAs indicated that they had experienced an increase in the number of requests to be removed from certification; four attributed personal financial disclosure requirements as the primary factor for removal and the other reported that there had been some confusion about their certification process. Seven STAs reported a decline in the number of requests to be removed from certification lists. There were no specific factors attributed to this trend.

Figure 2 shows the experience of STA administration with ready, willing, and able DBE firms. The only factor noted by more than one STA for their increase in the number of ready, willing, and able DBE firms was the effectiveness of outreach programs. On average, these STAs had experienced a 10% increase in the number of ready, willing, and able DBE firms. No information was provided by those experiencing a decline in ready, willing, and able DBE firms.

**NUMBER OF CERTIFICATIONS**

The number of certified DBE firms affects every aspect of the DBE program. The number of certified firms varies greatly from state to state. Although they are certified, many of the firms seeking certification do not perform work related to transportation construction. Table 1 shows the number of certifications and an estimate of the number of firms that were willing to work on highway construction projects. The list of certified firms also requires updates, as new firms are added or firms lose their eligibility. Monthly updates were performed by 60% of the responding STAs. The other responses were a mixture of weekly and biweekly updates.

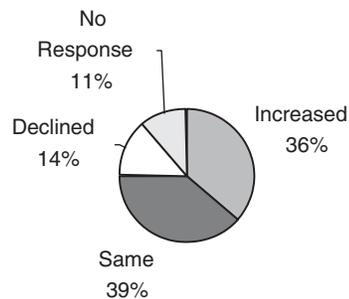


FIGURE 2 STA experience with the number of ready, willing, and able DBEs.

TABLE 1  
NUMBER OF DBEs CERTIFIED AS OF 2002

State	No. of Certified DBEs	RWA for STA Construction
Alabama	416	89
Alaska	190	130
Arizona	300	NA
Arkansas	125	110
California	2,739	1,949
Colorado	418	35
Connecticut	312	260
Georgia	750	225
Hawaii	350	30
Idaho	170	120
Illinois	575	466
Iowa	100	70
Kansas	245	95
Kentucky	337	94
Maine	220	190
Massachusetts	900	89
Michigan	319	NA
Minnesota	300	274
Missouri	250	80
Nevada	425	200
New Hampshire	170	69
New Jersey	425	417
New Mexico	175	40
New York	475	46
North Carolina	600	NA
North Dakota	75	40
Ohio	300	250
Oklahoma	150	65
Pennsylvania	475	171
South Dakota	75	30
Texas	1,198	NA
Vermont	131	20
Washington	673	NA
West Virginia	129	103
Wisconsin	292	81
Wyoming	65	14

Notes: NA = not available; RWA = ready, willing, and able.

## DETERMINATION OF INELIGIBILITY

Determining that a firm is ineligible as a DBE is not a common process; however, in some circumstances a DBE firm's certification will be removed. The determination can occur for a wide variety of reasons that could include ineligibility as a result of exceeding company size standard, poor contract performance, or fraud. The timing of the ineligibility decision and contracting phase of contracts the firm is involved in are two key points to consider with respect to their impact on contract administration. When a DBE has been declared ineligible, but was a certified DBE when the contract was signed, the prime contractor can finish the project with the ineligible firm and can count the work completed toward their contract goal. If the determination of ineligibility was made by the STA before the contract was executed, the contractor may not use the ineligible firm as part of its contract goal attainment. In most STAs, the contractor is expected to perform a good faith effort in obtaining a replacement subcontractor for the contract goal. Details and other information

about the frequency of ineligible DBEs were not requested in the questionnaire.

## GOALS

Before the current regulation, STA overall goals were generally considered to be 10% across the board, regardless of their local situation or market conditions. "The national 10% goal does not authorize or require recipients to set overall or contract goals at the 10% level, or any other particular level, or to take any special administrative steps if their goals are above or below 10%" (49 CFR 26.41, 2003). Recipients of U.S.DOT funds must, however, set an overall goal. The following are provided as guidelines:

- An 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 STA-assisted contracts.
- The goal must reflect a determination of the level of DBE participation absent the effects of discrimination.
- An STA cannot simply rely on the 10% national goal, any previous overall goal, or past DBE participation rates. They must benchmark relative to availability of DBEs in the market.

Five STAs did not report actual achievement as the result of unavailable data for 2002 when they completed the questionnaire. Split goals, those split between race-neutral and race-conscious methods, were reported for 70% of the STAs. The goal achievement for 2002 is shown in Table 2 and Figure 3. A significant change in the regulation is the requirement that state recipients must meet the maximum feasible portion of their overall goal by using race-neutral means of DBE participation. By definition, race neutral includes gender neutral. Race-neutral DBE participation primarily is any time a DBE wins a prime contract through customary competitive procurement procedures or a DBE firm is selected as a subcontractor on a project that does not have DBE participation goals. Race-conscious participation indicates that specific goals are established on contracts. The flexibility of the goal assignment is that individual contract goals may vary depending on factors such as availability, location, and contract size or type.

## COUNTING SECOND TIER DISADVANTAGED BUSINESS ENTERPRISE SUBCONTRACTOR CONTRIBUTIONS

Second tier subcontractors are created by subcontractors awarding subcontracts to other contractors for a portion of their work. When counting DBE participation, the direct work contribution of a first tier DBE subcontractor is counted toward the project goal. However, when a DBE subcontracts work to another DBE firm, that portion can also be counted

TABLE 2  
STATE OVERALL DBE GOALS AND ACHIEVEMENT (2002)

State	DBE Goal (%)	Race Neutral (%)	Race Conscious (%)	Achievement (%)
Alabama	9.00	2.6	6.4	9.00
Alaska	8.00	3.5	4.5	5.00
Arizona	9.00	2.5	6.5	9.00
Arkansas	8.15	0.30	7.8	7.00
California	17.00	3.0	14.0	NA
Colorado	10.93	8.1	2.83	11.00
Connecticut	11.70	1.7	10.0	NA
Georgia	12.00	4.0	8.0	12.00
Hawaii	17.00		17.0	17.00
Idaho	8.00	2.3	5.5	4.00
Illinois	12.29	2.5	9.79	10.95
Iowa	6.80			7.00
Kansas	10.30	1.0	9.3	9.00
Kentucky	11.00	9.0	2.0	NA
Maine	7.00			7.00
Massachusetts	13.80	4.3	9.5	13.00
Michigan	11.00	2.0	9.0	13.00
Minnesota	8.00	2.6	5.0	NA
Missouri	9.00	2.93	6.41	9.00
Nevada	6.00	3.0	3.0	7.00
New Hampshire	8.00	6.0	2.0	21.00
New Jersey	15.00	9.6	4.9	16.00
New Mexico	8.07			13.52
New York	12.70	1.2	11.5	NA
North Carolina	12.00	2.94	9.06	NA
North Dakota	7.00	4.42	2.71	5.00
Ohio	9.00			6.00
Oklahoma	10.00			6.00
Pennsylvania	9.00	1.93	6.93	NA
South Dakota	7.00	2.62	4.38	8.00
Texas	12.00			12.00
Vermont	12.50	10.5	2	13.00
Washington	12.00	7.0	5.0	14.00
West Virginia	10.00		9.75	5.00
Wisconsin	11.00	1.9	8.6	9.14
Wyoming	5.00	5.0		7.00

Note: NA = not available.

toward the project goal. The regulation describes the methods for counting DBE second tier subcontractor participation as follows [49 CFR 26.55 (a)]:

- (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.

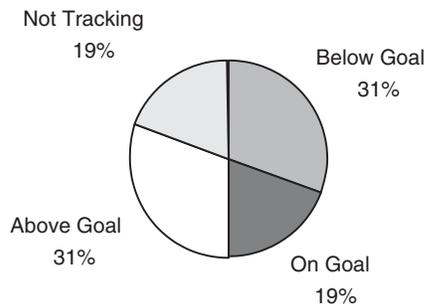


FIGURE 3 Goal achievement distribution, 2002.

Not all STAs include payments of second tier subcontractors. Twenty-three STAs have a mechanism to include second tier subcontracting contributions. Eleven indicated that they do not count second tier contributions and two did not provide a response to this question. No clarification was provided for why some STAs do not count second tier contributions.

**DISADVANTAGED BUSINESS ENTERPRISE REGULATION FOR LOCAL FUND PROJECTS**

Local projects with federal aid need to be included in STA goal-setting processes. Several terms are used to describe these projects. They are known as either “pass through” or “local let” contracts when they involve federal funds. The terms accurately describe the transactions. When a local government receives money from the federal government for a project the money is provided through the STA. The local authority is generally responsible for the bid letting, awarding, and oversight of the resulting contracts. The STA should receive monthly or quarterly reports on the disbursement of funds to the project contractors, including DBE firms, to use in the STA reports. In some cases, the local authority seeks STA assistance in the oversight and management of the local project. In most cases, the STA then has direct access to reporting documents. Of the 13 responses obtained to a question about local DBE programs, 7 STAs indicated that local goals had been established. Three STAs indicated that they are not tracking DBE participation in pass through or local let contracts.

**SET-ASIDE PROGRAMS**

Section 26.43 (2003) addresses the use of set-asides or quotas in meeting program goals. Quotas are not permitted and set-aside contracts are only permissible when no other method could reasonably be expected to achieve the program goals. None of the respondents had used any set-aside programs.

**OVERCONCENTRATION**

Overconcentration is not precisely defined in the regulation, allowing for a wide variety of interpretation. Overconcentration occurs when DBE firms are so frequently used in a certain type of work as to “unduly burden” the opportunity of non-DBE firms to participate in this type of work. It is up to each individual STA to establish the metrics for when a work type is “unduly burdened” or “overconcentrated.” New Mexico defined overconcentration as occurring where more than 50% of the firms ready, willing, and able to perform such work are DBE firms or when more than 50% of the total federal-aid dollars spent on such work in the previous fiscal year was earned by DBE firms. For trucking, they raise the definition percentages to 80%. In Georgia, overconcentration is when the total work of DBE firms comprises 85% of the

work in a specific area. Although the questionnaire sought processes for overconcentration, most respondents annotated their responses, stating that overconcentration did not exist or that they had not performed any analysis. Five respondents indicated that they did not have a method for evaluating overconcentration.

If an STA determines that it has overconcentration, it needs to devise and implement appropriate procedures to correct the situation. The regulation provides some limited insight into acceptable measures as follows:

- 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 where overconcentration is occurring.

Once approved, the overconcentration practice or procedure becomes part of the operating DBE program.

Without a requirement in the regulation for overconcentration analysis, 25% of the responding STAs have not performed an overconcentration analysis nor do they have a process for performing the analysis. Annual reviews were reported to be conducted at five (14%) of the responding STAs, whereas six of the STAs (16%) reported that their process was complaint driven. Complaint-driven processes are implemented only when a formal complaint is received. Only two STAs reported having received any complaints and they determined that overconcentration was not present in both situations. Thus, strategies for remedying overconcentration have not been widely tested. The following strategies were proposed by the STAs in responses to the questionnaire:

- Remove the item from DBE credit work items (Alaska).
- Set a 0% goal on contracts where only one item is identified for potential DBE participation, otherwise non-DBE contractors would be unfairly prevented from competing for the contract (Colorado).

Although not a direct response to known overconcentration, a cap of 50% of the value for permanent materials provided under furnish and install items was implemented on the Massachusetts Central Artery/Tunnel Project to broaden participation across subcontract areas.

In addition, mentor–protégé programs, business development activities, and technical assistance are also considered proactive measures to reduce overconcentration. However, because a majority of the state STAs did not feel they were experiencing overconcentration, these were not described as methods they were employing to reduce overconcentration.

**PUBLIC PARTICIPATION**

In addition to data collection on participation, the regulations call for STAs to include public participation in the goal-setting process. Several requirements concerning public participation in goal setting are published in the regulation as follows (Section 26.45, 2003):

1. Consultation with minority, women’s, and general contractor groups, community organizations, and other officials or organizations that could be expected to have information concerning the availability of disadvantaged and nondisadvantaged businesses.
2. A published notice announcing that the proposed overall goal is to inform the public about the proposed goal and its rationale.
3. The notice must include addresses to which comments may be sent, and it must be published in the general circulation media and available minority-focused media and trade association publications.
4. Overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

Table 3 summarizes the public participation reported in the study questionnaire. General contractor organizations were identified as state chapters of the Associated General Contractors of America (AGC) and chapters of the American Road and Transportation Builders Association. In some cases, special committees have been established to act as a liaison with all groups and to be the primary channel for goal recommendations. For example, in Wisconsin the Transportation Advisory Committee is a permanent standing committee that advises the Wisconsin DOT on DBE matters. This committee establishes the recommended overall goal. The committee is comprised of the following members:

- A woman-owned DBE,
- Three members of the Wisconsin Chapter of the National Association of Minority Contractors,
- Three members from the Wisconsin Transportation Builders Association,

TABLE 3  
TYPES OF PUBLIC PARTICIPATION IN GOAL SETTING

Public Participation	No. of STAs Responding
Minority and/or Women’s Contracting Groups	11
General Contractor Groups	11
Community Organizations	8
Publications (newspapers, trade magazines, etc.)	8
Direct Mailing	3
Personal Interviews	2
Website	2
Contact Other Authorities	1

Note: Only 11 of 36 survey respondents provided details on their public participation requirements to the open-ended goal-setting process.

- Three Wisconsin DOT staff members, and
- One staff person from the FHWA.

This composition covers all major stakeholders in the DBE program and ensures that most viewpoints are represented. Other STAs choose to have individual contacts with stakeholders. Public input can also be achieved by holding periodic public meetings and inviting the stakeholders to participate.

Publications used to advertise the goal and invite commentary included regional and local trade magazines, STA DBE newsletters, and local (major market) newspapers. Some also advertise through their Internet websites. The Idaho Transportation Department (ITD) used a direct solicitation mailing to minorities, women, contracting groups, and other organizations. The questions they use in their direct mailing approach are as follows:

1. Are you aware of any other disadvantaged businesses, other than certified DBE firms?
2. Do you have information regarding discrimination that has affected opportunities for the DBE and or non-DBE firms?
3. Do you believe that ITD’s efforts are helping to establish a level playing field?
4. Has ITD’s goal-setting process been beneficial to their group or organization?
5. Do you have comments or concerns that should be considered in the determination of new goals?
6. Do you have additional comments or concerns?

In addition to gaining information on the goal-setting process, this survey approach also directs some feedback to program administrators for potential process improvement.

**CONTRACT GOAL-SETTING PROCEDURES**

The basic guidance from 49 CFR 26.51 (2003) for goal-setting is as follows:

- Use contract goals only on those STA-assisted contracts that have subcontracting possibilities.
- Use goals to offset overall goal achievement not accomplished by race-neutral means.
- A goal set requirement is not required for every STA-assisted contract.
- The contract goal does not need to match the overall goal and depends on
  - Type of work involved,
  - Location of the work, and
  - Availability of DBEs for the work on the contract.
- Contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

The process to be used by STAs for setting contract goals is not specifically defined. The factors identified in the regu-

TABLE 4  
CONTRACT SELECTION FACTORS

Factors for Selecting Contracts for Goals	No. of States Responding <sup>1</sup>
Type of Work or Bid Items	24
Location of Work (geographic)	18
Availability of RWA DBE Firms	20 <sup>2</sup>
Contract Size (\$)	17 <sup>3</sup>
Project Schedule	3
Current Level of Goal Attainment	2

Notes: RWA = ready, willing, able; DBE = disadvantaged business enterprise.

<sup>1</sup>Thirty-six potential responses. Seven states did not provide a response (four were not using contract goals).

<sup>2</sup>Three states indicated they looked for a minimum of three RWA DBE firms to compete on each item included in the contract goal; one looks for a minimum of three RWA DBE firms for three or more work items.

<sup>3</sup>Various minimum contract sizes were noted as cut-offs for contract sizes with goals: \$100,000, \$250,000, and \$1,000,000.

lation are, in general, the same used by the state STAs for evaluating contracts. Table 4 is a summary of the factors used for selecting contract goals.

Specific factors eliminating a contract from a DBE goal requirement include

- Contract value deemed too small for subcontracting opportunities (7),
- Emergency work (4),
- High degree of work specialization (2),
- Only using state funds (2), and
- Very short duration contracts (1).

**DISADVANTAGED BUSINESS ENTERPRISE PROGRAM CONTRACT ADVISING**

The STAs were asked about how the DBE program personnel provide guidance or advice to engineering and/or the STA contracts division regarding contract size, bundling or grouping contracts with certain work types, and work type distribution in lettings. More than 60% (23 of 36) responded that they did not provide guidance to engineering or the contracts division on contract size, bundling, or grouping of contracts on lettings.

One-third of the respondents indicated that they had a role within their STA to advise on contract issues. This group indicated that the DBE program advised on and acted as advocates for smaller contract sizes and provided consultation and training to engineering groups. In two cases, the relationship described was a collaborative review of contracts with engineers and construction to determine contract DBE goals. The major problem reported was that large contracts associated with bundled contracts limited DBE participation.

**BUNDLED CONTRACTS**

Figure 4 shows that one-half of the responding states have experienced an increase in contract bundling. Contract bun-

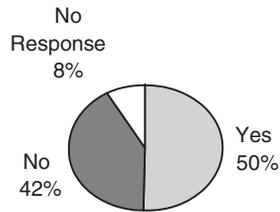


FIGURE 4 Percentage of STAs experiencing increased contract bundling.

ding occurs when an STA consolidates a group of smaller or potentially smaller contracts into one large contract. Fewer contracts require fewer lettings, project managers, consultants and so forth, which generates some overhead and administrative savings for an STA. For example, where the STA could have let three contracts for bituminous resurfacing on several roads in a district, it may bundle these together into a single contract for bid. Bundled contracts tend to be larger aggregate dollar volume contracts. Bundling reduces the number of DBEs able to bid as a prime contractor. In some instances, it limits opportunities for prime contractors as well. Bundling often reduces the pool of subcontractors owing to the increased size of the subcontracted work items. The prime contractor can redefine work packages to achieve the required DBE participation where there are contract goals.

The true impact of bundling cannot be determined from survey responses. Three of the 36 respondents believed that bundling has had no impact and their STAs benefited by having reduced administrative requirements. Ten STAs reported that bundling does affect a DBE's ability to bid as prime contractors. Only 5 of the 10 indicated that it was a problem for subcontracting. The others believed that there was little impact on subcontracting opportunities. To reduce the impact of bundling, Illinois has developed a "small contracts listing," enabling DBEs to identify and bid contracts as prime contractors or subcontractors. Pennsylvania reported that they no longer bundle contracts because of the impact it had on DBEs. An secondary effect noted in the response from Colorado was that some DBEs were bidding city, county, or private work because the contracts were smaller.

#### DISADVANTAGED BUSINESS ENTERPRISE GOALS FOR OTHER CONTRACTING METHODS

Other types of contracts that are commonly assigned contract goals are shown in Table 5 and briefly described here.

##### Construction Management

A number of states have leveraged their capability to undertake a larger number of contracts, without increasing their permanent staff levels, by outsourcing (contracting with outside firms) construction management. Fifteen STAs indicated

that they outsourced construction management services. The goals for construction management contracts were different. Only three states reported using a fixed-percentage goal for construction management contracts when determining contract goals for construction management services contracts.

##### Indefinite Delivery/Indefinite Quantity

Also known as "on-call contracts" or "retainer contracts," indefinite delivery/indefinite quantity (ID/IQ) contracts were also examined in the survey. Generally, DBE goals are not being used on ID contracts. Six STAs responded that they used ID/IQ contracting. One respondent further commented that the use of ID/IQ "improves DBE participation since they (the contracts) are let prior to the need for services," allowing the DBE firm to better allocate resources rather than waiting for individual contract bids. No changes in the reporting format were noted.

