New Hampshire DOT

Department of Transportation

Disadvantaged Business Enterprise (DBE) Program Manual

New Hampshire Department of Transportation
Disadvantaged Business Enterprise Program

Policy Statement

The New Hampshire Department of Transportation (NHDOT) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. NHDOT has received Federal financial assistance from the U.S. Department of Transportation, and as a condition of receiving this assistance, NHDOT has signed an assurance that it will comply with 49 CFR Part 26.

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

1. To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
2. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. To ensure that the DBE program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients;
7. To assist in the development of firms that can compete successfully in the marketplace outside the DBE program; and
8. To provide appropriate flexibility to recipients of federal financial assistance in establishing and providing opportunities for DBEs.

The Chief of Labor Compliance has been delegated as the DBE Liaison Officer. In that capacity, the Chief of Labor Compliance is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by NHDOT in its financial assistance agreements with the Department of Transportation.

NHDOT has disseminated this policy statement to the Commissioner, Directors and all the components of the organization. This policy statement shall be distributed to all DBE and non-DBE contractors, consultants and related trade and professional organizations by email. The NHDOT DBE program shall be provided to all requesting agencies or individuals by mail or email, and is available online through the NHDOT website. www.nh.gov/dot

Victoria F. Sheehan, Commissioner

12/19/2016
Date

New Hampshire Department of Transportation Disadvantaged Business Enterprise (DBE) Program Manual

Table of Contents

page

Policy Statement……..…….…... 1
Subpart A – General Requirements…….…… 3
Subpart B – Administrative Requirements…….. 6
Subpart C – Goals, Good Faith Efforts and Counting…….…… 14
Subpart D – Certification Standards …… 20
Subpart E – Certification Procedures……... 29
Subpart F – Compliance and Enforcement…..……...…..… 33

Attachments

1. New Hampshire Department of Transportation Organization Chart
2. Monthly Prompt Payment Certification
3. DBE Goal Methodology
4. DBE Special Attention
5. DBE Certification Application Forms
6. DBE Commitment Form and DBE Letter of Intent Form
7. DBE Commitment and Payment Review Form
8. 49 Code of Federal Regulations (CFR) Part 26
9. Uniform Report of DBE Awards or Commitments and Payments
10. Unified Certification Agreement
11. Annual Affidavit of No Change

SUBPART A - General Requirements

Section 26.1 Objectives

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

Section 26.3 Applicability

NHDOT is the recipient of federal airport funds authorized by 49 U.S.C. 47101, et seq.

NHDOT is the recipient of federal -aid highway funds authorized under Titles I and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107.

NHDOT is the recipient of federal transit funds authorized by Titles I, III, V, and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, II, and V of the Teas-21, Pub. L. 105-178.

Section 26.5 Definitions

NHDOT will adopt the definitions contained in Section 26.5 for this program. These definitions can be found electronically by opening the link highlighted above or in attachment #8 of this document.

The following definitions are provided to supplement the DBE Program definitions.

Affiliates has been updated to include any firm owned and/or controlled by any person(s) in SBA's definition of *Immediate Family Members.*

Commercially Useful Function (CUF) A DBE is said to be performing a commercially useful function when it is actually performing, managing, and supervising the work involved.

Native Americans must now be enrolled in a federally or State recognized Indian tribe to be presumed socially and economically disadvantaged.

Acronyms Specific to NHDOT or Federal Agencies

BDP	Business Development Program
CA	Contact Administrator
DBELO	Disadvantaged Business Enterprise Liaison Officer
DCE	District Construction Engineer
DBE/SS	Disadvantaged Business Enterprise Supportive Services
DOCR	Departmental Office of Civil Rights
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration

FTA	Federal Transit Administration
NAICS	North American Industry Classification Codes
NHDOT	New Hampshire Department of Transportation
OFC	Office of Federal Compliance
TVM	Transit Vehicle Manufacturer

Section 26.7 Non-discrimination Requirements

NHDOT shall never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In administering the DBE program, NHDOT shall 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.

Section 26.11 Record Keeping Requirements

Uniform Report 26.11(a)

NHDOT commits to the accurate and timely submission of the Uniform Report of DBE Awards or Commitments and Payments (Attachment #9) as directed by the appropriate operating administrations. NHDOT shall submit the Uniform Report on the following schedule:

As a recipient of FAA funding, the NHDOT shall report DBE participation using the Uniform Report of DBE Commitments/Awards and Payments annually, no later than December 1st.

As a recipient of FTA funding, the NHDOT shall report DBE participation on a semi-annual basis no later than June 1st and December 1st, using the Uniform Report of DBE Commitments/Awards and Payments. These reports will reflect commitments and payments made to DBEs on DOT-assisted contracts.

FHWA Recipients shall report DBE participation on a semi-annual basis no later than June 1st and December 1st, using the Uniform Report of DBE Commitments/Awards and Payments. These reports will reflect commitments and payments made to DBEs on DOT-assisted contracts.

Bidders List: 26.11(c)

NHDOT will create a bidders list annually with a record of all DBE and non-DBE firms that submitted a bid or quote for work on Federally-assisted contracts. The purpose of the bidders list is to assist with calculating overall DBE program goals and each annually completed bidders list will be saved for that purpose. The bidders list will include the name, address, DBE or non-DBE status, age and annual gross receipts of each firm.

NHDOT will collect this information in the following ways:

1. NHDOT will identify prime contractors that submitted a bid on Federally-assisted contracts by reviewing bid records for the previous calendar year.
2. Prime contractors who bid, regardless of whether they were awarded a contract, will be contacted and asked to provide a list of all subcontractors, DBE and non-DBE, that were utilized preparing each bid submitted.
3. Business name, address and DBE status information is readily available by reviewing bid records from the previous year. Business age and annual gross receipts are collected annually from all actively working contractors and subcontractors as part of their annual renewal process and readily available. Any contractor information not on file at NHDOT will be requested via email or telephone when compiling the bidders list.

Records 26.11(b)(d)

NHDOT shall maintain records documenting each DBE firm's certification and ongoing compliance as required by this program. NHDOT will continue to provide data about the DBE program as directed by each DOT operating administration.

UCP Information 26.11(e)

NHDOT shall submit a report to the Department of Civil Rights (DOCR) providing a percentage and location of all certified DBE firms in the New Hampshire directory controlled by (1) women, (2) socially and economically disadvantaged individuals (other than women) and (3) individuals who are women and are otherwise socially and economically disadvantaged. This report shall be submitted no later than January 1, annually.

Section 26.13 Federal Financial Assistance Agreement

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

Assurance: 26.13(a)

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 sanction as provided for under 49 CFR Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

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

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

Contract Assurance: 26.13b

NHDOT shall ensure the following clause is placed in every DOT-assisted contract and subcontract:

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

Note: This language is to be used verbatim, as it is stated in 26.13(b)
Sanctions for non-compliance will be considered on a case by case basis. Remedies may include, but are not limited to:

1. Withholding progress payments;
2. If a prime contractor, disqualifying the contractor from future bidding;
3. If a subcontractor, suspending the subcontractor from future work.

SUBPART B - ADMINISTRATIVE REQUIREMENTS

Section 26.21 DBE Program Plan and Updates

As a primary recipient of federal funds from FHWA, FTA and FAA, the NHDOT is committed to the administration of a DBE program that meets the requirements of 49 CRF Part 26. NHDOT affirms the DBE program requirements apply to all subrecipients, local public agencies, airports, contractors and others awarded federally assisted contracts. NHDOT will continue to carry out this program until all funds from DOT financial assistance have been expended.

Significant updates to the DBE program shall be submitted to FHWA for approval.

Section 26.25 DBE Liaison Officer (DBELO)

NHDOT has designated the following individual as our DBE Liaison Officer: Jay Ankenbrock, Chief of Labor Compliance, NH Department of Transportation, 7 Hazen Drive, PO Box 483, Concord, NH 03302-0483, 603-271-2467, john.ankenbrock@dot.nh.gov.

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that NHDOT complies with all provision of 49 CFR Part 26. The DBELO has direct, independent access to NHDOT Commissioner concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in attachment #

1 to this program.

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

1. Provides guidance and oversight to the DBE Coordinator, Compliance Review Officers and Program Assistant for implementing all aspects of the DBE program.
2. Advises NHDOT Commissioner and Directors on DBE program matters and achievements.
3. Consults with NHDOT Senior Staff on matters of contractor compliance, withholding, sanctions or investigations.
4. Consults with FHWA to ensure DBE program compliance.
5. Consults with contractors and NHDOT staff to resolve DBE program issues.
6. Analyzes NHDOT's progress toward DBE goal attainment and identifies ways to improve progress.
7. Provides oversight of DBE certification and recertification process.
8. Reviews and approves DBE goal methodology.
9. Gathers and reports statistical data and other information as required by DOT.