##### DESIGN-BUILD CONTRACTS

Goal setting on design-build drew a wide variety of responses. For example, not all STAs are authorized by their state regulations to use design-build or other innovative delivery methods at this time; therefore, they either stated this or provided no response. From the 36 available responses the following was reported:

- Thirteen use the same process for all contracts regardless of contract type,
- Three use one goal for the master contract in design-build contracts,
- One noted that it was considering separate goals for design and construction portions,
- Three are in the process of developing a procedure,
- Thirteen did not respond or indicated not applicable, and
- Three specifically do not use design-build.

The current DBE regulations have addressed design-build construction with the following:

- State STAs can establish an overall goal for design-build projects.
- The "master contractor" under the design-build agreement is responsible for establishing contract goals, as appropriate, for the construction subcontracts it lets.
- State STAs must maintain oversight of the master contractor's activities.

New Mexico is an example of a state using a single goal for the master contract. It lets the master contract for a design-build contract with a single goal established for the project. The master contractor establishes the individual contract goals as appropriate to the work division they establish. The New Mexico STA maintains an oversight role in the entire process.

TABLE 5  
DBE REQUIREMENTS ON CONTRACTS OTHER THAN CONSTRUCTION

State	Planning	Engineering and Architectural Services	Materials Testing and Inspection	Construction Inspection	Construction Management	Maintenance Services
Alaska	✓	✓		✓	✓	
Arizona		✓		✓	✓	
California	✓	✓	✓	✓		✓
Colorado		✓	✓			✓
Connecticut	✓	✓	✓	✓	✓	✓
Georgia	✓	✓			✓	✓
Hawaii	✓	✓		✓	✓	
Idaho	✓	✓	✓	✓	✓	
Illinois	✓	✓				
Iowa		✓				
Maine	✓	✓	✓	✓	✓	
Massachusetts	✓	✓		✓	✓	
Minnesota	✓	✓	✓			
Missouri	✓	✓		✓	✓	
Nevada		✓				
New Hampshire	✓	✓				
New Jersey	✓	✓	✓	✓	✓	✓
New Mexico	✓	✓	✓	✓	✓	✓
New York	✓	✓		✓	✓	
Ohio		✓				
Oklahoma	✓	✓	✓	✓		✓
Pennsylvania		✓	✓	✓	✓	
Texas		✓				
Vermont	✓	✓	✓	✓	✓	✓
Washington	✓	✓	✓			
Wisconsin	✓	✓	✓	✓	✓	

Notes: Alabama, Arkansas, Kansas, Kentucky, North Carolina, North Dakota, South Dakota, and Wyoming responded that they did not have DBE requirements on nonconstruction contracts. Michigan and West Virginia did not respond to this question.

Although design–build contracts were not used by more than one-half of the respondents; those that are using or experimenting with design–build provided some insight to their administration requirements.

- Include appropriate DBE language and provisions into the master contract.
- Require a written performance plan for meeting the overall project goal and a schedule of participation.
- Have the master contract holder submit periodic (yearly on large projects) goals, including the items to be contracted to DBE firms.

### PREQUALIFICATION PRACTICES

Prequalification of contractors is one way that an STA can ensure that the contractors bidding on work are qualified to perform specific types of work and to specify what size contracts they will be permitted to bid on. Prequalification is a process where the contractor submits experience and financial qualification information to the STA. Once qual-

ified for bidding, the contractor is typically classified according to eligible work types, STA total contract volume, and/or a limitation on the maximum size contract on which they can bid. Theoretically, prequalification enables the STA to limit their post-bid submission evaluation to only those issues related to bid responsiveness. Prequalification effectively establishes the contractor as a responsible bidder through the prequalification process. The breakdown of the prequalification of prime contractors and subcontractors is as follows:

- Prequalify prime contractors (30)—five states indicated that they did not use prequalification. One state did not respond to this question.
- Prequalify subcontractors (7)—some STAs are required to qualify all contractors regardless of their status as a prime contractor or subcontractor. One had a subcontract value qualifier. Contracts under \$250,000 do not require a state prequalification.

Not all STAs use prequalification. Some elect to have no requirement other than contract bonds and rely on the surety

bond approval process to qualify bidders. Others rely on a post-contract evaluation of contractor finances and qualifications to determine their qualification as a responsible bidder.

**BIDDERS LISTS**

Section 26.11 (c) (2003) of the regulation requires that STAs create and maintain a bidders list to aid in the identification of DBE and non-DBE contractors. The language of the regulation is very specific with regard to the information to be retained in such a list.

- (c) You must create and maintain a bidders list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects. For every firm, the following information must be included:
  - (1) Firm name,
  - (2) Firm address,
  - (3) Firm’s status as a DBE or non-DBE,
  - (4) The age of the firm, and
  - (5) The annual gross receipts of the firm.

There is no indication if this is for each letting or simply a listing of all contractors who have bid projects. Traditionally a bidders list is specific to a letting. Table 6 lists the information each STA included in their public bidders list

TABLE 6  
BIDDERS LIST INFORMATION

STA	Firm Name	Address	Age of the Firm	Annual Gross Receipts
Alabama	✓	✓		
Alaska	✓	✓		
Arizona	✓	✓		
Arkansas	✓	✓		
Colorado	✓	✓		✓
Connecticut	✓	✓		
Georgia	✓	✓		
Hawaii	✓	✓	✓	
Idaho	✓	✓		
Illinois	✓	✓	✓	✓
Iowa	✓	✓		
Kentucky	✓	✓		
Maine	✓	✓	✓	
Massachusetts	✓	✓	✓	
Missouri	✓	✓		
Nevada	✓	✓	✓	✓
New Hampshire	✓	✓		
New Mexico	✓	✓		
New York	✓	✓	✓	✓
North Carolina	✓	✓		
North Dakota	✓	✓		
Ohio	✓	✓		
Oklahoma	✓	✓	✓	
South Dakota	✓	✓		
Texas	✓	✓		
Vermont	✓	✓	✓	✓
Washington	✓	✓	✓	
Wisconsin	✓	✓		
Wyoming	✓	✓		

Note: No responses were received from California, Kansas, Michigan, Minnesota, New Jersey, Pennsylvania, and West Virginia.

based on the elements required in the regulation. It would appear that some STAs are maintaining a bidders list; however, they are primarily focused on providing a listing of active bidders for a specific letting. A random check of six STA websites confirmed their response listing in Table 6 as a letting specific listing according to specific contracts. A separate survey question asked if they maintained a bidders list of DBE and non-DBE firms quoting work for each highway letting. Seven of the 36 STAs responded “no” to this question and four indicated that they were only tracking prime contractors at this time. Many included other information such as contact telephone numbers, fax numbers, and type of work on the bidders list, in addition to the required information.

**BIDDERS LIST DATA COLLECTION**

Data to be included in a bidders list can be generated in a variety of ways. Table 7 summarizes the methods indicated by the responding STAs. Written and/or e-mail surveys requesting information for the bidders list from contractors were also noted. Most generate the list from contractors who have previously bid on STA projects as prime contractors or subcontractors. Another key source is the listing of active bidders determined from previous bid letting information. Subcontractor information regarding all quotes provided by DBE and non-DBE subcontractors is required of the successful bidder. This information is useful for the bidders list as well as evaluation of a good faith effort. A bid data subscription list may be an e-mail list, an automated fax system, or a physical mailing of anticipated letting projects. Whenever a contractor requests information about a project, they are included on the bidders list. Some STAs post letting information on their websites, so the need for mailing lists is limited. Two STAs required a contractor to provide their bidders list information as a registration requirement for access to project information.

TABLE 7  
BIDDERS LIST DATA COLLECTION

Method	No. of Respondents
Questionnaire/Survey	11
Previous Letting Information (successful primes and some request unsuccessful primes)	10
Bid Data Subscription	4
Certification Files—DBEs Only	3
Currently Performing Work for STA	2
Registration with the STA as a Bidder	2
Prequalification Lists	2
Bidder History File—Bidding on Past Projects	2
Plans Counter Information—Request for Documents	1
Required in Special Provision to Submit Data for Each Firm Bidding	1
Association Lists (general contractor, minority contractor, etc.)	1

Note: Total number of responses exceeds the number of respondents. Respondents were not limited to a single option or choice.

## MENTOR-PROTÉGÉ PROGRAMS

Regulation Section 26.35 (b) (2003) provides the following guidance on mentor-protégé programs as described in conjunction with or part of the STA business development program (BDP).

- (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 [included in Appendix B of this synthesis.]

A mentor-protégé program is a business relationship in which another firm is the principal source of business development assistance to a DBE firm. Only 12 of 36 respondents indicated that they have a mentor-protégé program in place. None of the STAs indicated that such programs were mandatory for DBE firms. Distinctly different approaches were noted among the mentor-protégé programs. The Ohio, California, and Texas programs are described briefly here.

### Ohio

The Ohio Contractor Association and Ohio DOT have entered into a partnership mentor-protégé program. Each mentor-protégé pair has agreed to work together for 2 years under the program guidelines. The time commitment for the mentor firm is estimated to be between 5 and 10 h per month. The relationship is monitored by the sponsor organization, the Ohio DOT. The roles of the three parties are described as follows (<http://www.dot.state.oh.us>):

- Mentor role:
  - Sign an agreement with the protégé;
  - Meet regularly to discuss protégé strengths, weaknesses, and opportunities;
  - Recommend training options; and
  - Monitor and report on protégé progress.
- Protégé role:
  - Be available for meetings with the mentor,

- Openly share relevant business information with the mentor,
- Follow through with actions identified in the developmental action plan, and
- Report on program progress and satisfaction.
- Sponsor role:
  - Monitor mentor-protégé working relationship,
  - Coordinate DBE support services,
  - Receive and evaluate progress reports, and
  - Program publicity.

The general text of the Ohio web page describing their mentor-protégé program is provided in Appendix E.

### California

The California DOT (Caltrans) mentor-protégé mission statement is as follows:

The Caltrans Mentor-Protégé Program will assist Disadvantaged Business Enterprises (DBEs) in the development of their technical and business capabilities via training and assistance from larger, well-established construction firms.

The program elements include:

- Monthly meetings between mentor and protégé,
- Technical support from service providers,
- Technical and administrative training,
- Notices of anticipated and actual project opportunities, and
- Networking opportunities.

Protégé firms are selected through an application process that limits enrollment to DBE firms in business for at least 24 months and specializing in highway construction and related activities. The AGC of California provides two mentor firms for each protégé. This partnership mentor-protégé program is supported by AGC of California and Caltrans.

### Texas

The Texas mentor-protégé program is called Learning Information Networking Collaboration (LINC). Its purpose is to prepare small businesses to bid and perform on Texas DOT (TxDOT) projects and functions as a business development and department mentor-protégé system. LINC mentors introduce the protégé firms to TxDOT staff and to prime contractors by providing networking opportunities. The mentor in this program is the STA rather than the traditional arrangement where a non-DBE contractor is a mentor to a DBE contractor. The program consists of six meetings; an introductory meeting followed by five meetings held in a specified STA district.

The location is determined by upcoming contracting volume in the area and the number of potential DBE firms. Participant firms receive presentations on the following topics:

- Bidding and estimating (with a hands-on bid review by a support services provider),
- Contract administration,
- Record keeping,
- Construction-related legal issues,
- Inspections,
- Equipment usage,

- Material/product testing, and
- Marketing plan.

In addition to the training, participants are directly introduced to prime contractor personnel who have been provided with an information packet about their LINC protégé. The final session provides participants with a working view of the opportunities to bid on maintenance contracts as prime contractors. Some additional topics are covered on prequalification, bidders questionnaire, bonding, insurance, and specific contract requirements.

## CONTRACT ADMINISTRATION

### BIDDING PATTERNS

The trend in the number of DBEs submitting as prime contractors is shown in Figure 5. Contract size and location of the projects were noted as the primary factors influencing the number of DBEs bidding as prime contractors. It should be noted for DBE programs, when as few as one or two DBEs lose their eligibility owing to growth (graduation) or personal net worth limitations, the impact to the availability of DBE firms bidding as prime contractors in that state can be significant. This is particularly noticeable in those STAs where a very limited number of DBE firms have the capacity and qualifications to bid as prime contractors.

Experience with bidding STA contracts is important to understanding the competitive prime contract and subcontract bidding process. However, as noted earlier, few DBEs have the capability to submit prime contract bids. Figure 6 shows the trend in the ability of firms to submit competitive bids. Supportive services impact was noted for two of the seven STAs reporting an increase in the ability of DBE firms to submit competitive subcontract bids. A slower economy was noted as the factor contributing to the decline in one STA. Otherwise, no specific factors were noted among the STAs reporting a decline in competitive subcontract bids.

The questionnaire also sought out studies that support or refine the information collected on past performance reported in Figures 5 and 6. Of the responding STAs, 83% (30 of 36) did not have supportive data or studies on the trends reported for their programs. The Vermont DOT conducted a survey study that focused on the needs of the DBE community with respect to contracting with the Vermont DOT. It reviewed a number of issues, including the DBE experiences in bidding as a prime contractor or a subcontractor. California conducted a survey on training needs for DBEs. Other than disparity studies and the two surveys noted, no studies had been conducted on these trends.

### DISADVANTAGED BUSINESS ENTERPRISE COMMITMENT SUBMISSIONS

Two basic elements must be present for any contract award. First, the prime contractor must be responsive, which means they must meet bid submission time requirements and address all the requirements in the bid forms including bonds, signatures, etc. Second, a prime contractor must be a responsible

bidder. DBE commitment data or an acceptable good faith effort is a condition of responsiveness when DBE commitments are required as part of a bid submission. If the data included do not pass a good faith effort analysis, the contractor's bid can be deemed nonresponsive and may not be considered for award or they may be given an opportunity to modify their DBE commitments depending on the problem with their submission. Other states treat DBE submission requirements more like a condition of responsibility, which means the low bid contractor is given a time period after the bid opening to finalize and submit its DBE commitments for STA reviews similar to their start-up schedule and other pre-construction submissions. The distribution of time allowances is shown in Table 8.

The positive aspect of delaying submission of DBE commitments is that it allows the prime contractor time to solidify their commitments and ensure that they have met contract goals. The negative aspect of allowing prime contractors time to submit their DBE commitments is the opportunity for bid shopping and bid peddling. Submission of DBE data with the bid limits the opportunity for bid shopping to the time period before the bid. Other methods to limit bid shopping and bid peddling were not included in the scope of the study.

### GOOD FAITH EFFORT

Regulation Section 26.53 applies evaluation of contractor good faith effort. A bidder has made good faith efforts if they can either

- Document that it has obtained enough DBE participation to meet the goal or
- Document that it made adequate good faith efforts to meet the goal even if the effort falls short.

The first approach is self-explanatory. The second merely indicates that a prime contractor may not be able to meet a goal and the contract can still be accepted, provided adequate documentation is provided. Appendix A of the regulation provides additional guidance on evaluation of good faith effort, including actions the bidders should undertake to ensure they have made appropriate efforts to meet the contract goal. Typical support documentation for good faith effort includes:

- Identification of the contract items to be sublet,
- Quotes of all subcontract bids, and

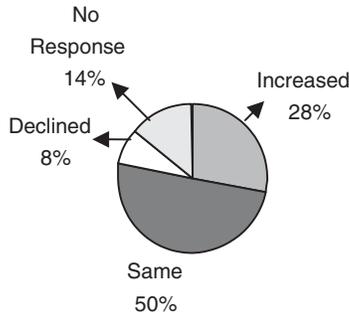


FIGURE 5 Percentage of DBE firms submitting bids as prime contractors in 2002.

- Copies of solicitations and advertisements used to gain DBE participation.

Table 9 summarizes good faith effort submissions and acceptances reported in the study survey for 2002 data. The time required to perform a good faith effort will in most cases delay a decision on the low bidder award and, if the documentation and analysis is difficult, the process could delay processing the contract for the actual award. Of the good faith effort submissions reported in 2002, 640 (77%) were accepted. On average, the STAs allow 18 days for determination of good faith effort, with the range from 3 to 45 days.

**IOWA EXPEDITED GOOD FAITH EFFORT PROCESS**

Iowa has adopted a different viewpoint to expedite the good faith effort determination. A brief outline of the Iowa decision process is provided here, with details of the 80% good faith effort and other elements provided in Appendix F. If a goal has been established for a contract, the Iowa STA will award the contract to the lowest bidder making good faith efforts to meet the contract goal. The following is a synopsis of the Iowa process:

1. Bidders with 80% of the established goal will be assumed to have made a good faith effort.

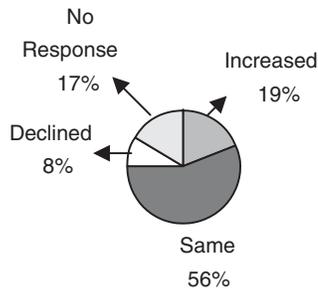


FIGURE 6 Percentage of DBE firms submitting competitive subcontract bids in 2002.

TABLE 8 DAYS ALLOWED TO SUBMIT DBE COMMITMENTS

Allowance for DBE Submission	No. of STAs
Responsive Bid Requirement (0 days)	11
Responsible Bid	
1-day submission	1
2-day submission	1
3-day submission	4
4-day submission	1
5-day submission	2
7-day submission	4
10-day submission	4
14-day submission	2
15-day submission	2
Reasonable Amount of Time	1
Responsibility with No Time Indicated	2
No Response to Question	1

2. A good faith effort is 80% of the average of the percentages of the DBE commitments submitted by all bidders.
3. Contractors with a history of using DBEs in the previous fiscal years will be assumed to have made a good faith effort to achieve the project goal.
4. Contractors who have not met any of the previous three administrative reconsiderations may request an administrative reconsideration of their good faith efforts.

California has a worksheet to evaluate good faith efforts. The contents are provided in Appendix F.

**MINIMUM LEVEL OF SELF-PERFORMED WORK**

The subcontracting opportunities for DBE or non-DBE subcontractors are somewhat defined by either STA or U.S.DOT requirements for a specified percentage of work performed by the prime contractor’s workforce that is commonly termed “self-performed” work. Contracts with federal aid usually require that the prime contractor has the responsibility to perform at least 30% of the work. This would suggest that 70% of the contract would be available for subcontracting. However, availability also depends a great deal on contract packaging. Some STAs specifically elect to package contract work according to a work type, such as excavation, paving, and structures like box culverts, which limits subcontracting opportunity availability. Where the contractor is required to perform 50% of the contract work, the opportunities for subcontracting may be restricted. Table 10 shows the distribution of self-performed work required by the responding STAs.

**FINANCIAL INCENTIVES FOR DISADVANTAGED BUSINESS ENTERPRISE USE**

Eleven of the 36 respondents reported that they had some form of incentive for improving DBE use. None were geared toward giving direct financial incentive. Most of the respondents, like

TABLE 9  
GFE ANALYSIS 2002

State	Written GFE Policy?	GFE Submissions 2002	GFE Accepted 2002	Time Allowance To Determine GFE
Alabama	Yes	NA	NA	No
Alaska	Yes	23	20	5 days
Arizona	No	0	0	No
Arkansas	Yes	2	0	Yes, ASAP
California	Yes	250	133	NR
Colorado	Yes	19	19	30 days
Connecticut	Yes	4	4	14 days
Georgia	Yes	0	0	Yes
Hawaii	No	1	NR	No
Idaho	No	1	0	15 days
Illinois	Yes	34	34	18 days
Iowa	Yes	All	All except 3	3 days
Kansas	Yes	7	5	No
Kentucky	Yes	1	1	10 days
Maine	Yes	NR	NR	NR
Massachusetts	Yes	0	NA	No
Michigan	Yes	35	35	20 days
Minnesota	No	NR	NR	NR
Missouri	Yes	10	6	3 days
Nevada	Yes	0	0	No
New Hampshire	Yes	0	0	No
New Jersey	Yes	0	0	No
New Mexico	Yes	0	0	No
New York	Yes	30	25	25–40 days
North Carolina	Yes	Unknown	95% estimated	Yes
North Dakota	Yes	27	23	30 days
Ohio	Yes	8	8	10 days
Oklahoma	Yes	30	30	Yes, varies
Pennsylvania	Yes	3	3	7 days
South Dakota	Yes	22	21	30 days
Texas	Yes	5	5	No
Vermont	Yes	0	NA	No
Washington	Yes	1	1	45 days
West Virginia	Yes	1	NR	NR
Wisconsin	Yes	126	118	10 days
Wyoming	Yes	0	0	0

Notes: GFE = good faith effort; NA = not available; ASAP = as soon as possible; NR = no response.