DBE Coordinator Responsibilities

The DBE Coordinator reports to the DBELO and is responsible for daily administration and oversight of the DBE program. The DBE Coordinator duties include the following:

1. Ensures DBE program is managed consistent with DOT regulations.
2. Acts as the Liaison to the Uniform Certification Process in New Hampshire.
3. Processes in-state and interstate DBE, ACDBE and annual renewal applications consistent with DOT certification standards and procedures.
4. Gathers and reports statistical data and other information as required by DOT.
5. Works with all Departments to set overall annual DBE goals consistent with DOT regulations and provides DBE program guidance.
6. Monitors ongoing DBE goal attainment and adjusts project specific goals as necessary.
7. Provides oversight for the Commercial Useful Function (CUF) review process.
8. Performs monthly Prompt Payment reviews, investigates Prompt Payment complaints.
9. Maintains NHDOT’s updated DBE directory on certified DBEs.
10. Provides outreach for DBEs seeking work on Federal-aid projects.
11. Ensures bid notices and requests for proposals are available to DBEs in a timely manner.
12. Promotes DBE program utilization and participation with community based organizations, and other Federal agencies.
13. Provides opportunities for DBEs and small businesses consistent with Business Development Program guidelines.
14. Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
15. Provides oversight and management of DBE supportive services contracts and activities.

Compliance Review Officer Responsibilities

Compliance Review Officers have general oversight of federally-assisted projects with respect to Contractor Compliance and Equal Employment Opportunity. Their responsibilities include the following:

1. Participates in pre-construction meetings.
2. Performs CUF reviews as necessary.
3. Reviews DBE utilization to ensure DBE contractual obligations are being fulfilled.
4. Assists with Prompt Payment investigations.

Program Assistant Responsibilities

The Office of Federal Compliance (OFC) Program Assistant provides support functions as necessary to assist with DBE program administration, reporting and data collection.

Contract Administrators/Engineer or Consultant Responsibilities

NHDOT Contract Administrators or Consultants with daily project oversight shall perform CUF reviews, when feasible, for every DBE contracted to work on their federally-assisted project. Reports of CUF issues necessitating investigation and follow-up shall be forwarded to the DBE Coordinator for review and follow-up.

Section 26.27 DBE Financial Institutions

It is the policy of NHDOT to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contract to make use of these institutions. At this time, no such financial institutions exist within the State of New Hampshire.

Section 26.29 Prompt Payment Mechanisms

NHDOT declines to hold retainage from prime contractors and prohibits prime contractors from holding retainage from subcontractors. NHDOT affirms the following prompt payment provision shall be included in every federally assisted contract and subcontract. NHDOT Supplemental Specification 109.09, Prompt Payment to Subcontractors, describes contractor responsibilities regarding prompt payment and prompt payment reporting.

109.09 Prompt Payment to Subcontractors.

The Prime Contractor shall pay all Subcontractors for the work performed no later than 21 calendar days from the date the Prime Contractor received payment from the Department for said work, including materials in accordance with 109.07 and/or 109.08 paid for in the progress payments. Subcontractors are required to pay Subcontractors and/or material

suppliers, within 21 calendar days from the date they receive payment for satisfactory work performed or supplies received. This Prompt Pay requirement shall be made part of all subcontracts and agreements.

If the Prime Contractor believes that any portion of the payment should be withheld from the Subcontractor, the Prime Contractor shall notify the NHDOT Contract Administrator in writing, prior to the estimate being processed. NHDOT Office of Federal Compliance shall be made part of this notification. NHDOT may withhold payment for the portion of work in dispute pending resolution.

This prompt payment provision is a requirement of 49 CFR 26.29 and does not confer third-party beneficiary right or other direct right to a subcontractor against the Department. This provision applies to both DBE and non-DBE subcontractors.

Satisfactory work performed shall be defined for purposes of this prompt payment provision as;

1. Upon review, the Engineer finds the work completed in accordance with the contract, plans and specifications, and;
2. Required paperwork, for progress and partial payments, including material certifications and payrolls, has been received.

The determination of whether work meets the standards set forth above is the responsibility of the Engineer. If the subcontractor becomes insolvent after it satisfactorily performs work as defined above but before payment is due, the obligation to pay is not extinguished. (Payment may have to be made to the bankruptcy trustee or to an escrow account for the benefit of the creditors.)

The Prime Contractor must include, in all subcontract agreements, notices to Subcontractors of their right to prompt payment, and of the Department's policy prohibiting Prime Contractors from holding retainage from Subcontractors under 49 CFR 26.29.

Failure of the Prime Contractor or a Subcontractor to comply with these prompt payment provisions may result in sanctions.

Non-Payment Claims. All notifications of failure to meet prompt payment provisions shall be referred by subcontractors, in writing, to NHDOT Office of Federal Compliance with a copy supplied to the respective Contract Administrator.

Payment Certifications. The prime contractor or any subcontractor who receives payment for work and/or materials (specifically supplied to the project in excess of $10,000) shall submit a "Monthly Prompt Payment Certification," OFC Form 18, to NHDOT Office of Federal Compliance no later than the 10th calendar day of each month.

Prompt Payment Reviews

The Office of Federal Compliance shall review prompt payment certifications (Attachment #2) each month to ensure payments to subcontractors and material suppliers are made in a timely manner. Additionally, random audits of prime and subcontractor submissions shall be conducted to ensure the accuracy of reported information.

When a contractor or subcontractor is found to be in violation of Section 109.09, the contractor or subcontractor shall be notified of the specific violation(s) in writing, and given the opportunity to take corrective action within a specified time period. If any contractor does not comply with the required corrective actions, or, demonstrates a continued pattern of violations to the prompt payment requirements, the Office of Federal Compliance, in cooperation with the NHDOT Contract Administrator and District Construction Engineer, may impose sanctions as necessary. Sanctions may include withholding of progress payments until the violation has been corrected or other remedies as determined by the Department.

Section 26.31 DBE Directory

NHDOT is the sole certifying agency in New Hampshire and maintains a directory identifying all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, contact person, email and website address. The directory also describes the type of work the firm is certified to perform and provides specific North American Industry Classification System (NAICS) code(s) for each certified work category. The directory is updated monthly and available by mail or email upon request, and available online at www.nh.gov/dot/org/administration/ofc/documents.htm.

Section 26.33 Overconcentration

NHDOT has not identified that overconcentration exists in the types of work that DBEs perform.

Section 26.35 Business Development Programs

NHDOT is committed to creating a Business Development Program (BDP) to evaluate and provide a structured process for DBEs to receive training and guidance to become more competitive within the transportation related highway construction industry. As part of the DBE Supportive Services Program (DBE/SS), NHDOT shall implement a BDP in accordance with 49 CFR 26, Appendix C.

The BDP is available on a limited basis to certified DBE contractors or consultants who have demonstrated themselves to be ready, willing and able to work on highway projects by submitting bids or quotes, even if they did not receive work. The NHDOT shall select one to three DBEs to participate in the BDP during a specific contract period.

The DBE/SS Consultant shall promote the benefits of the BDP to all highway construction related DBE contractors or consultants. DBEs must submit a letter of interest in order to apply for acceptance to the BDP. Applicants will be interviewed and a limited number of under-utilized firms will be selected using the following criteria:

1. The DBE firm is willing to commit to a two-year in-depth customized plan to enhance its business and has been operating for at least six months.
2. The DBE firm is certified to perform work in one or more highway construction related NAICS codes.
3. The DBE firm has demonstrated they are a ready, willing and able DBE firm by submitting previous bids and quotes, even though they may have not been awarded a contract.
4. The DBE firm has demonstrated the willingness and ability to build capacity to perform on highway-related projects.

BDP performance goals and measures shall be developed as part of the annual DBE Supportive Services Program.

Section 26.37 Monitoring and Enforcement Mechanisms

NHDOT is committed to ensure all subrecipients, contractors and all other program participants comply with DBE program requirements. All federally assisted contracts contain a DBE Special Attention provision. (Attachment #4) This document provides specific DBE program regulations and contract remedies available in the event of non-compliance by any prime contractor, subcontractor or other participant in federal-aid contract work or procurement.

NHDOT will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109. NHDOT will consider similar action under NHDOT's legal authority, including responsibility determinations in future contracts.

NHDOT will verify that work committed to DBEs at contract award is actually performed by the DBEs during project construction. This will be accomplished by reviewing quarterly payments made to DBEs to ensure timely utilization, and reviewing final payments made to DBEs at project completion to compare attainments against commitments. NHDOT shall utilize the DBE Commitment and Payment Review form for interim and final project reviews. (Attachment #7).

NHDOT tracks DBE awards, commitments, ongoing and completed DBE project utilization using a database developed by NHDOT specifically for the DBE and Contractor Compliance Programs. NHDOT semi-annual reporting information is compiled using an Excel based spreadsheet.

Section 26.39 Fostering Small Business Participation

The New Hampshire Department of Transportation (NHDOT) has been successful in meeting its overall DBE goal by implementing race and gender neutral strategies that encourage small business participation on USDOT-assisted projects. In addition to meeting statewide DBE goals, subcontracting opportunities for small businesses currently average 30% or more on federally funded NHDOT projects. The methods employed by NHDOT are designed to eliminate

obstacles and increase opportunities for DBEs and small businesses on projects with funding and oversight through the FHWA, FTA and the FAA. NHDOT provides training and assistance to contractors and utilizes statewide resources that promote small business outreach, education, development and training.