Iowa, focused on indirect assistance, where past track records of using DBEs are considered in evaluating a good faith effort. Two STAs reported providing additional credit for the specific use of DBEs. One gave double credit, in the letting, for DBEs used in bridge building, and the other gave a 2% bonus (not to exceed \$200,000) for using first-time DBEs. One STA reported reducing the payment retainage percentages for higher use. Three reported that the financial incentive was to

keep participation levels above the state goal to ensure that they did not need to return to specific contract goals. The remaining 24 respondents did not consider any type of incentive for improved DBE participation, and 1 did not provide a response.

#### PERFORMANCE BONDS

Thirty-one of 36 survey respondents indicated that they required performance bonds on all projects. Two indicated that they did not require bonds on all projects, and three did not provide a response in this section. In some states, there is the option to waive bonds on smaller projects. One state clarified their response by stating that the STA had the option to waive bonds on contracts under \$80,000. The questionnaire for this study did not attempt to define the bond coverage limits or requirements. Bonding for small firms, start-up firms specifically, is hard to obtain. Bonding assistance programs were put into place to aid DBE and small non-DBE firms in developing their experience and financial reports to qualify for bonding.

TABLE 10  
DISTRIBUTION OF SELF-PERFORMED WORK REQUESTED BY STAs

Minimum Level of Self-Performed Work	No. of Respondents
50% or Greater	15
40% or More	5
30% or More	10
Variable: 30% to 50% Depending on the Type of Contract (i.e., state-only funds, 50%; federal funds, 30%)	3
No Response	3

**DISADVANTAGED BUSINESS ENTERPRISE BONDING ASSISTANCE**

The U.S.DOT OSDBU administers a bonding assistance program through a number of selected surety bond providers. Elements of the U.S.DOT OSDBU bonding assistance program are described as follows (<http://osdbuweb.dot.gov>):

- The bonding program offers certified minority, women-owned, and DBEs an opportunity to obtain bid, payment, and performance bonds for transportation-related projects.
- The program provides an 80% guarantee against losses on contracts of up to \$1,000,000 and approved surety companies perform bond approval and issuance.
- Funding for the guarantee is provided by the U.S.DOT OSDBU and is administered by local bond agents that are located in designated areas of the country.
- Bond applications may be obtained from designated local bond agents or from the OSDBU.

Eight STAs indicated that they had an active DBE bonding assistance program. Of that group, only four affirmed that the bonding assistance program has reduced bonding difficulties. Eight STAs indicated that they had supportive services agreements or business development groups that aided DBE and small non-DBE firms to prepare for bonding submission.

**SHORT-TERM LOAN PROGRAM**

Undercapitalization has long been a problem for small businesses. As shown in Figure 7, most STAs do not support their own short-term loan programs (STLPs) for DBE or non-DBE firms.

The U.S.DOT OSDBU also developed a short-term lending program to ease the cash flow problems that most small contractors experience. However, this is not a program for new contractors. The basic qualification requirements are as follows:

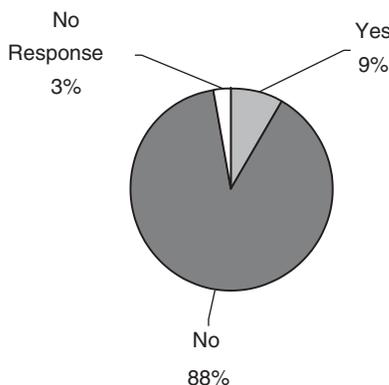


FIGURE 7 State-administered short-term loans.

- An applicant must have a transportation-related contract.
- An applicant must have current certification as a DBE by any agency applying U.S.DOT certification guidelines (49 CFR 26).
- It is recommended that a business have at least a 3-year past performance history before applying to the program.

The STLP is administered by the OSDBU through cooperative agreements with six regional banks. Loan documentation and financing transactions are performed by the STLP bank, which offers the line of credit. The maximum line of credit is \$750,000. Money borrowed under the lines of credit is to meet the short-term costs of performing the contract(s) being financed. Owing to the STLP structure and the short-term nature of borrowings, funds are not available for

- Contract mobilization,
- Equipment purchases or other long-term uses,
- Refinancing of existing debt,
- Payment of noncurrent taxes, and
- Distributions or other payments to stockholders.

Funds may be borrowed against each invoice of the contract(s) being financed. Repayment of the short-term loan occurs when the project owner or prime contractor pays the subcontractor’s invoice. Payments are made jointly to the borrower and to the STLP bank. Payments are sent to the bank, which repays the amount borrowed against the invoice and transmits the balance to the borrower. The line of credit normally covers a 1-year period and one or more renewals may be requested, with the maximum length of time in the program being 5 years. Contact information and other details can be obtained at the OSDBU website, <http://osdbuweb.dot.gov/>.

New York has alternate short-term working capital loan programs available to DBEs. The following description is from the STA website:

(1) A joint program of the New York State Department of Transportation [NYSDOT] and the Albany-Colonie Regional Chamber of Commerce.

Goal: to provide access to capital for women and minority-owned businesses in Albany, Schenectady and Rensselaer Counties that have secured NYSDOT contracts but are unable to obtain traditional working capital financing.

Provides working capital loans of up to \$25,000 to qualified business owners. Funds can be used to assist in the timely disbursement of employee wages and the purchase of supplies, allowing companies to complete current contracts and bid on more competitive jobs in the future.

(2) Transportation Loan Program: This program is administered by NYSDOT and the Empire State Development Corporation. It offers financial assistance in the form of working capital loans to small business and certified minority-owned and woman-owned business enterprises participating on NYSDOT contracts.

A firm can qualify for up to 50% of the amount of the contract(s) not to exceed \$500,000.

For more information, contact OEODC, Support Services at: <http://www.dot.state.ny.us/oeodc/support.html#Loan>.

**PROMPT PAYMENT**

Prompt payment and retainage were two major changes that affected subcontracting practices. In the past, prime contractors could withhold payment to subcontractors long after work was substantially completed. All firms working as subcontractors were affected by the reduced cash flow resulting from slow payment. Section 26.29 of the regulation describes the requirements for prompt payment as follows:

- (a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than a specific number of days from receipt of each payment you make to the prime contractor. This clause must also require the prompt return of retainage payments from the prime contractor to the subcontractor within a specific number of days after the subcontractor’s work is satisfactorily completed.
  - (1) This clause may provide for appropriate penalties for failure to comply, the terms and conditions of which you set.
  - (2) This clause may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.
- (b) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:
  - (1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.
  - (2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.
  - (3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

Overall there was little agreement about how many days constitute prompt payment among the responding agencies. Figure 8 shows the distribution of current prompt payment provisions. Seven respondents did not provide information to this question and stated that their regulations were not currently in compliance with the requirements.

Sanctions and penalties for prime contractors failing to comply with prompt pay requirements identified by the STAs included:

- Withholding future prime contractor payments (9),
- Interest of 1.5% to 2% per month on the amount owed or fixed-fee charges (liquidated damages) of \$50 per day or some other amount (7),
- Suspension of bidding privileges (5), and
- In repeat or chronic cases the contractor may be suspended from bidding or revocation of prequalification (3).

The primary approach to monitoring subcontractors’ payments was normal monthly progress payments either in the form of reports filed or software printouts. The primary enforcement mechanism is to conduct an investigation when a complaint is filed.

**RELEASE OF RETAINAGE**

Retainage is one mechanism to ensure that contractors and subcontractors complete their work. Retainage is money held back from payments made to the prime contractor or subcontractor. Traditionally, prime contractors withheld payment of retainage on subcontracts until they received final payment. Retainage options for STAs were described as follow ([www.azagc.org/sept03](http://www.azagc.org/sept03)):

1. Eliminate retainage entirely, prohibiting prime contractors from withholding retainage from subcontractors.
2. Stop prime contractor withholding, but allow prime contractors to withhold retainage on subcontractors.

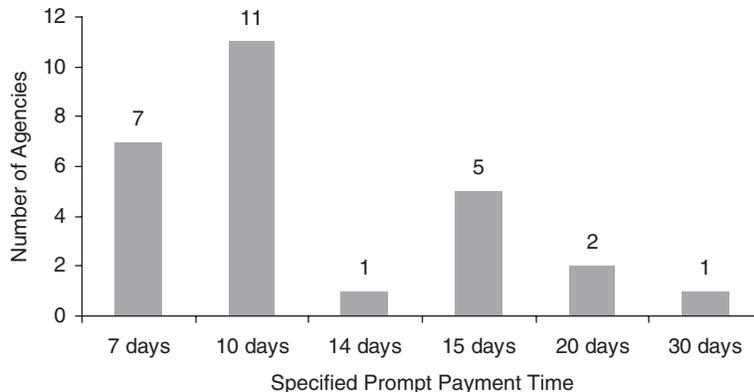


FIGURE 8 Prompt payment time specified.

Prime contractors must return retainage within 30 days of satisfactory completion.

3. Withhold on the prime contractor, but conduct incremental acceptance inspections (“mini-finals”). If work is found to be satisfactory, the retainage for the prime contractor is returned and the prime contractor would be expected to return retainage to the subcontractor within 30 days. Satisfactory completion is when all tasks called for in the subcontract have been accomplished and documented as required by the state.

Without an intermediate acceptance process, retainage can be held for the duration of the project. Incremental acceptance allows for acceptance of that portion of the work subcontracted and completed to be paid in full to the prime contractor. Before the 1999 regulation change, 12 of the 36 STAs had a prompt return of retainage to subcontractors as part of their prompt payment requirements. After the legislation, 32 STAs indicated that they require prompt payment of retainage to subcontractors. Fourteen STAs, based on this investigation, have a “zero” retainage policy for both prime contractors and for subcontractors. The responses imply, therefore, that 18 STAs withhold retainage on their prime contractors, but require prompt payment to subcontractors. Only four respondents specifically indicated that the prime contractors could withhold retainage on their subcontractors. STA prompt payment provisions reviewed in detail indicate that when incremental acceptance included all the work of the subcontractor, the prime contractor would need to pay the retained amounts to the subcontractor in the next payment. If there was work still in dispute, the contractor could retain a fair value of the work disputed until the dispute was resolved and then they had to comply with prompt payment time provisions.

Although a policy of zero retainage for prime contractors and subcontractors is the easiest to administer, there are some drawbacks to zero retainage and early release of retainage. The following contractual issues were noted in regard to zero retainage (numbers represent the number of times the issue was identified by the STAs in the questionnaire):

- Resulted in overpayment to contractor (7),
- Limited ability to recall subcontractors (7), and
- Limited ability to obtain final contract documentation from prime contractor (4).

### CONTRACT COMPLIANCE REVIEWS

There was no consistency among the responses to provide a general process approach to the issue of contract compliance reviews. Depending on the STA administrative organization, construction field personnel, EEO representatives, central office staff, and compliance specialists can be involved in conducting field audits. New York has a detailed procedural guide for conducting contractor compliance reviews (“New York State . . .” 2002). The STA uses compliance specialists

to perform the compliance review. For the DBE program portion of contract compliance the following contractor documentation is used for preliminary review:

- Copy of the currently approved Schedule of DBE Utilization (AAP 19),
- List of all DBE firms the contractor contacted as possible subcontractors,
- AAPHC 89s (Part 1—D/M/WBE Utilization Worksheet; Part 2—Approval to Subcontract) for all currently approved DBEs participating in this contract,
- List of all non-DBE vendors and material suppliers,
- Copies of invoices for DBE subcontractor materials, and
- Documentation of all back charges to DBE subcontractors.

The second phase was the actual field visit, where interviews and analysis of project-level documentation would be conducted. The two sets of data are compared as a method of cross-checking for contract compliance. Other questions on the New York DBE Compliance Data Report Addendum are indicators of the compliance analysis considerations.

1. Have all DBEs maintained a workforce and supervision separate and independent from that of the contractor, other subcontractors, or their affiliates?
2. Have all DBEs performed a commercially useful function?
3. Have DBE subcontractors obtained more than 50% of the equipment used to complete their work from the contractor, other subcontractors, or their affiliates?
4. Have DBE subcontractors documented the cost of any equipment obtained from the contractor, other subcontractors, or their affiliates?
5. Were the materials used by the DBE subcontractors ordered and paid for by the DBEs?
6. Have DBEs performing off-site trucking provided at least 20% of the equipment and manpower required?
7. Have DBEs performing off-site trucking obtained any equipment or manpower from the contractor, other subcontractors, or their affiliates?

### COMMERCIALLY USEFUL FUNCTION

Section 26.55 (c) describes how actual DBE participation is counted toward contract goals and forms the basis for defining commercially useful function (CUF).

- (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% 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.

The STAs that responded to the study questionnaire follow these guidelines very closely. Elements that are checked for CUF in addition to those specified in the regulation include

- Equipment appropriate to the work contracted (owned and leased),
- Qualifications of the subcontractor, and
- Observations of the work in the field.

If it is determined that no CUF is performed some sanctions or penalties may be appropriate. The penalties listed in the survey response include

- Prime contractor suspended from future bidding,
- DBE's certification reviewed,
- Monetary penalties
  - Dollar-for-dollar fine where contract amount for the DBE is paid to the STA
  - Suspend payment for work involved in non-CUF
  - Withhold payments
- Not counted toward contract goal, and
- Have violator secure participation over and above goal on future contracts.

#### **TERMINATION OF NONPERFORMING DISADVANTAGED BUSINESS ENTERPRISE SUBCONTRACTOR**

With most subcontract agreements the prime contractor has an ability to terminate the subcontractor for nonperformance of the contract requirements. Subcontractors can, in most

contracts, be terminated for convenience, which would allow the prime contractor to replace the subcontractor or perform the work with its own forces. Termination for convenience can be prohibited in the case of DBE subcontractors. In Illinois, for example, contract compliance requirements, for the prime contractor, states that "the contractor shall not terminate for convenience a DBE listed in the Utilization Plan and then perform the work of the terminated DBE . . . without first obtaining written consent of the Bureau of Small Business Enterprises to amend the Utilization Plan." The prime contractor will need to document the issues related to non-performance and seek state STA approval before termination. In addition, the prime contractor will need to replace the terminated contract dollar volume with an equivalent DBE subcontract dollar volume or submit evidence of a good faith effort.

California is more specific in defining the use of other forces or sources of materials for DBEs listed in the contract. California's *Construction Manual* (2001) requires a written request for substitution or removal of a DBE and the request must match an authorized situation specified in the contract. The following list describes situations where a prime contractor can request a change from a listed DBE subcontractor:

- A. The listed DBE, after having had a reasonable opportunity to do so, fails or refuses to execute a written contract, when such written contract, based upon the general terms, conditions, plans, and specifications for the project, or on terms of such subcontractor's or supplier's written bid, is presented by the Contractor.
- B. The listed DBE becomes bankrupt or insolvent.
- C. The listed DBE fails or refuses to perform the subcontract or furnish the listed materials.
- D. The Contractor stipulated that a bond was a condition of executing a subcontract and the listed DBE subcontractor fails or refuses to meet the bond requirements of the Contractor.
- E. The work performed by the listed subcontractor is substantially unsatisfactory and is not in substantial conformance with the plans and specifications, or the subcontractor is substantially delaying or disrupting the progress of the work.
- F. It would be in the best interest of the State.

#### **TRACKING INFORMATION**

The administrative requirements for monitoring the performance of the DBE program participants require tracking specific types of information. Within this section both monitoring and enforcement requirements are required. Information tracking in this section is focused on data collected as part of the monitoring function. Enforcement elements are covered elsewhere. From the regulation, the information must include the following (49 CFR 26.37):

- (a) You must implement appropriate mechanisms to ensure compliance with the part's requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state and local law). You must set forth these mechanisms in your DBE program.
- (b) Your DBE program must also include a monitoring and enforcement mechanism to verify that the work committed

to DBEs at contract award is actually performed by the DBEs. This mechanism must provide for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms) and include a provision ensuring that DBE participation is credited toward overall or contract goals only when payments are actually made to DBE firms.

Table 11 is a summary of the STA data tracking for bid submissions and awards.

The questionnaire did not include a responsive section to determine why all STAs were not tracking the required data at this time. However, five volunteered that they were still in the process of trying to implement a mechanism to track these data or that the information was not readily available. The responses suggest that there is overall compliance with tracking the prime contractor dollar commitments (33 of 36) and subcontractor commitments (34 of 36).

**FRAUD INVESTIGATIONS**

Situations where fraud may become an issue can be brought to the attention of the STA from various sources. Complaints from individuals or firms can be used to initiate the investigation. New Mexico requires all complaints to be submitted in writing with specific reasons why the firm should be examined. In some situations, the STA is notified that the U.S.DOT is conducting a fraud investigation depending on the reason for the complaint. Generally, fraud investigations can be generated by complaints from nearly any credible source. For the 36 STAs responding to the survey, 26 state-level investigations for fraud were reported for 2002. The U.S.DOT Office of Inspector General (OIG) is involved in a larger share of the fraud investigations where there are federal contracts and grants involved.

Fraud involving the DBE program for minority and women contractors who are used as “false-front” companies is an area with serious enforcement and compliance problems that appears to be nationwide in scope and requires more attention (“Disadvantaged Business Enterprise Program,” Nov. 18, 2003).

As of November 1, 2003, OIG had 40 ongoing DBE fraud investigations in 19 states. The summary of the activity is in Table 12.

TABLE 11  
BID DATA TRACKING

Tracking Information	No. of STAs Tracking Data*
Track Number of Bid Submissions for all DBE Firms Quoting as Prime or Subcontractor	17
Tracking DBE Prime Bid Dollar Volume	24
Tracking DBE Prime Award Dollars	33
Tracking DBE Subcontract Bids for all Prime Bidders (DBE and Non-DBE)	9
Tracking DBE Subcontract Dollar Awards	34

\*Multiple responses possible from each of the 36 responding STAs.

The types of fraud commonly encountered in DBE investigations include

- Individuals and companies applying for DBE certification that submit misleading or false information that is not easily detectable.
- Inconsistent interpretation of the regulations by the certifying entity and a lack of uniformity in the certification process among agencies receiving DOT funds, enabling some companies and individuals who do not meet DBE requirements to obtain certification.
- DBEs that were legitimately certified at one time that may fail to meet eligibility requirements in subsequent years and are not decertified in an expeditious manner.

The most common DBE schemes reported in the document were (OIG):

- Front or sham companies—established to illegally take advantage of the DBE program by falsely representing ownership and control.
- Pass-through or conduit companies—prime contractor indicates that the DBE performs the work they were hired to do when in actuality the DBE did not perform the work
- False eligibility—when DBEs misrepresent their profits or other criteria to qualify them as a DBE.

TABLE 12  
U.S. DOT OFFICE OF INSPECTOR GENERAL DBE FRAUD INVESTIGATIONS

Contract and Grant Year	Fraud Cases Opened	DBE Cases	DBE Cases % Total	Indictments	Convictions
FY 99	47	3	6%	5	1
FY 00	39	7	18%	9	4
FY 01	68	12	18%	10	9
FY 02	57	14	25%	10	11
FY 03	74	22	29%	9	5
	277	56	20%	40	29

Note: From web document, Federal Office of Inspector General (OIG) Nov. 18, 2003, *Backgrounder*.

**PROGRAM WAIVERS**

In collecting background information for the study, data on program waivers was requested to ensure that methods and techniques were clearly understood and reported. STAs are permitted in the regulation to request waivers if they wish to diverge from the regulation requirements. Five STAs have submitted requests for program waivers. Three STAs reported that they were informed that no waivers would be accepted and either withdrew or did not file waivers. One STA requested waivers in its certification procedures, but was denied. No

waivers have been requested in the scope of subjects encompassed by this study. At the time the study was prepared the following waivers had been requested:

- A 90-day waiver on goal establishment submission,
- A request to use state retainage requirements in lieu of 49 CFR 26.29 (b),
- A request to revise the trucking crediting, and
- A waiver on prompt payment requirement on retainage (denied).