In accordance with 49 CFR 26.39, NHDOT shall incorporate a small business element into its current DBE program to facilitate competition by and ensure opportunities for small businesses. NHDOT is committed to taking all reasonable steps to eliminate obstacles to small businesses, including DBEs, which may preclude their participation as prime contractors or subcontractors in federally assisted contracts. NHDOT shall employ the following strategies:

For Design-Build projects in excess of $1,000,000, NHDOT will require bidders to specify elements of the contract or subcontracting opportunities of a size small business, including DBEs, can reasonably perform. Specific elements or subcontracting opportunities available for small businesses shall amount to no less than 10% of the contract price.

NHDOT will make an assessment of all FHWA, FTA and FAA projects in excess of $1,000,000 prior to advertising to determine if sufficient subcontracting opportunities exist for small business concerns. If the anticipated project work is narrowly focused, for example, limited solely to paving, NHDOT may require the prime contractor to create subcontracting opportunities, rather than self-performing all of the work. Subcontracts must be of a size that small businesses, including DBEs, can reasonably perform and amount to no less than 10% of the total contract price.

NHDOT will conduct a semi-annual review of completed federally assisted projects to ensure sufficient subcontracting opportunities were available for small business concerns. Reviews shall be conducted in conjunction with data collection for the FHWA semi-annual Uniform Report of DBE Commitments, Awards and Payments. NHDOT shall determine the total prime contracts and subcontracts awarded to small businesses during each reporting period and calculate the average percentage of federal contracting dollars awarded. If the annual average prime and subcontracting opportunities for small businesses on completed federal projects fall below 10%, NHDOT will take proactive steps to increase small business participation. These steps may include, but are not limited to, one of the following:

1. Race-neutral small business set-aside for prime contracts under $1,000,000. NHDOT shall establish a set aside for small businesses, including DBE's, for an amount no less than 10% of each federally funded contract under $1,000,000.
2. On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.

Additional Race and Gender-Neutral Strategies for Promoting Small Business Participation:

1. NHDOT, Office of Federal Compliance, conducts periodic education and training seminars for contractors. The goal of this training is to inform key contractor employees and contractors unfamiliar with federal contracting of federal requirements and

reporting responsibilities.

2. NHDOT, Office of Federal Compliance, provides subcontractors with introductions to prime contractors.
3. NHDOT provides technical and business development assistance, help with government contracting and marketing through a network of state and federal partners including the Small Business Administration, NH Procurement Technical Assistance Program, NH Administrative Services and Small Business Development Centers.
4. Providing formal and informal training and presentations to DBEs and other small businesses.
5. Conducting periodic needs assessments to better determine small business needs and update contact information.
6. Assisting DBEs and other small business to identify contracting opportunities within NHDOT in areas of consulting and construction.
7. Assisting DBEs and small businesses to identify and bid on NHDOT contracting opportunities.
8. Assisting DBEs and small businesses with the process to establish pre-qualification status and obtaining approved subcontractor status.
9. Monthly prompt payment certification and enforcement of prompt pay requirements ensures small businesses are paid in a timely manner, and past due accounts receivable are reduced and do not impact business opportunities.

All documentation on project reviews, and proactive efforts to facilitate small business participation shall be kept on file and be made available for review at NHDOT, Office of Federal Compliance, 7 Hazen Drive, Concord, NH 03302.

A small business must be independently owned and operated, organized for profit, not dominant in its field and may not exceed the Small Business Administration (SBA) size standard for the type of work performed. Depending on the industry, SBA size standard eligibility is based on the average number of employees for the preceding twelve months, or the average of annual gross receipts over the past three-year period. Small businesses must meet the definitions specified in Section 3 of the Small Business Act and SBA regulations implementing it (13 CFR Part 121). NHDOT collects prime and subcontractor annual receipts information as part of the contractor's annual renewal obligations. When required, this information will be used to verify small business eligibility to participate in a federally assisted contract as a recognized small business. NHDOT recognizes firms certified by the SBA as eligible to participate in this program. In addition, any minority and/or women-owned business awarded contracts as a result of the methods and strategies implemented by this small business element will be strongly encouraged to seek DBE certification in order to be counted towards race-neutral DBE participation goals.

NHDOT will implement a review of subcontracting opportunities for all FHWA, FTA and FAA projects in excess of $1,000,000 advertised on or after October 1, 2012, and on an ongoing basis thereafter. NHDOT shall review small business participation on completed projects in conjunction with data collection for the FHWA semi-annual Uniform Report of DBE Commitments, Awards and Payments. Reviews on completed projects shall be performed at six-month intervals thereafter. NHDOT will continue to implement established race-neutral strategies to increase small business participation on an ongoing basis.

SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 26.43 Set-asides or Quotas

NHDOT does not use set-asides or quotas in the administration of this DBE program.

Section 26.45 Overall Goals

NHDOT will establish overall goals every three years in accordance with the 2-Step process as specified in 49 CFR Part 26.45 for FHWA, FTA, and FAA-assisted projects. The first step is to create a baseline figure reflecting the relative availability of "ready, willing and able DBEs" in our marketplace; the second step is to examine all relevant evidence, including past DBE participation, to determine what adjustments, if any, are needed to arrive at our overall goal. A description of the methodologies used to calculate the overall goal and the goal calculations for FHWA, FTA, and FAA can be found in #3 to this program, and are also available on the NHDOT website: www.nh.gov/dot/org/administration/ofc/dbe.htm. In accordance with section 26.45(f) NHDOT will submit its overall goal for legal sufficiency approval by August 1st at three-year intervals, based on the following schedule established by each operating administration:

For FHWA, August 1, 2014, 2017, 2020 and every three years thereafter;
For FTA, August 1, 2016, 2019, 2022 and every three years thereafter;
For FAA, August 1, 2014, 2017, 2020 and every three years thereafter.

NHDOT shall begin using the proposed overall DBE goal on October 1st of the year it has been submitted unless we have received other instructions from the specific operating administration. If NHDOT establishes a project specific DBE goal, NHDOT will begin using the project specific goal and include the goal requirements in all solicitations for a DOT-assisted contract for the project.

Section 26.47 Shortfall Analysis

If DBE awards and commitments reported on the Uniform Report of Awards or Commitments and Payments at the end of any fiscal year fail to meet or exceed the goal for that fiscal year, NHDOT shall commit to the submission of a shortfall analysis within 90 days of the end of the fiscal year. The shortfall analysis shall include the following:

1. A detailed analysis and explanation why the overall DBE goal was not met.
2. A specific plan with appropriate milestones to correct the problems identified in the analysis, enabling NHDOT to meet or exceed the DBE goal for the new fiscal year.

Section 26.49 Transit Vehicle Manufacturers Goals

NHDOT will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the

requirements of this section. Alternatively, NHDOT may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

Note: this element applies only to FTA recipients' programs.

Section 26.51(a-c) Breakout of Estimated Race-Neutral & Race-Conscious Participation

NHDOT shall meet the maximum portion of DBE goals by using race-neutral means of facilitating race-neutral DBE participation. The breakout of estimated race-neutral and race-conscious participation can be found in the DBE goal methodology in Attachment #3 to this program. This section of the program will be updated as required by each operating administration and posted for review on the NHDOT website, www/nh.gov/dot.

Section 26.51(d-g) Contract Goals

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

NHDOT will establish contract goals only on those DOT-assisted contracts that have subcontracting possibilities. NHDOT need not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work.)

NHDOT will express our contract goals as a percentage of the total amount of the DOT-assisted contract.

When a specific DBE contract goal is designated for a project, the bid and contract documents shall include the DBE Special Attention shown in Attachment #4. The DBE Special Attention provides the specific DBE contract goal, a summary of the DBE program and responsibilities, and the requirements for responsibility after contract award.

Section 26.53 Good Faith Effort Procedures

Demonstration of Good Faith Efforts 26.53(a) &(c)

Projects with race-conscious contract goals require the bidder/offeror to make good faith efforts to meet it. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting their good faith efforts for the portion of the goal not met with actual DBE commitments. Examples of acceptable good faith efforts are detailed in Appendix A to Part 26. (Attachment #8).

The DBELO is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsible. The DBELO shall consider the quality, quantity and intensity of the different kinds of efforts the

bidder has made, based on the regulations and guidance in appendix A. The efforts of 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.

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

For design build projects with specific project goals, NHDOT shall require the prime contractor submit a detailed summary of potential subcontracting activities which could reasonably provide opportunities for future DBE participation sufficient to meet the specific goal. NHDOT shall monitor all DBE subcontracting activity on a quarterly basis to ensure adequate progress and effort is being made towards goal achievement.

Information to be Submitted 26.53(b)

NHDOT treats bidder/offeror compliance with good faith efforts requirements as a matter of responsibility. The apparent low bidder/offeror must submit information documenting their efforts to meet the contract goal to the DBELO within 3 business days of the bid opening for review. NHDOT provides a DBE Commitment Form and Letter of Intent for this purpose. (Attachment #6)

To be eligible for use in the DBE commitment and good faith effort process, DBEs must be currently certified by NHDOT. DBEs must also be certified for work in the NAICS category which describes the type of work each DBE intends to perform. Each solicitation for which a contract goal has been established will require the bidders/offerors to submit the following information.