## CONCLUSIONS

The survey questionnaire requested comments on what the state transportation agencies (STAs) believed were the improvements that have resulted from the revised regulation. The following list indicates the Final Rule improvements, with the number of responses noted in parentheses. Responses that had similar content and subject were grouped together.

- Prompt payment provisions (6),
- Goals responsive to market (5),
- Unified Certification Program (UCP) (4),
- Personal net worth (2),
- Race-neutral participation (2),
- Better interpretation guidance—good faith effort (2), and
- Reduced number of fraudulent firms owing to compliance audits (1).

STAs were also asked to describe the methods, other than goal achievement, used to determine program effectiveness. Similar comments have been grouped together. The number in parentheses indicates the number of similar responses.

- Measures of improved Disadvantaged Business Enterprise (DBE) firm competitiveness (27).
  - DBE firm growth and/or graduating from DBE program (10);
  - Number of DBE firms with contracts (8);
  - Number of ready, willing, and able firms competing for contracts (4);
  - Firms bidding as prime contractors (3);
  - DBEs obtaining contracts outside of STA contracts (2); and
  - Ability to stay in business (1).
- Feedback from companies using surveys, focus groups, town meetings, etc.) (9).
- Number of new DBE firm start-ups (3).
- Race-neutral participation (3).

The diverse number of responses suggests that STAs tend to view DBE program effectiveness somewhat differently. However, the primary focus of the STAs responding to the questionnaire was on success measures related to DBE firms rather than on internal or administrative goals.

STAs were requested to provide their thoughts and expertise on what the greatest barriers were or remain for DBE utilization. The number of responses is noted in parentheses. Responses that had similar content and subject were grouped together.

- Lack of resources (financial, bonding, insurances, etc.) (12);
- Stigma of “DBE” designation or perception of special treatment (5);
- Larger contract sizes (5);
- Prime contractors unwilling to work with new DBE firms (4);
- FHWA/U.S.DOT (3);
- Lack of incentives to prime contractors to exceed goals (1);
- Personal net worth reporting (1);
- Not all DBEs are ready, willing, and able (1);
- Trucking rules (1); and
- DBE perception that certification is a work guarantee (1).

The primary barrier described by the STAs is the continuing difficulty with the lack of resources available to DBE firms. Larger contract sizes and related ideas that limit competitive opportunities was also a key trend described in the responses.

The questionnaire contained a request for information on what activities the STAs were involved in that included new methods or techniques to improve operational effectiveness. Responses that had similar content and subject were grouped together. Not all STAs provided a response.

- Implement or continue implementation of Champ, a software system for managing contract compliance (2),
- Improve business development programs (2),
- Develop auditing or monitoring for design contracts (2),
- Improve supportive services offerings (2),
- Improve our good faith effort analysis (2),
- Targeted assistance programs (1),
- Provide DBE training for on-line bidding (1),
- Conduct more focus groups to learn about program needs (1),
- Learn UCP best practices (1), and
- Develop next phase of mentor–protégé program (1).

The new methods and techniques identified here are predominately improvements in existing programs and activities.

Respondents were asked to provide their thoughts and expertise on what was needed to improve the DBE program and use of DBE firms. The following list notes the number of responses in parentheses. Responses that had similar content

and subject were grouped together. There was significant diversity in the responses to this question.

- Return to two goal program: women and minorities (4).
- Increase support services funding commensurate with the size of the state's DBE program and number of participants (3).
- Establish local DBE/small business bonding and insurance consortia (1).
- Create legal consortiums for subcontract oversight and resolution (1).
- Increase education of non-DBE contractors (1).
- Raise personal net worth cap (1).
- Increase Associated General Contractors of America participation (1).
- Measure success by growth and net worth of DBEs rather than dollars contracted (1).
- Provide more standardization and guidance nationally (1).
- Provide better access to prime contractors; break down barriers (1).
- When requested, have the U.S.DOT issue guidance (1).
- Include DBE utilization in bidding software (1).
- Continue networking with Small Business Administration (1).
- Consider regular dealer and trucking credit to conform to industry practice (1).

The DBE program's evolution resulting in the recent regulation has created many new requirements for DBE contractors, non-DBE contractors, and STA administrators. The data from this study suggest that STAs have, in most instances, adapted their programs or are in the process of addressing the new requirements. Recalling the major points of change in the program, the study data revealed the following:

- Set-aside programs are not being used.
- State goals are no longer 10% across the board, but range from 5% to 17%. Goal accomplishment was mixed for 2002, with equal proportions exceeding their goals and not meeting their goals.
- Certified DBEs and ready, willing, and able contractors willing to work in construction are not the same. States need to track the bidders on their contracts to determine ready, willing, and able DBEs.
- Bonding assistance and financial assistance for DBEs remain predominately U.S.DOT Office of Small and Disadvantaged Business Utilization programs. One STA provided documentation attesting to a local assistance program.
- Mentor-protégé programs have been developed in one-third of the surveyed STAs, with some variation in their structure and format. Their primary focus is to aid in small business development. Their use is nonmandatory.
- A recommended race-neutral strategy was to divide contracts into smaller pieces; however, 50% of the STAs

noted that they were experiencing an increase in bundled contracts. In addition, more STAs are using design-build delivery programs on larger projects. The impact of design-build was unknown at this time.

- A few STAs have been successful at establishing and accomplishing their goals in a race-neutral program. Split goals were predominate among the STA data in this study.
- Good faith efforts are approved nearly 80% of the time. This includes those who achieve or exceed the contract goal, as well as those accepted after an evaluation of the contractor's efforts to achieve the goal.
- Overconcentration is predominately a complaint-driven process. Not all STAs have a method to evaluate or rate overconcentration. No summary can be given on overconcentration correction strategies because little overconcentration has been reported.
- Waivers on program elements can be submitted to the U.S.DOT. Nearly as many STAs indicated that they had been instructed not to submit waivers as those who had. It was unclear, from the questionnaire, if any had been approved.
- Recipients must collect data about bidders on their contracts and subcontracts for later use in calculating overall goals. Data collection was not uniform and not all record keeping is being implemented in accordance with the regulation. Previously, a paper-based record system, the automation and capture of data will need development.

This study is one of the few published reports on the DBE program. It is a significant contract management area that needs further data collection and analysis to identify best practices or effective solutions. Through technology transfer activities these best practices and solutions can be disseminated to STAs. In particular, the following topics are suggested for future research:

- Program effectiveness and performance measures
  - Methods for improving goal setting accuracy—Some STAs are successfully achieving their goals, whereas others are not, based on their reported goals and achievements. The methods for establishing goals could be studied to better assist DBE program administrators.
  - STA program performance measures for comparisons—Achieving goals is the primary performance measure for STAs. However, many STAs have been successful in other aspects of their programs that support goal achievement. A study to benchmark other program elements and performance indicators could aid DBE program administrators.
- Technical/administrative issues
  - Refined good faith effort analysis procedures—There is wide latitude in determination of good faith efforts.

A study that would model the various approaches to good faith effort analysis would aid all STA programs that have good faith effort requirements.

- Design–build and bundled contract impact analysis—There is inadequate scientific data measuring the impact of new contracting approaches such as design–build and bundled contracts. The anecdotal data suggest that there is an impact on DBE contracting opportunities. This needs to be balanced with the impact on STA management requirements.
- Best practices
  - DBE company growth models—Growth models would aid DBE firms in understanding the pattern of growth for a construction firm in the transportation construction industry. Suggestions for all aspects of business growth could assist in business decision making.
  - Overconcentration definition and analysis model—Overconcentration and the analysis for overconcentration vary among the STAs. A more consistent method

for determining overconcentration might be developed to aid program managers in identifying where and when it occurs.

- Resource issues
  - A significant limiting factor for DBE participation is the lack of resources such as bonding and insurance. The issues to be researched might include appropriate models to provide assistance and to evaluate if the assistance creates an imbalance in the competitive bid process.

Generally, the overall lack of published investigations on these and related issues has limited the amount of information that is disseminated about DBE administrative activities. Innovative practices that could have a significant impact on all DBE programs may be discounted if they do not have independent analysis or evaluation data. Overall, the DBE programs reviewed in this study had some common points or objectives, but there were wide variations in interpretation, implementation, and tracking.

## REFERENCES

- “AASHTO Subcommittee on Construction Survey on the Effect of 1999 DBE Regulations on Retainage,” American Association of State Highway and Transportation Officials, Washington, D.C., 2001 [Online]. Available: <http://www.fhwa.dot.gov/programadmin/contracts/retsum.htm>.
- Construction Manual*, California Department of Transportation, Sacramento, 2001, updated July 2004.
- “Disadvantaged Business Enterprise Community of Practice,” Federal Highway Administration, Washington, D.C. [Online]. Available: <http://knowledge.fhwa.dot.gov/cops/dbex.nsf/home>.
- Disadvantaged Business Enterprises, Critical Information Is Needed to Understand Program Impact*, GAO-01-586, U.S. General Accounting Office, Washington, D.C., June 2001.
- “Disadvantaged Business Enterprise Program,” *Backgrounder*, Office of Inspector General, U.S. Department of Transportation, Washington, D.C., Nov. 18, 2003.
- “New York State Department of Transportation Loan Program,” Office Of Equal Opportunity Development and Compliance, New York State Department of Transportation, Albany, May 10, 2002 [Online]. Available: <http://www.dot.state.ny.us/oeodc/support.html#loan>.
- Office of Small and Disadvantaged Business Utilization, U.S. Department of Transportation, Washington, D.C. [Online]. Available: <http://osdbuweb.dot.gov/index.html>.
- Parvin, C., “Top Ten Issues on Certification for DBE Contractors,” Jenkens & Gilchrist, Memorandum, Feb. 26, 1999 [Online]. Available: [www.ftba.com](http://www.ftba.com).
- Parvin, C., “Taking Advantage of the Rule,” *Roads and Bridges*, Vol. 41, No. 8, Aug. 2003.
- “Supportive Services FAQ, Mentor Protégé Program,” Ohio Department of Transportation, Columbus [Online]. Available: <http://www.dot.state.oh.us>.
- “Solving the Equal Opportunity Puzzle,” Washington and Rice, LLC, Woodmere, Ohio, undated brochure [Online]. Available: [www.washingtonrice.com](http://www.washingtonrice.com).
- “TEA-21: Moving into the 21st Century,” Federal Highway Administration, Washington, D.C., Apr. 9, 2001 [Online]. Available: <http://www.fhwa.dot.gov/tea21/>.

# APPENDIX A

## Survey Questionnaire

### NCHRP PROJECT 20-5 SYNTHESIS

#### TOPIC 34-05

#### MANAGEMENT OF DISADVANTAGED BUSINESS ENTERPRISE ISSUES IN CONSTRUCTION CONTRACTING

#### QUESTIONNAIRE

#### PURPOSE OF THE SYNTHESIS

The purpose of this survey is to request information to document how state departments of transportation (DOTs) are administering the Disadvantaged Business Enterprise (DBE) rules implemented in February 2, 1999. The requirements in this regulation changed the way DOTs and contractors worked with DBE contracts. States have developed different approaches to bidders list information, prompt payment, retainage, good faith effort analysis, commitments and actual achievement measurement, and compliance issues of fraud, substitutions, and commercially useful function. This synthesis will primarily focus on post-award contract administration issues and include those pre-award issues that shape or define some of the post-award processes. The operating levels of each program are different and some DOTs will have progressed further in implementation of some techniques and methods than others. The synthesis will identify and categorize the processes and information related to contract administration procedures and practices for construction contracts including construction management contracts and design-build contracts, master contracts, pass-through contracts administration, and performance measures established other than overall goal achievement, confidentiality practices.

#### RESPONDING AGENCY INFORMATION

Agency:

Address:

City:

State:

Zip:

Questionnaire completed by (please provide primary contact information)

Name:

E-mail:

Current position/title:

Telephone:

Fax:

Agency contact (if different from above)

Name:

Telephone:

E-mail:

**PLEASE RETURN THE COMPLETED QUESTIONNAIRE BY APRIL 28, 2003 TO:**

Gary R. Smith  
North Dakota State University  
Division of Construction Management and Engineering  
120 CME Building  
Fargo, North Dakota 58105

Telephone: 701-231-7880  
Fax: 701-231-7431  
E-mail: gary.smith@ndsu.nodak.edu

Please contact Gary Smith if you have questions.

**INSTRUCTIONS**

Please be as concise as possible with your response. Many of the questions are open-ended. Follow-up telephone or e-mail contacts are likely to confirm and enhance the information provided. Please complete the contact person information as completely as possible.

Please provide any information, studies, or other documents that are relevant to answers provided in the questionnaire. Procedures, policies, and other information that may be of interest to other state highway agencies related to program administration in the post-award phase is of highest interest. If there is a website containing the policy or document please provide a detailed URL address. This will reduce the need to send hard copy documents.

**SCOPE—SYNTHESIS LIMITS**

As much as possible the scope has been limited to issues in the contract administration phase of DBE program administration. However, some background information on pre-award processes and general information is necessary to provide context to the responses. Since much of the information being requested has never been obtained in a synthesis format, your cooperation in responding and providing as much detail as possible will be a significant contribution.

**SECTION 1. GENERAL ADMINISTRATIVE QUESTIONS**

1. Briefly describe the administrative reporting relationship(s) for the DBE program (or attach a copy of organization chart showing the DBE program).
  
2. How many full-time staff members are assigned to the administration of the DBE program?
  - a. Full-time:  
Briefly describe the primary responsibility for each full-time staff member:
  
  - b. How many part-time staff members (temporarily assigned, partial assignment, indirect reporting)? Part-time:  
Please describe “part time” staff responsibilities. (For example, some district-level EEO personnel may also perform field audits for DBE certification process).
  
3. Does this administrative unit have responsibility for implementing and maintaining the Uniform Certification Process (UCP) for your state? Yes  No

How is UCP coordinated?

- 4. a. How many DBE firms (on average) were listed on your Certification List for 2002?
  
- b. How many (on average) of the Certified Firms perform work in highway construction (including design, construction, materials supply, and dealers)?
  
- c. How often is the certification list updated (adding new firms, removing graduations, etc.)?                      days

5. Please indicate what information is publicly available from the Certification List.

Owner name	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Address	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Telephone	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Fax	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Work type (listed specialties)	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Work areas (districts or radius from office)	Yes <input type="checkbox"/>	No <input type="checkbox"/>
SIC	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Age of firm	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Annual gross receipts	Yes <input type="checkbox"/>	No <input type="checkbox"/>			

Other (briefly describe):

- 6. a. What was your agency's DBE participation goal for the fiscal year 2002?                      %
  
- b. What was the actual DBE achievement (based on actual payments) for fiscal year 2002?                      %
  
- c. Please describe the method(s) used to collect actual DBE achievement from project data including when the data are collected.
  
- d. Do you have a split goal for race-neutral and race-conscious methods?    Yes                       No   
     If Yes, please list 2002 race-neutral goal                      % and 2002 race-conscious goal                      %
  
- e. Could you describe the method used to include all parties (including the public) in the goal setting process?
  
- f. Do you use any set aside contracts as allowed under 49 CFR 26.43 for limited extreme circumstances?  
     Yes                       No   
     If Yes, please provide your definition or description of what constitutes an "extreme circumstance."

- 7. a. Does your state have DBE legislation for publicly funded projects using only local funds (state, county, etc.)?  
     Yes                       No   
     If Yes, please respond to the following:

b. Who establishes goals for locally funded highway construction projects?

c. What was the goal for last year? %

If No, please respond to the following:

d. Do some local jurisdictions establish their own goals? Yes  No

8. How do you track DBE firm utilization on federally funded pass-through contracts?

9. In the event a firm is decertified, please describe the process used for notification of the prime contractor and owner.

What is the contract goal adjustment procedure that follows the notification?

10. Please describe your analysis process for determining over-concentration in work types (also include the frequency of analysis).

11. What actions are taken when over-concentration is determined and have they been successful?

12. Have any waivers been requested from FHWA on the DBE program administration activities? Please describe program waivers:

## SECTION 2. PRE-CONTRACT

13. a. What process is used for establishing which contracts are required to have goals?

b. Are there specific factors used to select contracts assigned goals? Yes  No   
Please list or describe the factors:

c. Are there specific factors that eliminate contracts from goal assignment? Yes  No   
Please list or describe the factors:

14. a. Does your state require prequalification for prime contractors? Yes  No

b. Do you also require prequalification for subcontractors? Yes  No

15. a. Do you maintain a bidder's list of DBE and non-DBE firms quoting highway work for each letting (firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects)? Yes  No

b. Please describe how the bidder's list is generated.

c. Describe any changes you have instituted in the process of collecting bidder's list information to improve the process.

16. Please indicate what information is publicly available from your bidders list.

Owner name	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Address	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Telephone	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Fax	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Work type (listed specialties)	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Work areas (districts or radius from office)	Yes <input type="checkbox"/>	No <input type="checkbox"/>
SIC	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Age of firm	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Annual gross receipts	Yes <input type="checkbox"/>	No <input type="checkbox"/>			

Other (briefly describe):

17. What is the minimum level of self-performed work a prime contractor must perform? %

18. Do you require a contract or performance bond on all projects? Yes  No

19. Do you include the contribution of second-tier subcontractors counted? Yes  No

20. Do you outsource construction management (CM) services? Yes  No   
If Yes, what portion of the CM services contract is counted in DBE goal achievement? %

21. Does your agency include DBE requirements contracts, other than construction contracts? Yes  No

a. If Yes, please identify the types of non-construction contracts that would be subject to DBE requirements. (Check all that apply.)

- Planning
- Engineering and architectural services
- Materials testing and inspection
- Construction inspection
- Construction management
- Maintenance services

Please note or comment on all of those contracts that are contracted as indefinite delivery and indefinite quantity contracts (ID/IQ). ID/IQ contracts are also called master contracts where work is assigned to a contractor via work orders that modify a master contract, rather than creating new contracts for each project.

22. a. Do you track the number of bid submissions on highway contracts for all DBE firms quoting highway work either as a prime or a subcontractor (successful and unsuccessful)? Yes  No   
Do you also track the dollar volumes for

b. DBE prime contract bids? Yes  No  If Yes, 2002 prime contract bids were \$

c. DBE prime contract awards? Yes  No  If Yes, 2002 prime contract awards were \$  
Do you also track for all prime contract bidders (DBE and non-DBE prime contractors)?

d. DBE subcontract bids? Yes  No  If Yes, 2002 subcontract bids were \$

e. DBE subcontract awards? Yes  No  If Yes, 2002 subcontract awards were \$  
Please describe other data that are tracked for each letting:

23. Does your web page provide a list of certified DBEs? Yes  No

a. In your opinion, is this list helpful to prime contractors?

b. In your opinion, is this list helpful to DBE subcontractors?

24. a. Do contractors submit their bids electronically (e-mail or web page)  or do they use a traditional paper (computer disk) submission  at a central bid submission location on bid day?

b. If your agency has elected to use electronic bidding or is currently making the transition:

a. Was/is the DBE program involved in the electronic bid implementation process? Yes  No

b. Was/is the DBE contracting community represented in the implementation decision? Yes  No

c. What impact has/will electronic bidding had/have on the DBE program?

25. Do you require DBE commitments be submitted as (49 CFR 26.53(b)(3) (check one);

a.  A condition of bid responsiveness or

b.  A condition of responsibility prior to award.

How many days does apparent low bidder have to furnish commitments? \_\_\_\_\_ days

26. Is there an active DBE Bonding Assistance program in your state? Yes  No

If Yes, has the program reduced the difficulty of obtaining bonds for DBE contractors? Yes  No

If No, please describe activities undertaken to reduce the difficulty of obtaining bonds for DBE contractors.

27. Do you have a written procedure or policy for evaluating good faith efforts (GFE)? Yes  No

a. If Yes, please provide a copy or URL for the GFE process.

b. How do you evaluate a GFE (describe the process steps, skip if you provide in "a" above).

c. How many good faith effort requests were submitted in Fiscal Year 2002?

d. Of those submitted, how many good faith effort submittals were accepted?

e. Do you have a time limit on GFE analysis within which to make a decision?

Yes ; Limit is defined as \_\_\_\_\_ days. No

- f. Do you have any special rules or exceptions established to reduce the need for GFE?  
 Yes  No   
 If Yes, please provide a description of your exceptions or process definitions that allow GFE.

### SECTION 3. CONTRACT ADMINISTRATION

28. a. Many construction firms are undercapitalized. Do you administrate a short-term loan program or loan assistance program specifically established for DBE firms? Yes  No   
 If Yes, how is funding for this program generated?
- b. What are the defined allowable uses of funds from this program?
- c. How is funds use monitored?
- d. Is there an automatic payment deduction from invoices to repay loans? Yes  No
29. Are there local banking firms supporting Short Term Loan (STL) programs for DBE firms in your state?  
 Yes  No   
 If your response was Yes, what is your opinion about the effectiveness of the STL program?
30. Please describe the requirements of your subcontractor prompt payment provision or provide a copy of your prompt payment requirements.
31. What process is used to ensure subcontractors are being paid in accordance with your prompt payment requirement?  
 How do you track payments?
32. Describe any sanctions or penalties for prime contractors that fail to comply with the prompt payment requirements.
33. Prior to the February 2, 1999 Final Rule, did you have a state law or policy requiring:
- a. Prompt payment Yes  No   
 If Yes, please describe the policy or law requirements.
- b. Prompt return of retainage? Yes  No   
 If Yes, please describe the law or policy requirements.

34. a. Since the February 2, 1999 Final Rule, have you developed a state law or policy concerning “satisfactory completion” as it relates to the release of retainage to a subcontractor from a prime? Yes  No   
If Yes, how many days after the subcontractor’s work is “satisfactorily completed” must the prime contractor release retainage?
- b. Have there been any contractual issues regarding contract completion or your agency’s ability to enforce contract terms? Yes  No
- c. Do you have a “zero retainage for primes” policy as a result of the DBE regulation (or some variation of the zero retainage for subcontracted work)? Yes  No
- d. If you have a zero retainage policy, is it used for all contracts? Yes  No
- e. What contractual issues have arisen related to zero retainage?
- Overpayment to prime contractors by DOT
  - Limiting DOT ability to obtain final contract documentation from prime contractor (FHWA-47, etc.)
  - Limiting prime contractor’s ability to recall subcontractors to the project at completion
  - Other (describe):
35. Please describe the process your agency uses for contract compliance reviews. Who conducts them? When are they conducted? Do you have established criteria for the review, including cross checks in the documentation?
36. Please describe the process used to ensure DBE firms are performing a commercially useful function (CUF) including CUF definition being applied.
37. What sanctions or penalties are there for prime contractors and/or DBE firms claiming a CUF on a contract when it is determined that no CUF was being performed?
38. a. How are you informed about situations where fraud investigations are required?
- b. How many investigations were conducted in 2002?
- c. How many cases of fraud were identified?
- d. How many cases are still pending from 2002 investigations?
39. Occasionally a prime contractor may have to terminate a non-performing subcontractor. When that subcontractor is a DBE, what process is required to ensure the contractor remains in compliance or qualifies for a good faith effort replacing the terminated firm? (Please describe.)

Please describe the general practices and procedures to be followed in removal of a DBE.

40. Under what circumstances would a contractor (prime or DBE) be debarred from lettings? In addition to describing the circumstances, please provide a description of the process used for determination and appeals.
41. What penalties are used for contractors who do not submit their documents, underutilize DBE, or eliminate DBEs without substitution? (Please describe.)

Do you have any standards for measuring contractor cooperation? Yes  No   
If Yes, please provide a description of the standard.

42. Do you offer any incentives to contractors to improve DBE utilization? Yes  No   
If Yes, please describe the incentives offered.

#### SECTION 4. OTHER CONTRACT ADMINISTRATION ISSUES

Please describe your experiences in the following administrative issues in FY 2002 compared to FY 2001:

43. The number of new firms seeking certification as a DBE has:  
 Increased %  Declined %  Remained the same  
Based on your knowledge, what factors are contributing to the increase or decrease?
44. The number of DBE firms requesting removal from certification has:  
 Increased %  Declined %  Remained the same  
Based on your knowledge, what factors are contributing to the increase or decrease?
45. The number of firms willing, capable and available to perform highway construction has:  
 Increased %  Declined %  Remained the same  
Based on your knowledge, what factors are contributing to the increase or decrease?
46. The number of DBE firms submitting bids as prime contractors has:  
 Increased %  Declined %  Remained the same  
Based on your knowledge, what factors are contributing to the increase or decrease?
47. The ability of DBE firms to submit competitive subcontract quotes has:  
 Increased %  Declined %  Remained the same  
Based on your knowledge, what factors are contributing to the increase or decrease?
48. Have you performed or contracted studies or analysis to verify the changes noted in Questions 43–47?  
Yes  No  If Yes, could you please provide a copy of the study or analysis.

49. Do you include design in the overall DBE participation goal? Yes  No
50. Do you have separate goals established for construction and design contracts? Yes  No
51. For design–build contracts, what written documentation of DBE commitments do you require from the proposing company or joint venture prior to contract award?
52. What reporting or investigation methods are used to measure contract DBE compliance on design–build contracts?
53. Have you experienced a trend toward larger contract sizes and bundled contracts (combining two or more smaller contracts into one large contract)? Yes  No   
If Yes, how has bundling and/or larger contract sizes impacted the administration of the DBE program?
54. How are DBE goals established for innovative contracting methods like design–build?
55. Do the DBE administrative personnel provide guidance and/or advice to engineering or contracts division regarding contract size, bundling or grouping of contracts of certain work types, and distribution of work types in lettings?  
Yes  No   
If Yes, please describe the process used to advise engineering and contracts departments or divisions with respect to DBE.
- If No, can you identify problems you have encountered between the contract work packages and DBE participation?
56. Other than measuring goal achievement, please describe what other measures are used to determine program effectiveness.
57. What new methods or techniques are you investigating to improve the operational effectiveness of the DBE program?
58. Mentor–protégé programs have been suggested as one effective method to improve effectiveness of DBE utilization.  
Have you implemented a mentor–protégé program? Yes  No   
Is it mandatory? Yes  No
59. What are the most effective improvements resulting from the February 2, 1999 Final Rule?
60. What future needs do you think are necessary to further improve the DBE program and utilization of DBE contractors?
61. What are the greatest barriers limiting improvement in DBE firm utilization in the highway construction market?

**DOCUMENT REQUEST**

The availability of previous studies and literature on this particular topic generally identifies legal challenges to the program. If you have conducted a study of a specific issue within the DBE program (good faith effort, design-build, etc.), a copy of each publication or study would be appreciated. These studies have not been tabulated or documented for research purposes. Many other agencies would be interested in seeing what has been studied. A complete bibliographic record of all studies, papers, and related papers on program administration will be compiled based on the documents provided. The requested copy is for the purpose of examination for subjects relevant to this synthesis and to prepare the bibliography. No further distribution or reproduction will be made without permission of the submitting agency.

Thank you for your time and contribution to the success of this synthesis project.

The final summary report is scheduled for November 2003.

**PLEASE RETURN COMPLETED SURVEY ON OR BEFORE APRIL 28, 2003**

## APPENDIX B

### Final Rule 49 CFR 26, 2003

THESE DATA CURRENT AS OF THE *FEDERAL REGISTER* DATED JANUARY 6, 2004

The most current versions of 49 CFR 26 can be accessed at: <http://www.gpoaccess.gov/ecfr/>

#### 49 CFR

#### Transportation

#### Subtitle A

#### Office of the Secretary of Transportation

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

#### Subpart A—General

##### Sec.

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

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

- 26.21 Who must have a DBE program?
- 26.23 What is the requirement for a policy statement?
- 26.25 What is the requirement for a liaison officer?
- 26.27 What efforts must recipients make concerning DBE financial institutions?
- 26.29 What prompt payment mechanisms must recipients have?
- 26.31 What requirements pertain to the DBE directory?
- 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?
- 26.35 What role do business development and mentor–protège programs have in the DBE program?
- 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?

#### 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?  
[26.84](#) How do recipients process applications submitted pursuant to the DOT/SBA MOU?  
[26.85](#) How do recipients respond to requests from DBE-certified firms or the SBA made pursuant to the DOT/SBA MOU?  
[26.86](#) What rules govern recipients' denials of initial requests for certification?  
[26.87](#) What procedures does a recipient use to remove a DBE's eligibility?  
[26.89](#) What is the process for certification appeals to the DOT?  
[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–Protège Program Guidelines  
 Appendix E to Part 26—Individual Determinations of Social and Economic Disadvantage  
 Appendix F to Part 26—Uniform Certification Application Form  
**Authority:** 23 U.S.C. 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C. 1615, 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107, 113.  
**Source:** [64 FR 5126](#), Feb. 2, 1999, unless otherwise noted.

#### **Subpart A—General**

[\[TOP\]](#)

##### **§26.1 What are the objectives of this part?**

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- (b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- (c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- (e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- (f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- (g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

[\[TOP\]](#)

##### **§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.

[\[TOP\]](#)

##### **§26.5 What do the terms used in this part mean?**

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

- (1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

- (i) One concern controls or has the power to control the other; or
- (ii) A third party or parties controls or has the power to control both; or
- (iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

*Alaska Native* means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

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

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

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

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

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

*Disadvantaged business enterprise or DBE* means a for-profit small business concern—

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

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

*DOT/SBA Memorandum of Understanding or MOU*, refers to the agreement signed on November 23, 1999, between the Department of Transportation (DOT) and the Small Business Administration (SBA) streamlining certification procedures for participation in SBA's 8(a) Business Development (8(a) BD) and Small Disadvantaged Business (SDB) programs, and DOT's Disadvantaged Business Enterprise (DBE) program for small and disadvantaged businesses.

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

*Immediate family member* means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

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

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

*Native Hawaiian* means any individual whose ancestors were natives, prior to 1778, of the area that 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 FAA, 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 that receives DOT financial assistance and passes some or all of it on to another recipient.

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

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

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

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

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

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

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

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

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

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

*Socially and economically disadvantaged individual* means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is—

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

- (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
- (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- (iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
- (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
- (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka;
- (vi) Women;
- (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

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

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

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

#### **§26.7 What discriminatory actions are forbidden?**

- (a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.
- (b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

#### **§26.9 How does the Department issue guidance and interpretations under this part?**

- (a) This part applies instead of subparts A and C through E of 49 CFR part 23 in effect prior to March 4, 1999. (See 49 CFR Parts 1 to 99, revised as of October 1, 1998.) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999, have definitive, binding effect in implementing the provisions of this part and constitute the official position of the DOT.
- (b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid and binding, and

constitute the official position of the DOT, 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 DOT has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.

#### **§26.11 What records do recipients keep and report?**

(a) [Reserved]

(b) You must continue to provide data about your DBE program to the Department as directed by DOT operating administrations.

(c) You must create and maintain a bidders list.

(1) The purpose of this list is to provide you as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your Federally assisted contracts for use in helping you set your overall goals.

(2) You must obtain the following information about DBE and non-DBE contractors and subcontractors who seek to work on your Federally assisted contracts:

(i) Firm name;

(ii) Firm address;

(iii) Firm's status as a DBE or non-DBE;

(iv) Age of the firm; and

(v) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (e.g., less than \$500,000; \$500,000–\$1 million; \$1–2 million; \$2–5 million; etc.) rather than requesting an exact figure from the firm.

(3) You may acquire the information for your bidders list in a variety of ways. For example, you can collect the data from all bidders, before or after the bid due date. You can conduct a survey that will result in statistically sound estimate of the universe of DBE and non-DBE contractors and subcontractors who seek to work on your Federally assisted contracts. You may combine different data collection approaches (e.g., collect name and address information from all bidders, while conducting a survey with respect to age and gross receipts information).

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000]

#### **§26.13 What assurances must recipients and contractors make?**

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

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

#### **§26.15 How can recipients apply for exemptions or waivers?**

(a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the 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 with the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(e) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:

(1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

[68 FR 35553, June 16, 2003]

#### **§26.31 What requirements pertain to the DBE directory?**

You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE. You must revise your directory at least annually and make updated information available to contractors and the public on request.

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

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

(b) These measures may include the use of incentives, technical assistance, business development programs, mentor-protège 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-protège 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-protège" 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-protège program are eligible to participate in the mentor-protège program.

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

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

- (ii) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.
- (3) For purposes of making determinations of business size under this part, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor–protégé program. See Appendix D of this part for guidance concerning the operation of mentor–protégé programs.
- (c) Your BDPs and mentor–protégé programs must be approved by the concerned operating administration before you implement them. Once approved, they become part of your DBE program.

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

- (a) You must implement appropriate mechanisms to ensure compliance with the part’s requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state, and local law). You must set forth these mechanisms in your DBE program.
- (b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs.
- (c) This mechanism must provide for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), including a means of comparing these attainments to commitments. In your reports of DBE participation to the Department, you must display both commitments and attainments.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35554, June 16, 2003]

**Subpart C—Goals, Good Faith Efforts, and Counting**

**§26.41 What is the role of the statutory 10 percent goal in this program?**

- (a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.
- (b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs’ opportunities to participate in DOT-assisted contracts.
- (c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

**§26.43 Can recipients use set-asides or quotas as part of this program?**

- (a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.
- (b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

**§26.45 How do recipients set overall goals?**

- (a)(1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.
- (2) If you are a FTA or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) \$250,000 or less in FTA or FAA funds in prime contracts in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA, respectively, for that fiscal year. However, if you have an existing DBE program, it must remain in effect and you must seek to fulfill the objectives outlined in §26.1.
- (b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on your DOT-assisted contracts (hereafter, the “relative availability of DBEs”). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal, or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.
- (c) *Step 1.* You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.
  - (1) *Use DBE Directories and Census Bureau Data.* Determine the number of ready, willing, and able DBEs in your market from your DBE directory. Using the Census Bureau’s County Business Pattern (CBP) database, 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 database may be obtained from the Census Bureau at their website, [www.census.gov/epcd/cbp/view/cbpview.html](http://www.census.gov/epcd/cbp/view/cbpview.html).) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.
  - (2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in

the same time period. Divide the number of DBE bidders and quoters by the number for all businesses to derive a base figure for the relative availability of DBEs in your market.

- (3) *Use data from a disparity study.* Use a percentage figure derived from data in a valid, applicable disparity study.
- (4) *Use the goal of another DOT recipient.* If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.
- (5) *Alternative methods.* You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.
- (d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.
- (1) There are many types of evidence that must be considered when adjusting the base figure. These include:
- (i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;
  - (ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and
  - (iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.
- (2) If available, you must consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete. These include, but are not limited to:
- (i) Statistical disparities in the ability of DBEs to get the financing, bonding, and insurance required to participate in your program;
  - (ii) Data on employment, self-employment, education, training, and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.
- (3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the “but for” factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.
- (e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:
- (1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming fiscal year;
- (2) If you are an FTA or FAA recipient, as a percentage of all FTA or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the forthcoming fiscal year. In appropriate cases, the FTA or FAA Administrator may permit you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects.
- (f)(1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration for review on August 1 of each year, unless the Administrator of the concerned operating administration establishes a different submission date.
- (2) If you are an FTA or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FTA or FAA Administrator.
- (3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see §26.51(c)).
- (4) You are not required to obtain prior operating administration concurrence with the your overall goal. However, if the operating administration’s review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.
- (5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:
- (i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and
  - (ii) Avoid imposing undue burdens on non-DBEs.
- (g) In establishing an overall goal, you must provide for public participation. This public participation must include:
- (1) Consultation with minority, women’s, and general contractor groups; community organizations; and other officials or organizations that could be expected to have information concerning the availability of disadvantaged and nondisadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs.

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 65 FR 68951, Nov. 15, 2000; 68 FR 35553, June 16, 2003]

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

(a) You cannot be penalized or treated by the Department as being in noncompliance with this rule because your DBE participation falls short of your overall goal unless you have failed to administer your program in good faith.

(b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

**§26.49 How are overall goals established for transit vehicle manufacturers?**

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal. In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying §26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will perform during the fiscal year in question. You must exclude from this base funds attributable to work performed outside the United States and its territories, possessions, and commonwealths. The requirements and procedures of this part with respect to submission and approval of overall goals apply to you as they do to recipients.

(c) As a transit vehicle manufacturer, you may make the certification required by this section if you have submitted the goal this section requires and FTA has approved it or not disapproved it.

(d) As a recipient, you may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

**§26.51 What means do recipients use to meet overall goals?**

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures; is awarded a subcontract on a prime contract that does not carry a DBE goal; or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

(b) Race-neutral means include, but are not limited to, the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBEs and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);

(2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs and other small businesses improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

- (8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
- (9) Assisting DBEs and other small businesses to develop their capability to utilize emerging technology and conduct business through electronic media.
- (c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.
- (d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.
- (e) The following provisions apply to the use of contract goals:
- (1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.
  - (2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.
  - (3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.
  - (4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.
  - (f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:
    - (1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

**Example to Paragraph (f)(1):** Your overall goal for Year I is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year I.

(2) If during the course of any year in which you are using contract goals you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

**Example to Paragraph (f)(2):** In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional 1 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 these data to the concerned operating administration as provided in §26.11.

**§26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?**

(a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:

- (1) Documents that it has obtained enough DBE participation to meet the goal; or
- (2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

- (1) Award of the contract will be conditioned on meeting the requirements of this section;
- (2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

- (i) The names and addresses of DBE firms that will participate in the contract;
- (ii) A description of the work that each DBE will perform;
- (iii) The dollar amount of the participation of each DBE firm participating;
- (iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
- (v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
- (vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part); and

(3) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

- (i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or
- (ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.

(c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.

(d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

(1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

(2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.

(3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

(4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

(5) The result of the reconsideration process is not administratively appealable to the DOT.

(e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.

(f)(1) You must require that a prime contractor not terminate for convenience a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without your prior written consent.

(2) When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.

(3) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.

(g) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

**§26.55 How is DBE participation counted toward goals?**

(a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.

(1) Count the entire amount of that portion of a construction contract [or other contract not covered by paragraph (a)(2) of this section] that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

(2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

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

(c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

(1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

(2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.

(3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.

(4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.

(d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

(1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

(2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

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

(4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

(5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate Department Operating Administration.

**Example to this paragraph (d)(5):** DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

(6) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

(e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)(i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(2)(i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

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

(B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

(C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).

(3) With respect to materials or supplies purchased from a DBE that is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

(f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in §26.87(i).

(g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.

(h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35554, June 16, 2003]

#### **Subpart D—Certification Standards**

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

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups identified in §26.67(a) are socially and economically disadvantaged. This means they do not have the burden of proving to you that they are socially and economically disadvantaged. In order to obtain the benefit of the rebuttable presumption, individuals must submit a signed, notarized statement that they are a member of one of the groups in §26.67(a). Applicants do have the obligation to provide you information concerning their economic disadvantage (see §26.67).

(d) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to you, by a preponderance of the evidence, that they are socially and economically disadvantaged. (See Appendix E of this part.)

(e) You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35554, June 16, 2003]

##### **§26.63 What rules govern group membership determinations?**

(a)(1) If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group [see §26.61(c)] you have a well-founded reason to question the individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group.

(2) You must provide the individual a written explanation of your reasons for questioning his or her group membership and a written request for additional evidence as outlined in paragraph (b) of this section.

(3) In implementing this section, you must take special care to ensure that you do not impose a disproportionate burden on members of any particular designated group. Imposing a disproportionate burden on members of a particular group could violate §26.7(b) and/or Title VI of the Civil Rights Act of 1964 and 49 CFR part 21.