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

Administrative Reconsideration 26.53(d)

If the apparent low bidder has not provided sufficient evidence of DBE commitments and/or good faith efforts and is denied a contract award, the apparent low bidder will be informed of their right to request administrative reconsideration. This request must be received within seven calendar days of being informed of the decision to deny the contract award. This request must be made in writing to: Kathleen Mulcahey-Hampson, Senior Hearings Examiner, New Hampshire Department of Transportation, PO Box 483, Concord, NH 03302-0483, 603-271-3734, kathleen.mulcahey-hampson@dot.nh.gov. The reconsideration official will not have any role in the original determination that the bidder/offeror did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do. The reconsideration official shall provide the bidder/offeror a written decision on reconsideration within 30 calendar days, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

DBE Termination and substitution 26.53(f)

NHDOT will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. NHDOT will require the prime contractor to notify the DBE, in writing, of the intent to remove or substitute the DBE and the reason for the request. The prime contractor must provide a copy of this notification to the DBELO, with reasonable documentation of the DBEs inability or unwillingness to perform the subcontracted work. The DBE must be given five business days to respond to the contractor and DBELO if they intend to object to the request for removal from the project. The five business day response period may be shortened for safety reasons existing on the project.

NHDOT will require the prime contractor obtain prior approval of the substitute DBE and provide copies of new or amended subcontracts, or documentation of good faith efforts.

If the prime contractor fails or refuses to comply with the above requests in a time specified, remedies may include suspending progress payments until the request is completed, or reducing project payments by the dollar amount required to meet the portion of the DBE goal originally contracted to the DBE.

Compliance with GFE 26.53(j)

NHDOT affirms the requirement in all federally assisted contracts that prime contractors make all subcontracts with DBEs available for review upon request.

Section 26.55 Counting DBE Participation

NHDOT will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55. These requirements are detailed in a DBE Special Attention and included in all NHDOT contracts with federal-aid. An example of the DBE Special Attention is available as Attachment #4 of this program.

Commercially Useful Function 26.55(a)

Counting DBE Participation for Project Goals. In order for payments made to DBE contractors to be counted toward DBE goals, the DBE contractors must perform a commercially useful function (CUF). The DBE must be responsible for execution of the work of the contract

and must carry out its responsibilities by actually performing, managing, and supervising the work involved, consistent with standard industry practices.

This means that:

A. The DBE must also be responsible for ordering its own materials and supplies, determining quantity and quality, negotiating price, installing (where applicable) and paying for the material itself;
B. The DBE must perform work commensurate with the amount of its contract;
C. The DBE's contribution cannot be that of an extra participant or a conduit through which funds are passed in order to obtain the appearance of DBE participation;
D. The DBE must exercise responsibility for at least fifty percent of the total cost of its contract with its own work force;
E. None of the DBE's work can be subcontracted back to the prime contractor, nor can the DBE employ the prime's, or other subcontractor's supervisors currently working on the project;
F. The DBE's labor force must be separate and apart from that of the prime contractor or other subcontractors on the project. Transferring crews between primes, subcontractors, and DBE contractors is not acceptable;
G. The DBE owner must hold a Public Works license and any other professional or craft licenses required for the type of work he/she performs on the project;
H. The DBE may rent or lease, at competitive rates, equipment needed on the project from customary leasing sources or from other subcontractors on the project.

NHDOT shall perform CUF reviews for each DBE working on a federally assisted project. CUF reviews may be completed by the DBE coordinator, compliance review officer, contract administrator or consultant with project oversight responsibility. CUF reviews shall be retained in the individual project files and a copy shall be retained by the Office of Federal Compliance.

Joint Ventures 26.55(b)

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

DBE Credit 26.55(c)

A contractor may take credit for payments made to a certified DBE that satisfies (CUF) requirements at the following rate:

A. A DBE Prime Contractor; count 100% of the value of work performed by own forces, equipment and materials count towards DBE goals.
B. An approved DBE subcontractor; count 100% of the value of work performed by the DBE's own forces, equipment and materials, <u>excluding the following</u>:
    i. The cost of materials/supplies purchased from a non-DBE Prime Contractor.
    ii. The value of work provided by non-DBE lower tier subcontractors, including non-DBE trucking to deliver asphalt to a DBE contractor.

C. A DBE owner-operator of construction equipment; count 100% of expenditures committed.
D. A DBE manufacturer; count 100% of expenditures committed. The manufacturer must be a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the Contractor.
E. A regular DBE dealer/supplier; count 60% of expenditures committed. A regular dealer/supplier is defined as a firm that owns, operates, or maintains a store, warehouse or other establishment, in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. A person may be a dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating or maintaining a place of business, if the person both owns and operates distribution equipment for the products, by the means of a long term agreement, and not by a contract by contract basis. Ensure credit for dealer/suppliers on a project by project basis.
F. A DBE Broker; count for DBE credit only the fees or commissions charged for assistance in the procurement, and, fees and transportation charges for the delivery of materials or supplies required at the job site, but not the cost of materials procured. A broker is defined as any person(s) or firm who arranges or expedites transactions for materials or supplies, and does not take physical possession of the materials or supplies at their place of business for resale.
G. A DBE renter of construction equipment to a contractor; count 20% of expenditures committed, with or without operator.
H. A bona fide DBE service provider; count 100% of reasonable fees or commissions. Eligible services include professional, technical, consultant, or managerial, services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for the performance of the contract. Eligible services also include agencies providing bonding and insurance specifically required for the performance of the contract.
I. A trucking, hauling or delivery operation, count 100% of expenditures committed when trucks are owned, operated, licensed and insured by the DBE and used on the contract and, if applicable, includes the cost of the materials and supplies. 100% of expenditures committed when the DBE leases trucks from another DBE firm including an owner-operator. 100% of reasonable fees, or commissions, the DBE receives as a result of a lease arrangement for trucks from a non-DBE, including an owner-operator. DBEs who utilize non-DBE trucking may only take credit for the value of the number of non-DBE trucks equal to the amount owned and/or leased by the DBE. The DBE contractor shall provide a breakdown of trucks owned and/or leased by the DBE and the total of all trucks performing project work upon request. The DBE Coordinator, Compliance Officer or Contract Administrator shall confirm the information provided as part of the CUF review.
J. Any combination of the above.

No DBE Credit 26.55(f)(g)(h)

NHDOT affirms no DBE credit shall be given towards goals if the DBE is not certified at time of the award or if the firm loses its certification. NHDOT also affirms no contract goal credit will be given until payment is made to the DBE.

SUBPART D - CERTIFICATION STANDARDS

Section 26.61 Burdens of Proof

NHDOT will adhere to the certification standards of 49 CFR Part 26, Subpart D to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. The firm seeking certification has the burden of demonstrating, 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.

NHDOT will consider members of the designated groups identified in 49 CFR 26.67(a) are socially and economically disadvantaged. Individuals seeking certification must submit a signed notarized statement that they are a member of one of the groups in 26.67(a). In addition, applicants must provide information concerning their economic disadvantage as detailed in 26.67.

Individuals who are not presumed to be socially and economically disadvantaged, or whom have had their presumption of disadvantage rebutted, may choose to submit information to prove they are socially and economically disadvantaged in accordance to 49 CFR 26, Appendix E, included as part of Attachment #8 to this program.

NHDOT will make certification decisions based on all the facts in the record, viewed as a whole. Subpart D is included as part of 49 CFR Part 26 included as Attachment #8 to this program.

Section 26.63 Rules Governing Group Membership Determinations

If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group NHDOT has reason to question an individual's claim to membership, NHDOT retains the right to ask for additional evidence from the applicant. This request shall be submitted in writing and detail the reasons for questioning their claim of group membership. NHDOT shall ensure it does not place an undue burden on members of one particular group in violation of their civil rights.

NHDOT shall consider if the applicant has considered themselves to be a member of a particular group for a long period of time prior to the application for certification and whether the individual is regarded as a member of the group by the relevant community.

Individuals determined not to be members of a disadvantaged group must demonstrate social and economic disadvantage on an individual basis. 49 CFR 26, Appendix E contains guidance for submission of documentation to prove an individual claim of social disadvantage status. This information must include at least one distinguishing feature, detailed personal experiences which contribute to barriers to entry in the business world, such as education, employment and business history.

Any decisions denying group membership claims are subject to certification appeals procedures of 49 CFR 26.89.

Section 26.65 Rules Governing Business Size Determinations

To be considered and eligible DBE, a firm (including its affiliates) must be an existing small business as defined by the Small Business Administration (SBA) standards found in 13 CFR 121 as appropriate to the NAICS code for which it is applying for certification. No business (including its affiliates) shall have annual gross receipts, averaged for the previous three years, in excess of $23.98 million. NHDOT shall review and apply any revisions to the SBA business size standards when they become effective. NHDOT shall review business tax return information to ensure compliance with this part.

Section 26.67 Rules Governing Social and Economic Disadvantage

NHDOT shall consider members of the following groups to be socially and economically disadvantaged individuals. Individuals who are African American; Hispanic American; Native American (if enrolled in a federally or State recognized Indian tribe); Asian Pacific American; Subcontinent Asia American and women. Each individual whose presumption of disadvantage is relied upon for DBE certification must submit a signed, notarized statement of personal net worth and supporting documentation to certify that their personal net worth does not exceed $1.32 million.

Other considerations when calculation personal net worth:

1. Applicants shall exclude the equity in their primary residence and business.
2. Applicants must use present value of retirement assets (value less penalties and deductions for early withdrawal).
3. Applicants must use the fair market value of any property (not assessed value)
4. Applicants must use the standard DOT personal net worth form supplied with the DBE application, without modification.
5. NHDOT is required to include, as part of the disadvantaged individual's personal net worth, any assets transferred to an immediate family member or to the applicant firm for less than fair market value within 2 years of the date of application or annual affidavit. NHDOT shall not include assets transferred for education, medical expenses or in recognition of a special event.
6. Applicants may not use a contingent liability to reduce their personal net worth.

NHDOT shall review the personal net worth statement and supporting documentation, personal tax returns and business tax returns to ensure each applicant meets the standards for social and economic disadvantage. NHDOT reserves the right to request, on a case by case basis, additional information as necessary to aid in the decision making process and make a determination regarding the social and economic disadvantaged status of each applicant. If NHDOT rebuts an individual's claim of economic disadvantage based on this information, NHDOT is not required to provide the opportunity for a hearing to support the decision.

NHDOT may rebut an individual's claim of economic disadvantage despite the fact that liabilities reduce the individual's personal net worth below the $1.32 million threshold if a reasonable person would consider the owner to be a wealthy individual. This recognizes an individual that, despite the claim to economic disadvantage, appears to have the ability to accumulate substantial wealth. This determination is subjective and may be based on factors such as accumulation of valuable personal property, such as cars, real estate or equipment. Other factors to consider may be an adjusted personal income over the last three year period exceeding $350,000; whether income is immediately invested in the firm or whether the total fair market value of the owners assets are greater than $6 million. If NHDOT rebuts an individual's claim of economic disadvantage based on this information, we are required to provide the opportunity for a hearing according to the rules contained in 49 CFR 26.87, where NHDOT has the burden of proof to support their decision to rebut.

Section 26.69 Rules governing determinations of ownership.

Ownership 26.69(a)(c)

NHDOT shall make a determination whether the socially and economically disadvantaged participant(s) own a firm. NHDOT shall consider all the facts in the record, viewed as a whole, including the origin of all assets and how they were used in obtaining the firm. NHDOT shall determine if all transactions for the establishment and ownership of the firm conform to normal industry practices.

To be considered an eligible DBE, a firm must be at least 51% owned by socially and economically disadvantaged individuals. The following documents are requested, based on the ownership structure of each firm, when making determinations of ownership:

1. If a corporation, the disadvantaged individual(s) must own at least 51% of each class of voting stock outstanding and 51% of the aggregate of all stock outstanding.

   The applicant must provide official articles of incorporation (signed by the NH Secretary of State's Office), both sides of all corporate stock certificates, shareholders agreement(s), minutes of all stockholders and board of directors meetings, corporate by-laws with any amendments, corporate bank resolution and bank signatory cards.

2. In the case of a partnership, 51% 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.

   The applicant must provide a copy of the original and any amended partnership or joint venture agreement.

3. In the case of an LLC, at least 51% of each class of member interest must be owned by socially and economically disadvantaged individuals.

The applicant must provide a copy of the official certificate of formation and operating agreement with any amendments.

Ownership 26.69(c)(d)(e)(f)

The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capitol or expertise to acquire their ownership interest, must be real, substantial, and continuing, going beyond pro forma ownership as reflected in ownership documents. The following information shall be submitted at the time of the application and will aid in the analysis of ownership claims.

1. Documented proof of contributions to acquire ownership for each owner shall be reviewed. If capitol is through a loan, there must be documentation of the value of assets used as collateral. Capital contributions must be sufficient and reasonably equate to the value of ownership interest acquired.
2. Debt instruments from financial institutions or organizations that lend funds in the normal course of their business are acceptable, even if the debtor's ownership interest is security of the loan.
3. All securities that constitute the applicants ownership of the firm must be held by the disadvantaged owner. No securities held in trust, or by any guardian for a minor, are considered to be held by disadvantaged persons for purposes of determining ownership. Exceptions would be if the beneficial owner of assets or securities in trust is a disadvantaged individual, and the trustee is the same or another such individual; or, if the beneficial owner is a disadvantaged individual, who, rather than the trustee, exercises control over the management, policy-making and daily operations of the firm. Revocable living trusts are only allowed who the disadvantaged owner is the sole grantor, beneficiary and trustee.
4. Expertise may be considered as part of the disadvantaged owner's contribution to acquire ownership. The owner's expertise must be in a specialized field; of outstanding quality; in areas critical to the firm's operation; indispensable to the firm's potential success; specific to the type of work the firm performs; and, documented in the records of the firm in such a way to clearly show the value of such expertise.

Ownership 26.69(g)(h)(i)(j)

For the purposes of determining ownership, NHDOT shall accept all interests in a business or assets held by a disadvantaged owner obtained as a result of a final property settlement or court order in a divorce or legal separation, provided no term or condition of the agreement or divorce decree is inconsistent with this section; or, through inheritance, or otherwise because of the death of the former owner.

For the purposes of determining ownership, NHDOT shall not accept interests in a business or assets obtained by a disadvantaged owner as result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is involved in the same or affiliate firm; involved in a similar line of business; or engaged in an ongoing business

relationship or with the firm, or an affiliate of the firm, for which the individual is seeking certification.

To allow interests or assets received in the form of a gift to count towards a disadvantaged individual's ownership, the individual must demonstrate, by clear and convincing evidence, the gift or transfer was made for reasons other than obtaining DBE certification; and the disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

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, we must count those assets towards ownership of the firm, provided the other spouse signs a legally binding document irrevocably renouncing and transferring all rights and ownership interest of those assets. The document renouncing ownership interest must be included as part of the firm's application for DBE certification.

As part of a review of ownership information, NHDOT may consider the following factors in determining ownership of a firm. However, may not regard the contribution of capital failing to be real or substantial, or find a firm ineligible, solely because the disadvantaged individual acquired ownership interest as result of a gift or transfer without adequate consideration; or, the signature of the non-disadvantaged spouse appears on financing agreements or other documents.

NHDOT shall review all information submitted as directed on the Uniform Certification Application Supporting Documents Checklist and ensure all claims of ownership are reflected and substantiated throughout. NHDOT will pay particular attention to circumstances involving spousal ownership and transfer of assets to ensure a firm is owned and controlled, in substance as well as form, by a socially and economically disadvantaged individual. Disadvantaged owners should be entitled to profits and losses commensurate with their ownership interest and any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits are grounds for denial.

Section 26.71 Rules governing determinations of control

In order to be certified as a DBE, the socially and economically disadvantaged owner(s) must have the ability to control all aspects of the day-to-day operations of the firm. The following rules should be considered when making a determination whether an applicant(s) meets the standard for control. NHDOT shall consider all the facts in the record, viewed as a whole.

Control 26.71(a)(b)

Only an independent business may be certified as a DBE. This means the applicant must not be dependent on a relationship with another firm or firms for their viability. NHDOT shall review relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources required for independent operation.

NHDOT shall examine current and recent employer/employee relationships with the applicant firm and non-DBE individuals and non-DBE firms to ensure the disadvantaged individual(s) have the ability to operate independently, without reliance on others which may compromise their independence.

Restrictions and Power 26.71 (c)(d)

NHDOT shall review all corporate charter provisions, by-law provisions, contracts or any other formal or informal devices, to ensure the disadvantaged owner is not restricted from making any business decision without the cooperation of others. Documents to review include, but are not limited to, cumulative voting rights, voting powers attached to different classes of stock, employment contracts, and a requirement for concurrence from non-DBE partners, restrictions on or assignments of voting rights.

The disadvantaged owner(s) must have the power to direct or cause the direction of the management or policies of the firm. They must possess the ability to make day-to-day as well as long term decisions on matters of management, policy and operations of the firm. A disadvantaged owner must hold the highest position in the firm, in a corporation, the disadvantaged owner(s) must control the board of directors and in a partnership, and the disadvantaged owner must serve as general partners with control over partnership decisions.

Management 26.71 (e)(f)

Immediate family members or other non-DBE individuals may be involved in the DBE firm as owners, managers, stockholders, officers, and/or directors. These individuals must not possess the power to control the firm, or be disproportionately responsible for operation of the firm. The disadvantaged owner(s) may delegate various areas of management, policymaking, or daily operations to others in the firm, as long as such delegations are revocable. The disadvantaged owner must retain the power to hire and fire any such person to whom such authority is delegated. The managerial role of the disadvantaged owner must be such that NHDOT can reasonably conclude the disadvantaged owner exercises control over the firm's operations, management and policy. NHDOT shall review employee and management roles to ensure the disadvantaged owner(s) retain the right and ability to control the business.

Experience 26.71 (g)(h)

The disadvantaged owner(s) 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 its operations. They are not required to have experience in every critical area of the firm's operations, or to have greater experience or expertise than key employees or managers. The disadvantaged owner(s) resume and work experience shall be reviewed and an interview conducted to determine if the owner(s) possess the ability to critically evaluate information presented by others and make independent decisions concerning the firm's daily operations, management and policymaking. Generally, expertise limited to office management, bookkeeping or administration unrelated to the principal business activities is deemed insufficient to demonstrate control.

If State law requires a specific license or other credential in order to own and/or control a certain type of firm, then the disadvantaged owner(s) must possess that specific license or credential. If State law does not require a specific license or credential to own and/or control a firm, we cannot deny DBE certification solely on the absence of such a license or credential, however, we may consider the lack of such a license or credential as one factor when considering whether the disadvantaged owner(s) actually control the firm.