(b) In making such a determination, you must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. You may require the applicant to produce appropriate documentation of group membership.

(1) If you determine that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis.

(2) Your decisions concerning membership in a designated group are subject to the certification appeals procedure of §26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35554, June 16, 2003]

#### **§26.65 What rules govern business size determinations?**

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. You must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402) over the firm's previous three fiscal years, in excess of \$16.6 million. The Secretary adjusts this amount for inflation from time to time.

#### **§26.67 What rules determine social and economic disadvantage?**

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian–Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(i) You must require each individual owner of a firm applying to participate as a DBE (except a firm applying to participate as a DBE airport concessionaire), whose ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed \$750,000.

(ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. This statement and documentation must not be unduly lengthy, burdensome, or intrusive.

(iii) In determining an individual's net worth, you must observe the following requirements:

(A) Exclude an individual's ownership interest in the applicant firm;

(B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm).

(C) Do not use a contingent liability to reduce an individual's net worth.

(D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the assets were distributed at the present time.

(iv) Notwithstanding any provision of Federal or state law, you must not release an individual's personal net worth statement nor any documentation supporting it to any third party without the written consent of the submitter. *Provided*, that you must transmit this information to DOT in any certification appeal proceeding under §26.89 in which the disadvantaged status of the individual is in question.

(b) *Rebuttal of presumption of disadvantage.* (1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of §26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(c) [Reserved]

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$750,000 shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35554, June 16, 2003]

#### **§26.69 What rules govern determinations of ownership?**

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole.

(b) To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

(2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

(3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

(c) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if—

(1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or

(2) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policymaking, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.

(e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

(1) The owner's expertise must be—

(i) In a specialized field;

(ii) Of outstanding quality;

(iii) In areas critical to the firm's operations;

(iv) Indispensable to the firm's potential success;

(v) Specific to the type of work the firm performs; and

(vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

(2) The individual whose expertise is relied upon must have a significant financial investment in the firm.

(g) You must always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual—

(1) As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or

(2) Through inheritance, or otherwise because of the death of the former owner.

(h)(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any nondisadvantaged 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 nondisadvantaged 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 that 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 nondisadvantaged 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 nondisadvantaged 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 nondisadvantaged 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 nondisadvantaged 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 nondisadvantaged 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, 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 nondisadvantaged individual who formerly owned and/or controlled the firm.

(m) In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

(n) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You may not, in this situation, require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions

imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any nondisadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer–employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

### **§26.73 What are other rules affecting certification?**

(a)(1) Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in paragraph (a)(2) of this section, you must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

(2) You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

(b) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part. Nor must you refuse to certify a firm solely on the basis that it is a newly formed firm.

(c) DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

(d) Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

(e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.

(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization, or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) You may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:

**Example 1:** Socially and economically disadvantaged individuals own 100 percent of a holding company, which has a wholly owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

**Example 2:** Disadvantaged individuals own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

**Example 3:** Disadvantaged individuals own 80 percent of the holding company, which in turn owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is 56 percent (80 percent of the 70 percent). This is more than 51 percent, so you may certify the subsidiary, if all other requirements are met.

**Example 4:** Same as Examples 2 or 3, but someone other than the socially and economically disadvantaged owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, you cannot certify it because it fails to meet control requirements.

**Example 5:** Disadvantaged individuals own 60 percent of the holding company, which in turn owns 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is about 31 percent. This is less than 51 percent, so you cannot certify the subsidiary.

**Example 6:** The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of §26.65(b). Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

(f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

(g) You must not require a DBE firm to be prequalified as a condition for certification unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.

(h) A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of §26.35. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in §26.71.

(i) The following special rules apply to the certification of firms related to Alaska Native Corporations (ANCs).

(1) Notwithstanding any other provisions of this subpart, a direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification as a DBE if it meets all of the following requirements:

(i) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;

(ii) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and

(iii) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.

(2) As a recipient to whom an ANC-related entity applies for certification, you do not use the DOT uniform application form (see Appendix F of this part). You must obtain from the firm documentation sufficient to demonstrate that entity meets the requirements of paragraph (i)(1) of this section. You must also obtain sufficient information about the firm to allow you to administer your program (e.g., information that would appear in your DBE directory).

(3) If an ANC-related firm does not meet all the conditions of paragraph (i)(1) of this section, then it must meet the requirements of paragraph (h) of this section in order to be certified, on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003]

## **Subpart E—Certification Procedures**

### **§26.81 What are the requirements for Unified Certification Programs?**

(a) You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).

(1) Within three years of March 4, 1999, you and the other recipients in your state must sign an agreement establishing the UCP for that state and submit the agreement to the Secretary for approval. The Secretary may, on the basis of extenuating circumstances shown by the recipients in the state, extend this deadline for no more than one additional year.

(2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.

(3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.

(4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.

(5) If you and the other recipients in your state fail to meet the deadlines set forth in this paragraph (a), you shall have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond your control. If you fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary shall direct you to complete the required action by a date certain. If you and the other recipients fail to carry out this direction in a timely manner, you are collectively in noncompliance with this part.

(b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.

(1) Certification decisions by the UCP shall be binding on all DOT recipients within the state.

(2) The UCP shall provide “one-stop shopping” to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

(3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.

(c) All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

(d) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The “home state” UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm’s application.

(e) Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.

(f) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.

(g) Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under the provisions of this section), the information required by §26.31. The UCP shall make the directory available to the public electronically, on the Internet, as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

(h) Except as otherwise specified in this section, all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

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

(a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.

(b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.

(c) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their resumes 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 on the site visit report of any other recipient with respect to a firm applying for certification;

(2) If the firm is a corporation, analyze the ownership of stock in the firm;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;

(6) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(7) Require potential DBEs to complete and submit an appropriate application form, unless the potential DBE is an SBA-certified firm applying pursuant to the DOT/SBA MOU.

(i) You must use the application form provided in Appendix F to this part without change or revision. However, you may provide in your DBE program, with the approval of the concerned operating administration, for supplementing the form by requesting additional information not inconsistent with this part.

(ii) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(iii) You must review all information on the form prior to making a decision about the eligibility of the firm.

(d) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other recipient.

(e) When another DOT recipient has certified a firm, you have discretion to take any of the following actions:

(1) Certify the firm in reliance on the certification decision of the other recipient;

(2) Make an independent certification decision based on documentation provided by the other recipient, augmented by any additional information you require the applicant to provide; or

(3) Require the applicant to go through your application process without regard to the action of the other recipient.

(f) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.

(g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.

(h) Once you have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of §26.87. You may not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made changes.

(i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.

- (1) Changes in management responsibility among members of a limited liability company are covered by this requirement.
- (2) You must attach supporting documentation describing in detail the nature of such changes.
- (3) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under §26.109(c).
- (j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under §26.109(c).
- (k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. You may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under §26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003]

#### **§26.84 How do recipients process applications submitted pursuant to the DOT/SBA MOU?**

- (a) When an SBA-certified firm applies for certification pursuant to the DOT/SBA MOU, you must accept the certification applications, forms, and packages submitted by a firm to the SBA for either the 8(a) BD or SDB programs, in lieu of requiring the applicant firm to complete your own application forms and packages. The applicant may submit the package directly or may request that the SBA forward the package to you. Pursuant to the MOU, the SBA will forward the package within 30 days.
- (b) If necessary, you may request additional relevant information from the SBA. The SBA will provide this additional material within 45 days of your written request.
- (c) Before certifying a firm based on its 8(a) BD or SDB certification, you must conduct an on-site review of the firm [see §26.83(c)(1)]. If the SBA conducted an on-site review, you may rely on the SBA's report of the on-site review. In connection with this review, you may also request additional relevant information from the firm.
- (d) Unless you determine, based on the on-site review and information obtained in connection with it, that the firm does not meet the eligibility requirements of Subpart D of this part, you must certify the firm.
- (e) You are not required to process an application for certification from an SBA-certified firm having its principal place of business outside the state(s) in which you operate unless there is a report of a "home state" on-site review on which you may rely.
- (f) You are not required to process an application for certification from an SBA-certified firm if the firm does not provide products or services that you use in your DOT-assisted programs or airport concessions.

[68 FR 35555, June 16, 2003]

#### **§26.85 How do recipients respond to requests from DBE-certified firms or the SBA made pursuant to the DOT/SBA MOU?**

- (a) Upon receipt of a signed, written request from a DBE-certified firm, you must transfer to the SBA a copy of the firm's application package. You must transfer this information within 30 days of receipt of the request.
- (b) If necessary, the SBA may make a written request to the recipient for additional materials (e.g., the report of the on-site review). You must provide a copy of this material to the SBA within 45 days of the additional request.
- (c) You must provide appropriate assistance to SBA-certified firms, including providing information pertaining to the DBE application process, filing locations, required documentation, and status of applications.

[68 FR 35555, June 16, 2003]

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

- (a) When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.
- (b) When you deny DBE certification to a firm certified by the SBA, you must notify the SBA in writing. The notification must include the reason for denial.
- (c) When a firm is denied certification, you must establish a time period of no more than 12 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 decision maker 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 DOT under §26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

(h) When you decertify a DBE firm certified by the SBA, you must notify the SBA in writing. The notification must include the reason for denial.

(i) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(j) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(k) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under §26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003]

#### **§26.89 What is the process for certification appeals to the DOT?**

(a)(1) If you are a firm that is denied certification or whose eligibility is removed by a recipient, including SBA-certified firms applying pursuant to the DOT/SBA MOU, you may make an administrative appeal to the Department.

(2) If you are a complainant in an ineligibility complaint to a recipient [including the concerned operating administration in the circumstances provided in §26.87(c)], you may appeal to the Department if the recipient does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) Send appeals to the following address: Department of Transportation, Office of Civil Rights, 400 7th Street, SW, Room 5414, Washington, DC 20590.

(b) Pending the Department's decision in the matter, the recipient's decision remains in effect. The Department does not stay the effect of the recipient's decision while it is considering an appeal.

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and arguments concerning why the recipient's decision should be reversed. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal.

(1) If you are an appellant who is a firm that 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 that currently certifies the firm, that has rejected an application for certification from the firm or removed the firm's eligibility within 1 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 the DOT takes an action on an appeal that results in or confirms a loss of eligibility to any SBA-certified firm. The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

(8) The Department's policy is to make its decision within 180 days of receiving the complete administrative record. If the Department does not make its decision within this period, the Department provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.

(g) All decisions under this section are administratively final and are not subject to petitions for reconsideration.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35556, June 16, 2003]

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

(a) If you are the recipient from whose action an appeal under §26.89 is taken, the decision is binding. It is not binding on other recipients.

(b) If you are a recipient to which a DOT determination under §26.89 is applicable, you must take the following action:

(1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in §26.87(i) take effect.

(2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in §26.87.

(3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of the 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 the 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 the 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 FAA Office of Chief Counsel.

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

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.

(e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

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

(a) *Availability of records.* (1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Department may make available to the public any information concerning the DBE program release which is not prohibited by Federal law.

(2) Notwithstanding any provision of Federal or state law, you must not release 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 documentation. However, you must transmit this information to the DOT in any certification appeal proceeding under §26.89 in which the disadvantaged status of the individual is in question.

(b) *Confidentiality of information on complainants.* Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding, or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. The 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 that uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

(d) *Intimidation and retaliation.* If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003]

**Appendix A to Part 26—Guidance Concerning Good Faith Efforts**

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it does not 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 that 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. nonunion employee status) are not legitimate causes for the rejection or nonsolicitation of bids in the contractor's efforts to meet the project goal.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

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

## INSTRUCTIONS FOR COMPLETING THE UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS

1. Indicate the DOT Operating Administration (OA) that provides your Federal financial assistance. If assistance comes from more than one OA, use separate reporting forms for each OA. If you are an FTA recipient, indicate your Vendor Number in the space provided.
2. If you are an FAA recipient, indicate the relevant AIP Numbers covered by this report. If more than six, attach a separate sheet.
3. Specify the Federal fiscal year (i.e., October 1 – September 30) in which the covered reporting period falls.
4. State the date of submission of this report.
5. Check the appropriate box that indicates the reporting period that the data provided in this report covers. If this report is due June 1, data should cover October 1 – March 31. If this report is due December 1, data should cover April 1 – September 30. If this report is due to the FAA, data should cover the entire year.
6. Name of the recipient.
7. State your annual DBE goal(s) established for the Federal fiscal year of this report to be submitted to and approved by the relevant OA. Your Overall Goal is to be reported as well as the breakdown for specific Race Conscious and Race Neutral Goals (both of which include gender-conscious/neutral goals). The Race Conscious Goal portion should be based on programs that focus on and provide benefits only for DBEs. The use of contract goals is a primary example of a Race Conscious measure. The Race Neutral Goal portion should include programs that, while benefiting DBEs, are not solely focused on DBE firms. For example, a small business outreach program, technical assistance, and prompt payment clauses can assist a wide variety of businesses in addition to helping DBE firms.
- 8-9. The amounts in items 8(A)-9(I) should include all types of prime contracts awarded and all types of subcontracts awarded or committed, including: professional or consultant services, construction, purchase of materials or supplies, lease or purchase of equipment and any other types of services. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.
  - 8(A). Provide the total dollar amount for all prime contracts assisted with DOT funds that were awarded during this reporting period.
  - 8(B). Provide the total number of all prime contracts assisted with DOT funds that were awarded during this reporting period.
  - 8(C). From the total dollar amount awarded in item 8(A), provide the dollar amount awarded to certified DBEs during this reporting period.
  - 8(D). From the total number of prime contracts awarded in item 8(B), specify the number awarded to certified DBEs during this reporting period.
  - 8(E). From the total dollars awarded in 8(C), provide the dollar amount awarded in 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.

UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS									
"Please refer to the instructions sheet for directions on filling out this form"									
1. Submitted to (check only one): <input type="checkbox"/> FHWA <input type="checkbox"/> FAA <input type="checkbox"/> FTA--Vendor Number									
2. AIP Numbers (FAA Recipients Only):									
3. Federal fiscal year in which reporting period falls: FY _____ 4. Date This Report Submitted:									
5. Reporting Period <input type="checkbox"/> Report due June 1 (for period Oct. 1-Mar. 31) <input type="checkbox"/> Report due Dec. 1 (for period April 1-Sept. 30) <input type="checkbox"/> FAA Annual Report									
6. Name of Recipient:									
7. Annual DBE Goal(s): Race Conscious Goal _____ % Race Neutral Goal _____ % OVERALL Goal _____ %									
AWARDS/COMMITMENTS MADE DURING THIS REPORTING PERIOD <small>(total contracts and subcontracts awarded or committed during this reporting period)</small>	A	B	C	D	E	F	G	H	I
	Total Dollars	Total Number	Total to DBEs (dollars)	Total to DBEs (number)	Total to DBEs /Race Conscious (dollars)	Total to DBEs/Race Conscious (number)	Total to DBEs/Race Neutral (dollars)	Total to DBEs/Race Neutral (number)	Percentage of total dollars to DBEs
8. Prime contracts awarded this period									
9. Subcontracts awarded/committed this period									
<b>TOTAL</b>									
DBE AWARDS/COMMITMENTS THIS REPORTING PERIOD-BREAKDOWN BY ETHNICITY & GENDER	A	B	C	D	E	F	G	H	I
	Black American	Hispanic American	Native American	Subcont. Asian American	Asian-Pacific American	Non-Minority Women	Other (i.e., not of any other group listed here)	TOTALS (for this reporting period only)	Year-End TOTALS
10. Total Number of Contracts (Prime and Sub)									
11. Total Dollar Value									
ACTUAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD	A		B		C		D		E
	Number of Prime Contracts Completed		Total Dollar Value of Prime Contracts Completed		DBE Participation Needed to Meet Goal (Dollars)		Total DBE Participation (Dollars)		Percentage of Total DBE Participation
12. Race Conscious									
13. Race Neutral									
14. Totals									
15. Submitted by (Print Name of Authorized Representative)					16. Signature of Authorized Representative				
17. Phone Number:					18. Fax Number:				

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003]

### Appendix C to Part 26—DBE Business Development Program Guidelines

The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into nontraditional 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) 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 nontraditional 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 that 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 that 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 nontraditional 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–Protège Program Guidelines**

(A) The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into nontraditional 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–protège program, a recipient must obtain the approval of the concerned operating administration.

(B)(1) Any mentor–protège 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 protège. The formal mentor–protège 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 protège 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 protège 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–protège agreement.

(C) DBEs involved in a mentor–protège agreement must be independent business entities that meet the requirements for certification as defined in subpart D of this part. A protège firm must be certified *before* it begins participation in a mentor–protège arrangement. If the recipient chooses to recognize mentor–protège 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–protège 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 that 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 that have channeled the individual into nonprofessional or nonbusiness 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 with 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 that 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 2 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 with 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 that 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 2 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 2-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35559, June 16, 2003]

## Appendix F to Part 26—Uniform Certification Application Form

**INSTRUCTIONS FOR COMPLETING THE DISADVANTAGED BUSINESS ENTERPRISE (DBE)  
PROGRAM UNIFORM CERTIFICATION APPLICATION**

**NOTE:** If you require additional space for any question in this application, please attach additional sheets or copies as needed, taking care to indicate on each attached sheet/copy the section and number of this application to which it refers.

**Section 1: CERTIFICATION INFORMATION****A. Prior/Other Certifications**

Check the appropriate box indicating for which program your firm is currently certified. If you are already certified as a DBE, indicate in the appropriate box the name of the certifying agency that has previously certified your firm, and also indicate whether your firm has undergone an onsite visit. If your firm has already undergone an onsite visit/review, indicate the most recent date of that review and the state UCP that conducted the review.

**NOTE:** If your firm is currently certified under the SBA's 8(a) and/or SDB programs, you may not have to complete this application. You should contact your state UCP to find out about a streamlined application process for firms that are already certified under the 8(a) and SDB programs.

**B. Prior/Other Applications and Privileges**

Indicate whether your firm or any of the persons listed has ever withdrawn an application for a DBE program or an SBA 8(a) or SDB program, or whether any have ever been denied certification, decertified, debarred, suspended, or had bidding privileges denied or restricted by any state or local agency or Federal entity. If your answer is yes, indicate the date of such action, identify the name of the agency, and explain fully the nature of the action in the space provided.

**Section 2: GENERAL INFORMATION****A. Contact Information**

- (1) State the name and title of the person who will serve as your firm's primary contact under this application.
- (2) State the legal name of your firm, as indicated in your firm's Articles of Incorporation or charter.
- (3) State the primary phone number of your firm.
- (4) State a secondary phone number, if any.
- (5) State your firm's fax number, if any.
- (6) State your firm's or your contact person's email address.
- (7) State your firm's website address, if any.
- (8) State the street address of your firm (i.e., the physical location of its offices – not a post office box address).
- (9) State the mailing address of your firm, if it is different from your firm's street address.

**B. Business Profile**

- (1) In the box provided, briefly describe the primary business and professional activities in which your firm engages.
- (2) State the Federal Tax ID number of your firm as provided on your firm's filed tax returns, if you have one. This could also be the Social Security number of the owner of your firm.
- (3) State the date on which your firm was officially established, as stated in your firm's Articles of Incorporation or charter.

- (4) State the date on which you and/or each other owner took ownership of the firm.

- (5) Check the appropriate box that describes the manner in which you and each other owner acquired ownership of your firm. If you checked "Other," explain in the space provided.

- (6) Check the appropriate box that indicates whether your firm is "for profit."

**NOTE:** If you checked "No," then you do NOT qualify for the DBE program and therefore do not need to complete the rest of this application. The DBE program requires all participating firms be for-profit enterprises.

- (7) Check the appropriate box that describes the legal form of ownership of your firm, as indicated in your firm's Articles of Incorporation or charter. If you checked "Other," briefly explain in the space provided.