Compensation and Outside Employment 26.71(i)(j)

NHDOT may consider differences in compensation between the disadvantaged owner(s) and other participants in the firm as an additional factor when considering certifying a firm. A review of business and personal tax returns, payroll records, and stated salaries may provide information whether the disadvantaged owner(s) are being compensated sufficiently in relation to their duties, standard industry practice and reinvestment of income. A disadvantaged owner(s) may still be viewed as controlling a firm if their compensation is lower than some other participants in the firm.

In the case where a non-disadvantaged individual formerly controlled the applicant firm, and a disadvantaged owner now controls it, NHDOT may place added emphasis on the difference in compensation as one factor in determining control, particularly when the former owner is still involved with the firm and receives higher compensation.

The disadvantaged owner(s) must not engage in outside employment or other business interests that conflict with the management of the firm or prevent the owner(s) from devoting sufficient time and attention to be considered controlling the firm. For example, part-time work in a full-time business is not viewed as constituting control. An owner of a part-time business could be considered in control if they control it all the time it is operating. We will review the owner(s) current resume, work schedule and compensation to confirm compliance with this part.

Family Relations and Former Owners 26.71(k)(l)

If family members are owners, employees or managers in the firm, NHDOT must consider whether the disadvantaged owner(s) actually control the firm, just as we would in any other situation, without regard for the familial relationships involved. If NHDOT cannot determine the disadvantaged owner(s), as distinct from the family as a whole, control the firm, the disadvantaged owner has failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities. Family owned or husband and wife owned firms must be carefully reviewed to ensure the individual claiming disadvantaged status actually controls the firm, without requiring concurrence on business decisions from the involved spouse.

When considering an application involving a firm formerly owned and controlled by a non-disadvantaged individual, and ownership has been transferred to a disadvantaged individual, and the former owner remains involved with the firm in any capacity, there is a rebuttable presumption of control by the non-disadvantaged individual. In this situation, the disadvantaged

owner(s) seeking certification must demonstrate, by clear and convincing evidence, that the transfer of ownership was made for reasons other than obtaining DBE certification; and, the disadvantaged owner actually controls the management, policy, and operations of the firm, notwithstanding the continued participation of the former owner.

Equipment 26.71(m)

In determining whether a firm is controlled by a disadvantaged applicant, NHDOT may consider whether the firm owns equipment necessary to perform its work. If standard industry practice includes leasing equipment, we must not disqualify a firm solely because it leases equipment. NHDOT must review vehicle titles and lease agreements to ensure the firm's primary equipment is not owned by others or leased from a prime contractor which may compromise the independence of the applicant firm.

NAICS Codes 26.71(n)

NHDOT must grant certification to a firm only for the specific types of work the disadvantaged owner(s) have the ability to control. The applicant firm shall request specific NAICS code(s) as part of their initial DBE application, with NHDOT assistance if necessary, that best describes the activity of the firm. The applicant has the burden of providing specific company information allowing NHDOT to make appropriate NAICS code designations. The NAICS code(s) shall be as specific as possible and describe the goods and services which a firm would provide DOT recipients. Multiple NAICS code(s) may be used when appropriate. NHDOT shall confirm and assign NAICS code(s) to be used by the firm and displayed in the DBE directory as part of our DBE certification review. Should a firm desire to add a NAICS code(s) in the future, NH based firms must request the addition and demonstrate to NHDOT the disadvantaged owner(s) have the ability to control the firm in the additional type of work and corresponding NAICS code. Out-of-state firms must have additional NAICS codes approved by their home state certifying agency in order to request an update to the NH DBE directory listing. The firm is not required to recertify when requesting an additional NAICS code.

NHDOT shall ensure the NAICS description(s) in the DBE directory are kept up-to-date and accurately reflect the work NHDOT has determined the firm's disadvantaged owners can control. Upon request by the firm, NHDOT may supplement the NAICS code description to better and fully describe the work in which the DBE has been certified, if the NAICS code designation is vague. NHDOT is allowed to modify or change a certification classification or description if there is a factual basis in the record to do so. We shall not make after the fact changes to the scope of a firm's certification, unless supported by evidence in the record of the initial certification.

Franchising, Partnerships and Employee Leasing 26.71(o)(p)(q)

A business under a franchise agreement may be certified if the disadvantaged owner meets the standards for DBE certification and is not affiliated with the franchiser. A franchisee may be bound by contracts relating to standardized advertising, purchasing, quality or other provisions imposed on the franchisee. This is allowable only if the franchisee has the ability to profit from

their efforts and bears the risk commensurate with ownership. We must be careful when certifying to review all franchise documents and insure no affiliations with a non-disadvantaged arise due to common management or excessive restrictions.

In order for a partnership to be controlled by a disadvantaged individual, any non-disadvantaged partners must not have the power to bind the firm to any contract or subject the firm to any tort liability without the express, written consent of the disadvantaged owner(s). NHDOT shall carefully review all contract documents during certification to ensure compliance with this part.

The use of a leasing company is allowable if the disadvantaged owner(s) maintains an employer-employee relationship with the leased employees and pays wages and payroll taxes. NHDOT shall review the employee lease agreement and company management practices to ensure compliance with this part.

26.73 Other rules affecting certification

NHDOT affirms commercially useful function reviews are not to be considered as part of initial DBE certification. We may consider, as part of our initial certification process, if a firm has exhibited a pattern of conduct indication its involvement in attempts to evade or subvert the requirements of the DBE program.

NHDOT shall evaluate a firm based on present day circumstances.

NHDOT shall not deny certification solely because a firm is newly formed and does not have completed projects, contracts or other evidence of successful operation.

NHDOT shall require all firms to cooperate fully with requests for information from NHDOT and DOT relevant to the certification process. Refusal to cooperate shall render the firm ineligible for certification.

Only firms organized for profit are eligible for DBE certification. NHDOT shall not certify any non-profit entities.

Only DBE firms owned and controlled by disadvantaged individuals are eligible for certification. A firm owned by another firm, even a DBE firm, is not eligible for DBE certification, unless a parent company has been established for tax, capitalization or other purposes. In this specific case, NHDOT shall only certify the subsidiary company if it otherwise meets all other certification requirements of the DBE program.

Recognition of a business as a separate entity for tax purposes does not necessarily demonstrate that a firm is an independent business and eligible for DBE certification.

NHDOT shall not require a DBE to be prequalified as a condition for DBE certification.

A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than individual Indians or Native Hawaiians as individuals, may be eligible for DBE certification if they comply

with the size standards and are controlled by socially and economically disadvantaged individuals, as provided in 26.71.

Alaska Native corporations may be certified as DBEs under this program in their home state of Alaska. NHDOT shall provide reciprocal DBE certification to any DBE certified in their home state.

SUBPART E - CERTIFICATION PROCEDURES

Section 26.81 Unified Certification Program

NHDOT has identified USDOT recipients and sub recipients within the State of New Hampshire. These participating agencies, through agreement, recognize NHDOT as having the "sole" authority to make certification decisions on their behalf. Furthermore, participating agencies shall utilize the DBE directory published by NHDOT and shall acknowledge only those firms identified therein as certified DBEs.

The UCP agreement is available for review as attachment #10 to this document and available online for review at http://www.nh.gov/dot/org/administration/ofc/documents.htm

Section 26.83 Procedures for Certification Decisions

NHDOT DBE Coordinator shall conduct a DBE certification review in accordance with the procedures set forth in this section to ensure only eligible firms participate as DBEs in our program. Applicant firms are required to complete and submit the DBE application and personal net worth form provided in Appendix F to Part 26, without modification, and all appropriate supporting documentation required therein.

NHDOT shall review all supporting documentation as directed in 49 CFR 28.83 to ensure a comprehensive and accurate analysis of each application and compliance with DBE certification guidelines.

Documentation review timelines 26.83(k)(i)

NHDOT shall review all new applications and advise applicants within 30 days, if not complete and suitable for review, what is required to complete their application. NHDOT shall ensure all required documentation itemized on the uniform certification application supporting documents checklist, included as part of the DBE application, has been received prior to the start of the DBE application review. If the applicant does not respond to NHDOT's request for additional information within 30 days, the application shall be returned to the applicant as incomplete, without further review.

NHDOT shall review a completed application and perform the required onsite evaluation within 90 days of receipt of a complete application. It is permissible for NHDOT to request an extension once, for a period not to exceed 60 days, by providing written notice to the firm with a detailed explanation and specific reasons for the extension.

NHDOT shall include a log detailing activity for each step in the DBE certification review process and the date that activity occurred.

Onsite Evaluations 26.83 (c)(1)

NHDOT must perform an on-site visit to the firm's principal place of business. NHDOT must interview the DBE applicant(s) and principal officers, review resumes and/or work histories. NHDOT may interview other key personnel if necessary. NHDOT must perform an on-site visit to job sites on which the firm is working at the time of the eligibility investigation if within the local area.

Following the on-site visit, a report based on facts contained in the application, accompanying documents and the on-site visit report will be developed by the DBE Coordinator and a certification eligibility decision will be made. NHDOT shall complete the certification review process within the time frame allowed in 26.83(k).

Firms eligible for DBE certification shall be issued a DBE certification letter, including the scope of work the firm can perform as detailed in the firm's approved NAICS codes. NAICS codes are specific descriptions of work categories and shall be refined to provide the most accurate description possible for each approved work type. NAICS codes are available online at http://www.census.gov/eos/www/naics/. DBE certification is limited to the scope of work as described by the approved NAICS codes. NAICS codes may be modified or added if there is a factual basis in the record to do so.

Notices of Change and Annual Affidavit of No Change 26.83(i)(j)

NHDOT shall require all DBEs to inform the OFC, in a written affidavit, of any change in its circumstances affecting its ability to meet size, disadvantaged status, ownership or control criteria of 49 CFR Part 26, Subpart D, or of any material changes in the information provided with the firm's application for certification.

NHDOT also require all owners of all NHDOT certified DBEs to submit, on the anniversary date of their certification, an Annual Affidavit of No Change meeting the requirements of 26.83(j). (Attachment #11) The affidavit must be notarized and affirm there have been no changes in the firm's circumstances affecting its ability to meet the size, disadvantaged status, ownership, or control requirements of 49 CFR Part 26, Subpart D, and there have been no material changes in the information provided in its application for certification, except for any changes about which the firm has provided written notice to NHDOT under 26.83(i). The firm must also provide the current Federal tax return to document the firm's annual gross receipts.

NHDOT will notify all NHDOT certified DBE firms of their annual submission requirements by mail or email prior to the firm's anniversary date. Failure to respond shall be considered a lack of responsiveness and may subject the firm to decertification proceedings as detailed in 26.109(c) Cooperation.

Section 26.85 Interstate Certification

When a firm is currently certified as a DBE in its home state, NHDOT shall accept the DBEs home state certification status and certify the firm without further procedures. To obtain certification in this manner, the firm must provide NHDOT with a copy of a current DBE certification notice from their home state. NHDOT shall confirm the firm has a current valid DBE certification by either reviewing the home state's electronic DBE directory or obtaining written confirmation from the home state. If eligible for interstate certification, NHDOT shall provide notice of NH certification and add the applicant firm in the NH DBE directory within 60 days of receipt of an interstate certification request. If ineligible for certification, NHDOT shall provide notice of ineligibility within 60 days of receipt of an interstate certification request in accordance to the NHDOT eligibility denial process detailed in Section 26.86 of this document.

NHDOT shall comply with requests for information from other state UCP's as allowable under the regulations and in a timely manner as required.

Section 26.86 NHDOT Eligibility Denial Process

If a decision is made to deny a firm's initial certification, NHDOT will provide the firm with a written explanation of the reasons for denial, specifically referencing the evidence in the record that supports each reason for the denial. The letter will also inform the applicant firm of the ability to appeal the decision to the USDOT. All documents and other information on which the denial is based shall be made available to the applicant, on request. Any applicant firm denied certification by NHDOT shall be advised of their right to appeal the decision to the USDOT under 26.89.

Firms denied DBE certification must wait twelve (12) months after the effective date of the final decision before reapplying for DBE certification.

Section 26.87 Removal of a DBE's Eligibility

NHDOT may remove a certified DBE from eligibility in accordance with 49 CFR §26.87. Removal of eligibility to participate in NHDOT DBE program may occur for any of the following reasons:

1. The firm has been listed in the DOCR as ineligible for DBE certification by its "Home State" UCP or any certified UCP having denied the firm's certification.
2. Notification by the firm that it no longer meets Federal regulations for DBE certification.
3. If the DBE's business entity has changed to the extent the business is no longer a small business concern.
4. If the socially and economically disadvantaged individual's status has been challenged by NHDOT as a result of information received through the annual renewal submission requirements or, as a result of an investigation initiated by a complaint from a third party or, as a result of information received from another UCP. If as a result of these

inquiries NHDOT has found the individual does not meet the definition of a "socially and economically disadvantaged individual" used in 49 CFR 26.63, 26.67 and Appendix E, "Individual Determinations of Social and Economic Disadvantage," and that the firm is no longer owned and controlled at least 51 percent by a socially and economically disadvantaged individual(s).

5. If the firm's business structure has changed to the extent the business is no longer owned and controlled by socially and economically disadvantaged individual(s) as defined by 49 CFR 26.
6. NHDOT receives an order from the Office of the Secretary of Transportation, USDOT, to remove the eligibility of a DBE firm.
7. If an investigation uncovers evidence of violations of 49 CFR Part 26, with regard to the actual work performed by a DBE and the findings and conclusions show that the firm's ownership or control has changed to the extent that the firm is no longer eligible.

If grounds for removal of eligibility are sufficient, the firm will be notified by certified mail, with the reasons for the decision and advised of the opportunity and procedures for an informal hearing of appeal before NHDOT. The effective date of the de-certification shall be the date appearing on the notice of de-certification. The applicant has 30 days from this date to file an appeal with NHDOT. If the DBE firm appeals the decertification, NHDOT shall schedule a hearing within 30 days of receipt of a request. During the time of the appeal, the DBE is still considered an eligible DBE.

NHDOT Senior Hearings Examiner, whose office did not take part in the eligibility determination and is not subject to direction from the Office of Federal Compliance, shall conduct the hearing. At the hearing, reasons for the intended removal of eligibility will be discussed, either in person by the DBE or through an administrative review of documents, if requested by the firm. NHDOT bears the burden of proving, by a preponderance of the evidence; the firm does not meet the certification standards of this part. The Hearings Examiner may not consider any new developments/changes in the firm's organization, structure or operations that occurred after the date of the Notice of Intent to Remove Eligibility or any changes that were not documented in the certifying agency's file as of that same date. The Hearings Examiner must provide a written notice of the decision and the reasons for it within 90 days of the hearing, including specific references to the evidence in the record that supports each reason for the decision. NHDOT must inform the firm of the consequences of the decision and of the appeal process to the US Department of Transportation under 26.89(f).

Firms must wait 12 months after the effective date of the final decision before reapplying for DBE certification with NHDOT.

Section 26.88 Summary Suspension of Certification

NHDOT shall immediately suspend a DBE's certification without adhering to the requirements in 26.87(d) when the individual owner, whose ownership and control are necessary to the firm's certification dies or is incarcerated; when there is adequate evidence to believe there has been a material change to circumstances affecting the eligibility of a DBE firm to remain certified; or if the DBE fails to file a timely affidavit of no change.

When a firm is suspended one or more of the reasons stated in the previous paragraph, NHDOT shall notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

The suspension is a temporary status pending an expedited ineligibility hearing as detailed in 26.87 above. The suspension takes effect when the DBE has or is deemed should have received the notice of suspension letter. The DBE may elect to voluntarily withdraw from the program, in which case, no further action is necessary. The DBE may provide information demonstrating the firm is eligible, notwithstanding its changed circumstances. In that case, the NHDOT must review the submitted information and decide to reinstate the DBE, or, proceed with decertification according to procedures outlined in 26.87 above.

The DBE is allowed to be counted toward contract goals of existing contracts only while suspended if performing a commercially useful function.

Section 26.89 Certification Appeals

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

U.S. Department of Transportation
Departmental Office of Civil Rights
1200 New Jersey Ave., S.E.
Washington, DC 20590-0001
Phone: (202) 366-4754

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

SUBPART F - COMPLIANCE AND ENFORCEMENT

Sections 26.101 to 26.107 Compliance and Enforcement

Any person who believes that NHDOT has failed to comply with its DBE obligations may file a written complaint with the USDOT Office of Civil Rights. The complaint must be received no later than one hundred eighty (180) calendar days after the alleged violation or from the date of which the complainant learned of a continuing course of conduct in violation of this program and 49 CFR 26. NHDOT shall cooperate with any investigation by the USDOT Office of Civil Rights and provide information as requested during the course of any investigation. Written complaints may be mailed to the following address:

FHWA complaints may be mailed to:
Federal Highway Administration
Office of Civil Rights

1200 New Jersey Ave, S.E.
Washington, DC 20590

FTA Complaints may be mailed to:
Federal Transit Administration
Office of Civil Rights
1200 New Jersey Ave, S.E.
Washington, DC 20590

FAA Complaints may be mailed to:
Federal Aviation Administration
Office of Civil Rights
PO Box 92007
Los Angeles, CA 90009

Section 26.109 Information, Confidentiality, Cooperation

Notwithstanding any provision of Federal or state law, NHDOT will not release information that may be reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation. However, NHDOT must transmit this information to USDOT in any certification appeal proceeding under §26.89 in which the disadvantaged status of the individual is in question. NHDOT may provide onsite evaluations to requesting UCP's in support of a DBE's application for interstate certification.