- (8) Check the appropriate box that indicates whether your firm has ever existed under different ownership, a different type of ownership, or a different name. If you checked "Yes," specify which and briefly explain the circumstances in the space provided.

- (9) Indicate in the spaces provided how many employees your firm has, specifying the number of employees who work on a full-time and part-time basis.

- (10) Specify the total gross receipts of your firm for each of the past three years, as declared in your firm's filed tax returns.

**C. Relationships with Other Businesses**

- (1) Check the appropriate box that indicates whether your firm is co-located at any of its business locations, or whether your firm shares a telephone number(s), a post office box, any office space, a yard, warehouse, other facilities, any equipment, or any office staff with any other business, organization, or entity of any kind. If you answered "Yes," then specify the name of the other firm(s) and briefly explain the nature of the shared facilities or other items in the space provided.

- (2) Check the appropriate box that indicates whether at present, or at any time in the past:

- (a) Your firm has been a subsidiary of any other firm;

- (b) Your firm consisted of a partnership in which one or more of the partners are other firms;

- (c) Your firm has owned any percentage of any other firm; and

- (d) Your firm has had any subsidiaries of its own.

- (3) Check the appropriate box that indicates whether any other firm has ever had an ownership interest in your firm.

- (4) If you answered "Yes" to any of the questions in (2)(a)-(d) or (3), identify the name, address and type of business for each.

**D. Immediate Family Member Businesses**

Check the appropriate box that indicates whether any of your immediate family members own or manage another company. An "immediate family member" is any person who is your father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law. If you answered "Yes," provide the name of each relative, your relationship to them, the name of the company they own or manage, the type of business, and whether they own or manage the company.

**Section 3: OWNERSHIP**

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

**A. Background Information**

- (1) Give the name of the owner.
- (2) State his/her title or position within your firm.
- (3) Give his/her home phone number.
- (4) State his/her home (street) address.
- (5) Check the appropriate box that indicates this owner's gender.
- (6) Check the appropriate box that indicates this owner's ethnicity (check all that apply). If you checked "Other," specify this owner's ethnic group/identity not otherwise listed.
- (7) Check the appropriate box to indicate whether this owner is a U.S. citizen.
- (8) If this owner is not a U.S. citizen, check the appropriate box that indicates whether this owner is a lawfully admitted permanent resident. If this owner is neither a U.S. citizen nor a lawfully admitted permanent resident of the U.S., then this owner is NOT eligible for certification as a DBE owner. This, however, does not necessarily disqualify your firm altogether from the DBE program if another owner is a U.S. citizen or lawfully admitted permanent resident and meets the program's other qualifying requirements.

**B. Ownership Interest**

- (1) State the number of years during which this owner has been an owner of your firm.
- (2) Indicate the dollar value of this owner's initial investment to acquire an ownership interest in your firm, broken down by cash, real estate, equipment, and/or other investment.
- (3) State the percentage of total ownership control of your firm that this owner possesses.
- (4) State the familial relationship of this owner to each other owner of your firm.
- (5) Indicate the number, percentage of the total, class, date acquired, and method by which this owner acquired his/her shares of stock in your firm.

- (6) Check the appropriate box that indicates whether this owner performs a management or supervisory function for any other business. If you checked "Yes," state the name of the other business and this owner's function or title held in that business.

- (7) Check the appropriate box that indicates whether this owner owns or works for any other firm(s) that has any relationship with your firm. If you checked "Yes," identify the name of the other business and this owner's function or title held in that business. Briefly describe the nature of the business relationship in the space provided.

**C. Disadvantaged Status**

**NOTE:** You only need to complete this section for each owner that is applying for DBE qualification (i.e., for each owner who is claiming to be "socially and economically disadvantaged" and whose ownership interest is to be counted toward the control and 51% ownership requirements of the DBE program)

- (1) Indicate in the space provided the total Personal Net Worth (PNW) of each owner who is applying for DBE qualification. Use the PNW calculator form at the end of this application to compute each owner's PNW.
- (2) Check the appropriate box that indicates whether any trust has ever been created for the benefit of this disadvantaged owner. If you answered "Yes," briefly explain the nature, history, purpose, and current value of the trust(s).

**Section 4: CONTROL**

**A. Identify your firm's Officers and Board of Directors:**

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

**B. Identify your firm's management personnel (by name, title, ethnicity, and gender) who control your firm in the following areas:**

- (1) Making financial decisions on your firm's behalf, including the acquisition of lines of credit, surety bonds, supplies, etc.;
  - (2) Estimating and bidding, including calculation of cost estimates, bid preparation and submission;
  - (3) Negotiating and contract execution, including participation in any of your firm's negotiations and executing contracts on your firm's behalf;
  - (4) Hiring and/or firing of management personnel, including interviewing and conducting performance evaluations;
  - (5) Field/Production operations supervision, including site supervision, scheduling, project management services, etc.;
  - (6) Office management;
  - (7) Marketing and sales;
  - (8) Purchasing of major equipment;
  - (9) Signing company checks (for any purpose); and
  - (10) Conducting any other financial transactions on your firm's behalf not otherwise listed.
- (11) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above perform a management or supervisory function for any other business. If you answered "Yes," identify each person by name, his/her title, the name of the other business in which s/he is involved, and his/her function performed in that other business.
- (12) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above own or work for any other firm(s) that has a relationship with your firm. If you answered "Yes," identify the name of the firm, the name of the person, and the nature of his/her business relationship with that other firm.
- C. Indicate your firm's inventory in the following categories:**
- (1) **Equipment**  
State the type, make and model, and current dollar value of each piece of equipment held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm.
  - (2) **Vehicles**  
State the type, make and model, and current dollar value of each motor vehicle held and/or used by your firm. Indicate whether each vehicle is either owned or leased by your firm.
  - (3) **Office Space**  
State the street address of each office space held and/or used by your firm. Indicate whether your firm owns or leases the office space and the current dollar value of that property or its lease.
  - (4) **Storage Space**  
State the street address of each storage space held and/or used by your firm. Indicate whether your firm owns or leases the storage space and the current dollar value of that property or its lease.
- D. Does your firm rely on any other firm for management functions or employee payroll?**  
Check the appropriate box that indicates whether your firm relies on any other firm for management functions or for employee payroll. If you answered
- "Yes," briefly explain the nature of that reliance and the extent to which the other firm carries out such functions.
- E. Financial Information**
- (1) **Banking Information**
    - (a) State the name of your firm's bank.
    - (b) State the main phone number of your firm's bank branch.
    - (c) State the address of your firm's bank branch.
  - (2) **Bonding Information**
    - (a) State your firm's Binder Number.
    - (b) State the name of your firm's bond agent and/or broker.
    - (c) State your agent's/broker's phone number.
    - (d) State your agent's/broker's address.
    - (e) State your firm's bonding limits (in dollars), specifying both the Aggregate and Project Limits.
- F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of persons or firms securing the loan, if other than the listed owner:**  
State the name and address of each source, the name of the person securing the loan, the original dollar amount and the current balance of each loan, and the purpose for which each loan was made to your firm.
- G. List all contributions or transfers of assets to/from your firm and to/from any of its owners over the past two years:**  
Indicate in the spaces provided, the type of contribution or asset that was transferred, its current dollar value, the person or firm from whom it was transferred, the person or firm to whom it was transferred, the relationship between the two persons and/or firms, and the date of the transfer.
- H. List current licenses/permits held by any owner or employee of your firm.**  
List the name of each person in your firm who holds a professional license or permit, the type of license or permit, the expiration date of the permit or license, and the license/permit number and issuing State of the license or permit.
- I. List the three largest contracts completed by your firm in the past three years, if any.**  
List the name of each owner or contractor for each contract, the name and location of the projects under each contract, the type of work performed on each contract, and the dollar value of each contract.
- J. List the three largest active jobs on which your firm is currently working.**  
For each active job listed, state the name of the prime contractor and the project number, the location, the type of work performed, the project start date, the anticipated completion date, and the dollar value of the contract.
- AFFIDAVIT & SIGNATURE**  
Carefully read the attached affidavit in its entirety. Fill in the required information for each blank space, and sign and date the affidavit in the presence of a Notary Public, who must then notarize the form.

**DISADVANTAGED BUSINESS ENTERPRISE PROGRAM  
49 C.F.R. PART 26**

## *UNIFORM CERTIFICATION APPLICATION*

### ROADMAP FOR APPLICANTS

① **Should I apply?**

- Is your firm at least 51%-owned by a socially and economically disadvantaged individual(s) who also controls the firm?
- Is the disadvantaged owner a U.S. citizen or lawfully admitted permanent resident of the U.S.?
- Is your firm a small business that meets the Small Business Administration's (SBA's) size standard and does not exceed \$17.42 million in gross annual receipts?
- Is your firm organized as a for-profit business?

⇒ If you answered "Yes" to all of the questions above, you may be eligible to participate in the U.S. DOT DBE program.

② **Is there an easier way to apply?**

If you are currently certified by the SBA as an 8(a) and/or SDB firm, you may be eligible for a streamlined certification application process. Under this process, the certifying agency to which you are applying will accept your current SBA application package in lieu of requiring you to fill out and submit this form.

**NOTE: You must still meet the requirements for the DBE program, including undergoing an on-site review.**

③ **Be sure to attach all of the required documents listed in the Documents Check List at the end of this form with your completed application.**

④ **Where can I find more information?**

- U.S. DOT – <http://osdbuweb.dot.gov/business/dbe/index.html> (this site provides useful links to the rules and regulations governing the DBE program, questions and answers, and other pertinent information)
- SBA – <http://www.ntis.gov/naics> (provides a listing of NAICS codes) and <http://www.sba.gov/size/index/ableofsize.html> (provides a listing of NAICS codes)
- 49 CFR Part 26 (the rules and regulations governing the DBE program)

Under Sec. 26.107 of 49 CFR Part 26, dated February 2, 1999, if at any time, the Department or a recipient has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, the Department may initiate suspension or debarment proceedings against the person or firm under 49 CFR Part 29, Governmentwide Debarment and Suspension (nonprocurement) and Governmentwide Requirements for Drug-free Workplace (grants), take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, and/or refer the matter to the Department of Justice for criminal prosecution under 18 U.S.C. 1001, which prohibits false statements in Federal programs.

**Section 1: CERTIFICATION INFORMATION**

**A. Prior/Other Certifications**

Is your firm currently certified for any of the following programs? <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)	<b>⊗ STOP!</b> 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 <i>(if have one)</i> :		
(8) Street address of firm <i>(No P.O. Box)</i> :	City:	County/Parish:	State:	Zip:
(9) Mailing address of firm <i>(if different)</i> :	City:	County/Parish:	State:	Zip:

**B. Business Profile**

(1) Describe the primary activities of your firm:		(2) Federal Tax ID <i>(if any)</i> :
(3) This firm was established on ___ / ___ / ___		(4) I/We have owned this firm since: ___ / ___ / ___
(5) Method of acquisition <i>(check all that apply)</i> :		
<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 <i>(explain)</i>		
(6) Is your firm "for profit"? <input type="checkbox"/> Yes <input type="checkbox"/> No		<b>⊗ STOP!</b> If your firm is NOT for-profit, then you do NOT qualify for this program and do NOT need to fill out this application.

(7) Type of firm (check all that apply):

- Sole Proprietorship
- Partnership
- Corporation
- Limited Liability Partnership
- Limited Liability Corporation
- Joint Venture
- Other, Describe: \_\_\_\_\_

(8) Has your firm ever existed under different ownership, a different type of ownership, or a different name?  
 Yes  No  
 If Yes, explain: \_\_\_\_\_

(9) Number of employees: Full-time	Part-time	Total
(10) Specify the gross receipts of the firm for the last 3 years: Year _____	Total receipts \$ _____	
Year _____	Total receipts \$ _____	
Year _____	Total receipts \$ _____	

**C. Relationships with Other Businesses**

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

If Yes, identify: Other Firm's name: \_\_\_\_\_  
 Explain nature of shared facilities: \_\_\_\_\_

(2) At present, or at any time in the past, has your firm:	(a) been a subsidiary of any other firm?	<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.					

**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 <i>(Check all that apply):</i>	
(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
(8) Lawfully Admitted Permanent Resident: <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Asian Pacific	<input type="checkbox"/> Subcontinent Asian
	<input type="checkbox"/> Other <i>(specify)</i> _____	

**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? <i>(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)</i>
(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 <i>(attach additional sheets if needed):</i>

**Section 4: CONTROL**

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

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

(3) Do any of the persons listed in (1) and/or (2) above perform a management or supervisory function for any other business?  Yes  No

If Yes, identify for each: Person: \_\_\_\_\_ Title: \_\_\_\_\_  
 Business: \_\_\_\_\_ Function: \_\_\_\_\_

(4) Do any of the persons listed (1) and/or (2) above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)?  Yes  No

If Yes, identify for each: Firm Name: \_\_\_\_\_ Person: \_\_\_\_\_  
 Nature of Business Relationship: \_\_\_\_\_

**B. Identify your firm's management personnel who control your firm in the following areas** (If more than two persons, attach a separate sheet):

	Name	Title	Ethnicity	Gender
(1) Financial Decisions <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.			

(11) Do any of the persons listed in (1) through (10) above perform a management or supervisory function for any other business?  Yes  No  
 If Yes, identify for each: Person: \_\_\_\_\_ Title: \_\_\_\_\_  
 Business: \_\_\_\_\_ Function: \_\_\_\_\_

(12) Do any of the persons listed in (1) through (10) above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)?  
 Yes  No

If Yes, identify for each: Firm Name: \_\_\_\_\_ Person: \_\_\_\_\_  
 Nature of Business Relationship: \_\_\_\_\_

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

**(1) Equipment**

Type of Equipment	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

**(2) Vehicles**

Type of Vehicle	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

**(3) Office Space**

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

**(4) Storage Space**

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

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

If Yes, explain:  
 \_\_\_\_\_  
 \_\_\_\_\_

**E. Financial Information**

**(1) Banking Information:**  
 (a) Name of bank: \_\_\_\_\_ (b) Phone No: ( ) \_\_\_\_\_  
 (c) Address of bank: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

(2) **Bonding Information:** If you have bonding capacity, identify: (a) Binder No: \_\_\_\_\_  
 (b) Name of agent/broker \_\_\_\_\_ (c) Phone No: ( ) \_\_\_\_\_  
 (d) Address of agent/broker: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_  
 (e) Bonding limit: Aggregate limit \$ \_\_\_\_\_ Project limit \$ \_\_\_\_\_

**F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of any persons or firms securing the loan, if other than the listed owner:**

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

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

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

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

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

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

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

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

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

**DBE UNIFORM CERTIFICATION APPLICATION SUPPORTING DOCUMENTS CHECKLIST**

In order to complete your application for DBE certification, you must attach copies of all of the following documents as they apply to you and your firm.

**All Applicants**

- Work experience resumes (include places of ownership/employment with corresponding dates), for all owners and officers of your firm
- Personal Financial Statement (form available with this application)
- Personal tax returns for the past three years, if applicable, for each owner claiming disadvantaged status
- Your firm's tax returns (gross receipts) and all related schedules for the past three years
- Documented proof of contributions used to acquire ownership for each owner (e.g., both sides of cancelled checks)
- Your firm's signed loan agreements, security agreements, and bonding forms
- Descriptions of all real estate (including office/storage space, etc.) owned/leased by your firm and documented proof of ownership/signed leases
- List of equipment leased and signed lease agreements
- List of construction equipment and/or vehicles owned and titles/proof of ownership
- Documented proof of any transfers of assets to/from your firm and/or to/from any of its owners over the past two years
- Year-end balance sheets and income statements for the past three years (or life of firm, if less than three years); a new business must provide a current balance sheet
- All relevant licenses, license renewal forms, permits, and haul authority forms
- DBE and SBA 8(a) or SDB certifications, denials, and/or decertifications, if applicable
- Bank authorization and signatory cards
- Schedule of salaries (or other compensation or remuneration) paid to all officers, managers, owners, and/or directors of the firm
- Trust agreements held by any owner claiming disadvantaged status, if any

**Partnership or Joint Venture**

- Original and any amended Partnership or Joint Venture Agreements

**Corporation or LLC**

- Official Articles of Incorporation (signed by the state official)
- Both sides of all corporate stock certificates and your firm's stock transfer ledger
- Shareholders' Agreement
- Minutes of all stockholders and board of directors meetings
- Corporate by-laws and any amendments
- Corporate bank resolution and bank signature cards
- Official Certificate of Formation and Operating Agreement with any amendments (for LLCs)

**Trucking Company**

- Documented proof of ownership of the company
- Insurance agreements for each truck owned or operated by your firm
- Title(s) and registration certificate(s) for each truck owned or operated by your firm
- List of U.S. DOT numbers for each truck owned or operated by your firm

**Regular Dealer**

- Proof of warehouse ownership or lease
- List of product lines carried
- List of distribution equipment owned and/or leased

**NOTE: The specific state UCP to which you are applying may have additional required documents that you must also supply with your application. Contact the appropriate certifying agency to which you are applying to find out if more is required.**

**AFFIDAVIT OF CERTIFICATION**

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

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

I \_\_\_\_\_ (full name printed), swear or affirm under penalty of law that I am \_\_\_\_\_ (title) of applicant firm \_\_\_\_\_ (firm name) and that I have read and understood all of the questions in this application and that all of the foregoing information and statements submitted in this application and its attachments and supporting documents are true and correct to the best of my knowledge, and that all responses to the questions are full and complete, omitting no material information. The responses include all material information necessary to fully and accurately identify and explain the operations, capabilities and pertinent history of the named firm as well as the ownership, control, and affiliations thereof.

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

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

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

I agree to provide written notice to the recipient agency or Unified Certification Program (UCP) of any material change in the information contained in the original application within 30 calendar days of such change (e.g., ownership, address, telephone number, etc.).

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

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

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

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

I further certify that my personal net worth does not exceed \$750,000, and that I am economically disadvantaged because my ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

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

Executed on \_\_\_\_\_ (Date)

Signature \_\_\_\_\_  
(DBE Applicant)

**NOTARY CERTIFICATE**

## APPENDIX C

### What's New in the New DOT Disadvantaged Business Enterprise Rule?

The Department of Transportation's new disadvantaged business enterprise (DBE) program final rule (49 CFR Part 26) makes significant changes that will affect recipients, DBEs, and non-DBE contractors who participate in the program. This paper summarizes the major changes from the old rule.

#### SETTING AND MEETING DBE GOALS

- The rule explicitly prohibits the use of quotas. The rule also explicitly prohibits the use of set-asides, except in extreme cases to remedy egregious problems. The rule explicitly provides that recipients will not be penalized for failing to meet their DBE goals. **[The old rule did not use, but also did not explicitly prohibit, quotas. It explicitly authorized set-asides under some circumstances. The Department never penalized recipients for failing to meet goals under the old rule, but the text of the rule did not make the point explicitly.]**
- The rule views the statutory 10 percent goal as a nationwide aspirational goal, which does not require that recipients set their goals at 10 percent or any other particular level. **[Under the old rule, recipients who had less than a 10 percent goal had to make a special justification to the Department.]**
- Recipients must set overall goals to represent a "level playing field"—the amount of DBE participation they could realistically expect in the absence of discrimination. This goal must be based on demonstrable evidence of the availability of ready, willing, and able DBEs to participate on your DOT-assisted contracts. The rule gives recipients substantial flexibility in the methods they choose to set overall goals. **[Under the old rule, overall goals were set to achieve the object of "maximum practicable" use of DBEs. The recipient's goal could be based directly on the 10 percent national goal or on the recipient's past achievements.]**
- Recipients must obtain as much as possible of the DBE participation needed to meet their overall goals through race-neutral measures. Race-neutral measures include such activities as training, technical assistance, bonding assistance, business development or mentor-protégé programs, breaking contracts up into pieces that small businesses can readily perform, and awards of prime contracts to DBEs through the regular competitive process. One type of race-neutral measure, a prompt payment provision, will be required for all subcontractors, DBEs and non-DBEs alike. **[The old rule did not mandate the use of race-neutral measures or give them priority. There was no prompt payment requirement.]**
- Contract goals, or other race-conscious measures, must be used only to obtain DBE participation needed to meet overall goals that cannot be obtained through use of race-neutral measures. Contract goals are not required on every contract. If recipients are overachieving or underachieving their overall goals, they have to adjust their use of contract goals. **[Under the old rule, contract goals were required on all contracts with subcontracting possibilities, regardless of whether the contract goals were needed to meet overall goals.]**
- When there is a contract goal, a bidder must make good faith efforts to meet it. The bidder can do so either through obtaining enough DBE participation to meet the goal or documenting the good faith efforts it made to do so. The rule explicitly provides that recipients must not disregard showings of good faith efforts, and it gives bidders the right to have the recipient reconsider a decision that their good faith efforts were insufficient. **[The old rule employed the same good faith efforts mechanism, but did not emphasize as strongly the mandate that recipients seriously consider good faith efforts showings. There was no reconsideration provision.]**
- If a recipient determines 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, it must devise appropriate measures to address this overconcentration. **[The old rule did not have an overconcentration provision.]**

#### CERTIFICATION AND ELIGIBILITY

- Applicants must show that they meet size, group membership, ownership, and control standards by a preponderance of the evidence. **[The old rule did not state a specific standard of proof.]**
- Each disadvantaged individual seeking certification for his or her firm must submit a notarized certification of disadvantage and a statement of personal net worth. If an individual's personal net worth (excluding his or her principal residence and his or her interest in the applicant firm) exceeds \$750,000, the person is not an eligible DBE owner. **[The old rule did not have either a personal net worth cap for participation or a requirement to submit information concerning personal net worth.]**
- Ownership and control requirements provide detailed, specific, clarified standards for determining whether to certify firms. The standards are intended to resolve many difficult issues that have arisen in the implementation of the program. **[The less specific standards of the old**

**regulation were interpreted in many varying ways by recipients and DOT offices, leading to inconsistent and confusing results.]**

- By February 2002, all the transit, airport, and highway recipients in each state are required to agree on a Unified Certification Program (UCP). This program must be fully operational no later than August 2003. The UCP must provide for “one-stop shopping” for DBE firms applying for certification in each state. The applicant fills out one form, goes through one application process and, if certified, can work as a DBE for any DOT recipient in the state. There will be a single DBE directory for the state. The rule allows recipients substantial discretion about the form the UCP will take in each state. **[Formerly, a firm that wanted to work for the state highway agency, two airports, and three transit agencies in the same state had to fill out six application forms and endure six certification processes. This created significant burdens on applicants and used recipient resources inefficiently.]**
- In certifying or “decertifying” firms, recipients must provide administrative due process to ensure that procedures are fair. When a firm is certified, it normally stays certified for 3 years, but must inform the recipient in writing of any changes that would affect its eligibility and must submit an annual affidavit that such changes have not taken place. **[The old rule suggested, but did not require, administrative due process. Recipients’ practices varied, and some recipients’ processes were so lacking in due process that substantively valid decisions were overturned by the courts on procedural grounds. Many recipients erroneously believed that the Department required annual “recertifications,” which burdened DBEs and used recipient resources inefficiently.]**
- All certification actions begin with a proceeding by a recipient. A party dissatisfied with the result can appeal to the DOT Office of Civil Rights. This appeal proceeding is an administrative review of the record of the recipient’s action, and does not involve a new hearing

before the DOT. Recipients must promptly implement the Department’s decision. **[The old rule lacked specific standards and procedures for certification appeals, resulting in informal and sometimes inconsistent handling of certification issues.]**

#### PROGRAM ADMINISTRATION

- A recipient can apply to the Department for a program waiver if it wants to implement the program in a way not provided for in the rule. If the Secretary believes that the recipient’s idea will meet the program’s objectives, he or she will approve the application. Waivers can apply to such matters as overall and contract goals. Program waivers do not apply to DBE eligibility standards and procedures, which must remain uniform nationwide. **[There was no program waiver provision in the old rule.]**
- Recipients must submit revised DBE program documents to DOT, reflecting the new rule’s changed requirements, by September 1999.
- To avoid confusion and promote consistency and certainty, written guidance about the new rule is valid and binding—and represents the official position of the Department—only if it has been approved by the DOT General Counsel. Guidance issued under the old rule is no longer binding. **[The inconsistency of DOT guidance concerning the old rule led to substantial confusion and was criticized by a General Accounting Office report. Greater coordination is appropriate in an era of “One DOT.”]**
- Recipients must begin to collect data about the bidders on their contracts and subcontracts for later use in calculating overall goals.

In the near future, the DOT will develop new, uniform program data reporting and certification application forms. **[The old rule did not have similar provisions.]**

(<http://osdbuweb.dot.gov/business/Dbe/Summary.html>)

**APPENDIX D**

**Design-Build Special Provision Table of Contents—Minnesota**

MINNESOTA DEPARTMENT OF TRANSPORTATION  S.P. 5502-85  T.H. 52 (ROCHESTER)  
DESIGN-BUILD RFP  MAY 2002  
PART III—SPECIAL PROVISIONS: DIV. A, DBE REQUIREMENTS PAGE 1 OF 27

**DISADVANTAGED BUSINESS ENTERPRISE (DBE)  
SPECIAL PROVISIONS FOR DESIGN-BUILD PROJECTS**

**TABLE OF CONTENTS**

Policy Statement ..... 2

Contract Assurance ..... 2

DBE Goal ..... 2

Definitions ..... 3

Submittal of Documentation ..... 4

Failure to Submit Documentation ..... 6

Failure to Meet Goal ..... 6

Evaluation of Good Faith Efforts ..... 7

Good Faith Efforts Determination ..... 7

Counting DBE Participation ..... 8

Commercially Useful Function ..... 9

DBE Contracts ..... 11

Design-Build or Turnkey Contracts ..... 12

Termination of DBE Contracts ..... 12

Applicability to DBE Bidders/Proposers ..... 12

Continuing Good Faith Efforts ..... 12

Reporting Requirements and Mn/DOT Review ..... 13

Bidder’s List ..... 13

Effect of Supplemental Agreements ..... 14

Prompt Payment ..... 14

Consequences of Non-Compliance ..... 14

Sanctions ..... 15

DBE Liquidated Damages ..... 15

DBE Records ..... 15

Summary of Subcontracts Awarded and Paid Report ..... 15

DBE Final Report ..... 15

Quarterly Review/DBE Work and Payment Schedule ..... 16

Trucking Guidelines ..... 17

Design-Builder’s DBE Good Faith Efforts—Form CGF ..... 19

Exhibit “A” Form ..... 24

Bidder’s List ..... 26

Contractor Payment Form ..... 27

Full text of the Special Provision is at the following web address:  
<http://www.projects.dot.state.mn.us/hdr/052/rfp/addenda/AddendumNo3/Attachment10/DBESpecProv-DesignBuild-6-2002.pdf>

## APPENDIX E

### Details of Ohio Mentor–Protégé Website

From Ohio Department of Transportation website  
(<http://www.dot.state.oh.us>)

#### MENTOR–PROTÉGÉ PROGRAM

##### What Is the Mission of the Mentor–Protégé Program?

The mission of the program is to ensure the full participation of DBE contractors in the programs and services of the Ohio Department of Transportation (ODOT). A primary goal is to deliver management and technical services that would allow DBE firms to more effectively compete in the construction industry. Through mentoring and technical assistance, DBE firms gain access to the best construction management practices and industry innovations.

By using the Stempel Plan as the basis for its Mentor–Protégé Program, the Office of Contracts has positioned itself to meet its federal DBE goals, while creating a widely heralded nation-wide model Mentor–Protégé Program.

##### Who Are the Program Sponsors?

The Mentor–Protégé Program operates by authority of the ODOT Office of Contracts and the FHWA in full partnership with the Ohio Contractors Association (OCA). Authority for policymaking, budget appropriation, and administration rest with the Office of Contracts, DBE Supportive Services. The Mentor–Protégé Program is expected to increase the number of DBE contractors who participate in ODOT construction projects.

##### Define Mentor and Protégé

*Mentors* are primarily construction contractors who hold membership in the OCA. They are committed to providing DBE firms with guidance and direction to improve business operations. Mentors voluntarily devote a minimum of 5 to 10 hours per month with select DBE firms.

*Protégés* are certified DBE highway contractors and consultants. By working closely with established contractors, DBE firms receive invaluable knowledge and experience to improve their business operations.

##### How Does the Mentoring Relationship Work?

The foundation of the mentoring business relationship is communication and trust. The mentor and protégé firm work

together to adopt a growth and development strategy that will define the steps the DBE firm should take to compete more effectively in the construction market.

As part of the strategy, the mentor will assist the DBE firm to identify management strengths and challenges while recommending best practice solutions.

##### Mentor Role

- Sign an agreement with the protégé;
- Meet regularly to discuss protégé strengths, weaknesses, and opportunities;
- Recommend training options; and
- Monitor and report on protégé progress.

##### Protégé Role

- Be available for meetings with the mentor,
- Openly share relevant business information with the mentor,
- Follow through with actions identified in the developmental action plan, and
- Report on program progress and satisfaction.

##### Sponsor Role

- Monitor Mentor–Protégé working relationship,
- Coordinate DBE support services,
- Receive and evaluate progress reports, and
- Program publicity.

##### What Is the Selection Process?

DBE certification and prequalification status determines participation in the Mentor–Protégé Program. Interested contractors or consultants should submit an application and be available for an interview. Protégés graduate out of the program in 1 to 2 years.

##### DBE Criteria

- Work type (prequalification preferred),
- Length of time in business,
- ODOT volume, and
- Past and current project awards.

The OCA recruits mentors from its growing membership of construction contractors. ODOT and OCA then work together

to match mentors with protégés based on compatibility and construction services offered.

#### **Mentor Criteria**

- Company size,
- Work type,
- OCA membership status,
- Geographic territory served, and
- Past or current experience with DBE/MBE subcontractors.

#### **What Are the Benefits of the Mentor–Protégé Program?**

Participation in the Mentor–Protégé Program offers many benefits. As a DBE protégé, you will gain access to the resources and expertise of some of the largest and most respected construction companies in the state of Ohio. Mentor firms can positively impact your company’s bottom line by assisting you to identify revenue opportunities, and improve profits and productivity.

Protégés also have direct access to the consulting, training, and technical resources of ODOT’s Office of Contracts. A team of dedicated and qualified consultants have been retained by the department to support the management and technical needs of protégés.

- Accounting services
- Bidding/estimating
- Advertising/promotion
- Marketing plans
- Business plans
- Management consulting
- Bonding
- Loan packaging
- Information systems
- Website development
- Fundamentals of small business.

#### **How Will the Program Be Evaluated?**

A Developmental Action Plan establishes the measurable outcomes for each Mentor–Protégé relationship. The stated goals and objectives will be reviewed and evaluated regularly by program staff from ODOT and OCA. The evaluation process is a hands-on model designed to maximize program strengths while streamlining challenges. The monitoring program will give attention to:

- The outcomes of the Developmental Action Plan,
- Working relationship between the mentor and protégé,
- Communication and information sharing, and
- Growth and expansion of DBE firm.

The ultimate success of the Mentor–Protégé Program will be determined by whether participating DBE firms have improved construction competencies and capabilities.

#### **How Do I Contact the Ohio Department of Transportation?**

1-800-459-2778 (toll free)

Our DBE Supportive Services Staff is available to answer any questions you may have about the Mentor–Protégé Program. If counseling is needed to establish program eligibility, please e-mail our Columbus office to schedule a consultation.

E-mail—[Wilbert.Crockett@dot.state.oh.us](mailto:Wilbert.Crockett@dot.state.oh.us)

You may also contact the consulting firm retained by ODOT and OCA to implement, monitor, and evaluate the Mentor–Protégé Program.

[www.bermultinational.com](http://www.bermultinational.com)

Dr. P. Bertrand Phillips, President  
 Bermultinational Limited  
 1403 Northcrest Drive  
 Silver Spring, MD 20904  
 Phone: 301-384-1449  
 301-384-1249

## APPENDIX F

### Good Faith Effort Systems

#### CALIFORNIA GOOD FAITH EFFORT ANALYSIS

(Note: Original was not suitable for reproduction; subject headings are provided below.)

- A) Advertisement (for each publisher)
- Did the firm advertise?
  - Were copies of the ads included?
  - Did ads include the bid date, contract number, and work items that were available?
  - Was assistance with bonding, equipment, and supplies described?
  - Contact person listed?

(Space provided for descriptions of the Action of the Bidder, Analysis of the Action, Reviewer's Findings.)

- B) Solicitation
- Solicitation copies included?
  - Does solicitation include bid date, contract number, and items of work available?
  - Was assistance with bonding, equipment, and supplies described?
  - Contact person listed?

(Space provided for descriptions of the Action of the Bidder, Analysis of the Action, Reviewer's Findings.)

- C) Items of Work Made Available
- Was enough made available?
  - Items listed in solicitation; advertisement?
  - Did low bidder break down items?

(Space provided for descriptions of the Action of the Bidder, Analysis of the Action, Reviewer's Findings.)

- D) Rejected DBEs
- Did low bidder list rejected DBEs?
  - Did low bidder provide copies of quotes?
  - Did low bidder provide copies of accepted quotes?

(Space provided for descriptions of the Action of the Bidder, Analysis of the Action, Reviewer's Findings.)

- E) Assistance with Bonding
- Referenced in advertisement, solicitation?
  - Was assistance requested?

(Space provided for descriptions of the Action of the Bidder, Analysis of the Action, Reviewer's Findings.)

- F) Assistance with Equipment or Supplies
- Referenced in advertisement, solicitation?
  - Was assistance requested?

(Space provided for descriptions of the Action of the Bidder, Analysis of the Action, Reviewer's Findings.)

- G) Agencies, Organizations, and Groups Contacted
- Did bidder contact any agencies, organizations, or groups?

(Space provided for descriptions of the Action of the Bidder, Analysis of the Action, Reviewer's Findings.)

- Considered DBEs
  - Did low bidder provide copies of quotes?
  - Did low bidder provide copies of accepted quotes?
 (Space provided for descriptions of the Action of the Bidder, Analysis of the Action, Reviewer's Findings.)
- Additional Data Supporting GFE

#### IOWA DEPARTMENT OF TRANSPORTATION'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

September 2, 1999  
(REVISED June 19, 2000)

Good Faith Efforts (49 CFR §26.53)

The proposal will specify if the proposed contract has an established DBE goal or has no established DBE goal. The established DBE goal will be shown on the proposal as a percent of the total amount bid. The proposal may also designate the items that are overutilized by DBE firms and cannot be used for DBE commitments.

- It is the bidder's responsibility to determine the level of professional competence and financial responsibility of any proposed DBE subcontractor. The bidder shall ascertain that the proposed DBE subcontractor has suitable experience and equipment to perform a commercially useful function for work that is common industry practice in the Iowa highway construction industry. Subcontractor expenditures, which may be counted towards the DBE commitment, will include DBE trucking, purchase of materials from a DBE manufacturer or supplier, or off-site services provided by a certified DBE firm.
- For contracts with established project goals the bidders will be required to complete the form "STATEMENT OF DBE COMMITMENTS," number 102115, which is included in the bidding documents and in the computer software provided by the Department.
 

The bidder shall list the following information on the Statement of DBE Commitments form that is submitted with their bid:

  - Certified DBE firms contacted.
  - Date that each DBE firm was first contacted concerning quoting on the proposal to be bid.
  - Whether each DBE firm submitted a quote on the proposal to be bid.
  - If the DBE firm is being used as part of the bidder's DBE commitment.

- If used as part of the bidder's DBE commitment, the work items that the DBE will be used for on the contract.
- If used as part of the bidder's DBE commitment, the "Quote Amount" that has been committed to each DBE firm, which will be used on the contract.
- If the DBE firm is being used as a supplier (in which case, only 60% of the dollars paid to the DBE firm will count toward the DBE commitment).
- The "Net Dollar Commitment" of each DBE firm, which will be counted towards the DBE commitment.

The percent of DBE participation of each bidder will be calculated by the Office of Contracts by dividing the sum of the commitments to each DBE firm by the total of the contract amount as defined by Article 1102.10. Each bidder's DBE participation commitment will be calculated to the nearest tenth of a percent. If two or more projects are combined on one proposal, the DBE commitment will be calculated using the sum of DBE commitments and the sum of the project totals. Only DBE firms listed in the directory for the current letting may be used.

- C. The successful bidder shall be selected on the basis of having submitted the lowest responsive bid. Contractors who have met or exceed the proposed contract goal will be assumed to have made Good Faith Effort to utilize DBE firms. DBE firms who bid as prime contractors will be considered to have met the goal.
- D. If a goal has been established for a contract, the Iowa DOT will award the contract to the lowest bidder making good faith efforts to meet the contract goal. The following is the Department's process used to judge the Good Faith Efforts of bidders who have not met the established DBE goal:
1. Eighty Percent of the Goal—Bidders who have achieved 80% of the established goal will be assumed to have made a Good Faith Effort to achieve the goal.
  2. Eighty Percent of the Average Commitment—The Department has utilized an objective measurement of good faith effort since October 31, 1988, where Good Faith Effort is determined by calculating 80%

of the average of the percentages of the DBE commitments submitted by all bidders on the contract.

3. Contractors with History of Utilizing DBEs—Bidders who have demonstrated their ability to utilize DBE firms on both federal-aid and non-federal-aid projects let by the Department in the previous fiscal years will be assumed to have made a Good Faith Effort to achieve the project goal.
4. Administrative Reconsideration of Project-Specific Good Faith Efforts—Contractors who have not met any of the previous three Administrative Reconsideration criteria for being responsive for demonstrating a Good Faith Effort to utilize DBE firms may request an Administrative Reconsideration of their Good Faith Efforts. The Department's Administrative Reconsideration Committee, who was not involved in the previous three steps, will perform the Administrative Reconsideration. This committee consists of the Department's Contract Engineer, Assistant Contracts Engineer, and the EEO/AA Administrator. The determination made by the Administrative Reconsideration Committee shall be considered final.

- E. Good Faith Efforts when a DBE is replaced on a contract.

If a DBE, committed for a goal on a contract, has been terminated or has otherwise failed to complete work on a contract, the contractor must make Good Faith Efforts to replace the DBE, to the extent needed to meet the goal on the contract, with another certified DBE. The prime contractor must immediately notify the project engineer of the DBE's inability or unwillingness to perform, providing reasonable documentation to support the notice. The project engineer will then notify the Civil Rights Administrator in the Iowa DOT's Office of Contracts and will obtain the administrator's approval of any substitution that is made.

When requesting approval of a substitution, the prime contractor must provide the Civil Rights Administrator with copies of new or amended subcontract requests, along with documentation of Good Faith Efforts to continue meeting the original contract goal. If the contractor fails or refuses to provide the required information, the contractor will be penalized, dollar for dollar, for any work committed to DBEs but performed by non-DBEs. Repeated violations may result in suspension of the contractor's bidding privileges.

Abbreviations used without definitions in TRB publications:

AASHO	American Association of State Highway Officials
AASHTO	American Association of State Highway and Transportation Officials
APTA	American Public Transportation Association
ASCE	American Society of Civil Engineers
ASME	American Society of Mechanical Engineers
ASTM	American Society for Testing and Materials
ATA	American Trucking Associations
CTAA	Community Transportation Association of America
CTBSSP	Commercial Truck and Bus Safety Synthesis Program
DHS	Department of Homeland Security
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
IEEE	Institute of Electrical and Electronics Engineers
ITE	Institute of Transportation Engineers
NCHRP	National Cooperative Highway Research Program
NCTRP	National Cooperative Transit Research and Development Program
NHTSA	National Highway Traffic Safety Administration
NTSB	National Transportation Safety Board
SAE	Society of Automotive Engineers
TCRP	Transit Cooperative Research Program
TRB	Transportation Research Board
TSA	Transportation Security Administration
U.S.DOT	United States Department of Transportation