Monitoring Payments to DBEs

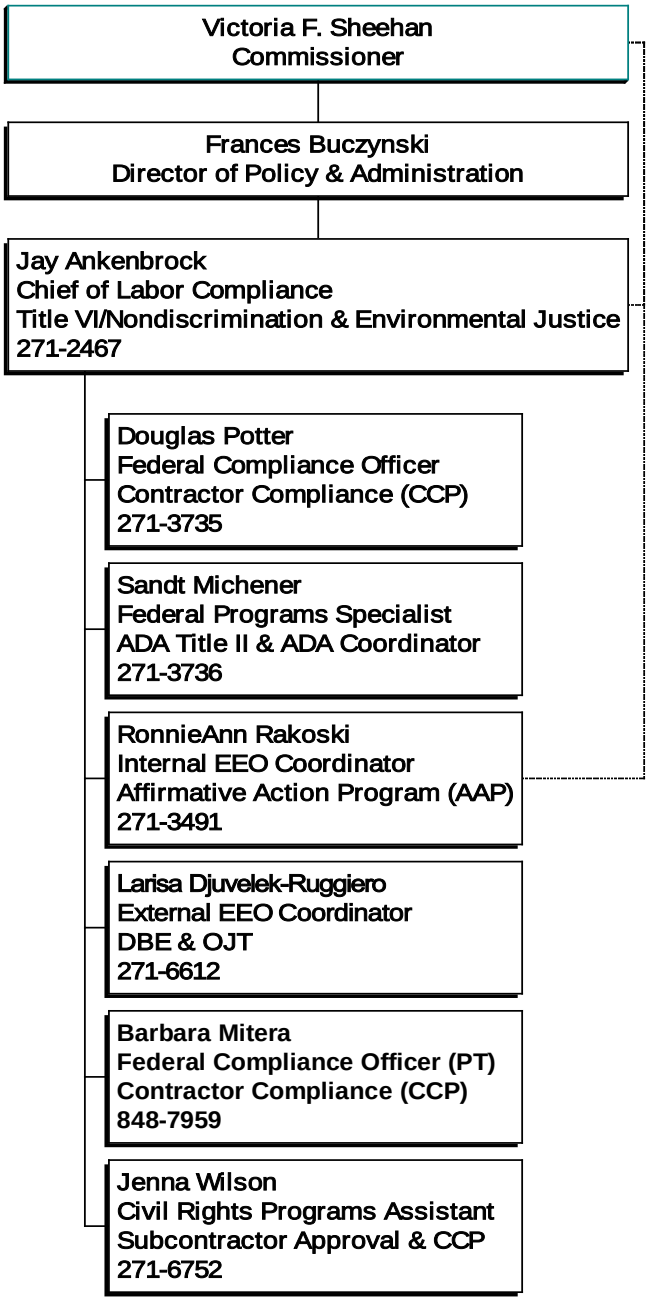
NHDOT will require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of NHDOT or DOT. This reporting requirement also extends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

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

Attachment 1

NHDOT Organization Chart

Office of Federal Compliance Organization Chart



Attachment 2

Monthly Prompt Payment Certification

NHDOT Monthly Prompt Pay Certification

Contractor _____ **Project Name** _____ **Project #** _____ **Reporting Month** _____

Estimate or Invoice #	Date of Estimate or Invoice	Date Contractor Rcvd. Pmt.	Subcontractor Name	Total $ Amt. Paid To Sub For This Estimate/Invoice	Date Sub Was Paid	Comments

CERTIFICATION: This is to certify that the above information is correct and complete. Payments made to subcontractors represent the full amount owed to the subcontractor for work performed under each estimate, by agreement or invoice, and that no amounts have been withheld by this company.
This form must be completed and submitted to the Office of Federal Compliance for every active project by the 10th calendar day of each month.

_____ Signature and Title

_____ Printed Name

_____ Date

Attachment 3

FHWA and FTA DBE Goal Methodology

New Hampshire Department of Transportation
Statewide DBE Goal Setting and Methodology for FY 2015-2017

OVERALL GOAL (§ 26.45)

Pursuant to the USDOT amendment effective March 5, 2010, the New Hampshire Department of Transportation (NHDOT) will submit to the Federal Highway Administration (FHWA) the DBE goal and methodology at three-year intervals. The first three-year submission will be submitted to FHWA by August 1, 2011, and at three-year intervals thereafter. The Department may make a mid-cycle adjustment to its DBE goal if circumstances that have a significant impact on the current stated goal are experienced. Any mid-cycle adjustment will not take effect until approved by the FHWA.

GOAL

NHDOT intends to expend **5.63** % of the amounts received under Titles I, III and V of the Transportation Equity Act for the 21st Century or any subsequently enacted Federal laws, with small business concerns owned and controlled by socially and economically disadvantaged individuals (DBEs). It is the intent of NHDOT that this expenditure is obtained to the extent practicable, through a race and gender-neutral program (see 49 CFR § 26.5 for definitions.)

METHOD OF ATTAINMENT

NHDOT will calculate the overall goal using the criteria based in 49 CFR § 26.45. The determination will be based on a level of DBE participation relative to all businesses ready, willing and able to participate on Federally-assisted contracts, and reflect a level of participation expected in the absence of discrimination. The overall goal setting procedure is based on the following:

STEP 1: BASE FIGURE

Method Selected: The NHDOT uses an *Alternative Method*.

Description of Data Used: The data used in this calculation was obtained from two sources. The primary source is the NHDOT bidders list. This includes all bidders, successful and unsuccessful, prime and subcontractors, DBEs and non-DBEs which were seeking work on state and municipal FHWA-assisted transportation related construction contracts in the local market area during the period of January 1, 2013 through December 31, 2013. The secondary data source includes all ready, willing, and able firms, DBE and non-DBE, accepted by the NHDOT Consultant Selection Committee and eligible to participate in environmental, engineering and other FHWA-assisted consulting agreements in the local market area during the period of January 1, 2013 through December 31, 2013. The data collected resulted in a list of prime and subcontractors, DBE and non-DBE, which directly participated in, attempted to participate in, or were ready, willing, and able to participate in FHWA-assisted highway construction projects and environmental, engineering, and other FHWA-assisted consulting contracts.

The NHDOT is the sole certifying agency for the State of New Hampshire. The NHDOT Office of Federal Compliance (OFC) is responsible for reviewing prime and subcontractors prior to approval for project work. The OFC continuously reviews contractor information submitted during the bidding and approval process on all projects in an effort to identify minority and women-owned non-DBE firms for recruitment and possible DBE certification. The NHDOT works closely with the N.H. Procurement Technical Assistance Program, the Small Business Administration, the Association of General Contractors, and the National Association for Women in Construction to identify and recruit minority and women-owned firms for potential participation in the DBE program. In addition to these ongoing practices, the OFC has reviewed the ownership and control data from all primes and subcontractors submitting bids or quotes during calendar year 2013 to ascertain if potential DBEs exist for inclusion in the numerator of the base figure calculation. The NHDOT concluded no potential DBEs are present for inclusion in this report during the data collection period.

Collection of the Data To determine the relative availability of construction contractors, information was collected from the bidders list. The NHDOT, Office of Federal Compliance (OFC), maintains a bidders list in accordance with 49 CFR Part 26.11, which includes all DBE and non-DBE prime contractors that have submitted a bid or quote on any state or municipal FHWA-assisted transportation related construction project. The OFC sends a notice to each contractor, identifying each project for which they submitted a bid or quote and requires the contractor to provide the names of any subcontractors or material suppliers, (DBE and non-DBE), that may have submitted a bid or quote in support of their own proposal. The response rate for this inquiry is 85% and therefore considered reliable. The information is compiled using a spreadsheet to ensure that double counting is eliminated. This information is used for the purpose of establishing the portion of the base figure derived from FHWA-assisted construction contracts. The formula is detailed below.

Primes contractors that have submitted bids or quotes during 2013	39
Subcontractors that have submitted bids or quotes during 2013	346
Total of Primes and Subs that have submitted bids or quotes	385
DBE's that have submitted bids or quotes during 2013	18

DBE contractors (18)/All available construction contractors (385) 18/385 = 4.68%

The majority of consultant agreements do not employ a standard low bid procedure. In an effort to ensure a complete accounting of possible DBE participation in the consulting process, the NHDOT will compare the total eligible DBE consultants against the total of all eligible consultants to arrive at a potential DBE participation figure absent of any discrimination.

DBE consultants (23)/All available consultants (164) 23/164 = 14.02%

Based on past participation of the construction and consultant contract awards of 97.1% construction contracts and 2.1% consultant contracts, the following calculations were performed to determine an appropriately weighted baseline goal:

Construction contracts:	4.68% *.979 = 4.58%.
Consultant contracts:	14.02% *.021 = 0.29%
	4.87%

OTHER CONSIDERATIONS WHEN CALCULATING THE BASE FIGURE:

A. Past participation: The use of past participation as a tool to establish the base figure is not appropriate because it may not be a reflection of the ready, willing and able DBE population that exists today.

B. Use of the most refined data available: The NHDOT relies on the contractor data directly associated to Federal-aid transportation related projects. Any ready, willing and able DBE capable of transportation work and identified using specific NAICS codes or census data would also be included in the data captured using the bidders list and subcontractor approval process listed above. Any firm (DBE or non-DBE) not identified as submitting a bid or being approved for work on a Federal-aid project would be considered by their exclusion, as being not ready, willing and able and therefore, should not be included in the calculations for the DBE goal.

C. Use of the DBE Directory: The NHDOT does not use the DBE Directory and census data for DBE goal setting purposes. The Department is very proactive in its efforts to identify prospective transportation related DBE firms, however, will only include a DBE firm in its calculations after it has demonstrated, by bid submission or approval as a subcontractor on a Federal–aid project, that the firm is a ready, willing and able DBE.

D. Local market area: The NHDOT considers the entire state to be the Local Market Area. Prime and subcontractors have demonstrated their ability to travel throughout state boundaries to perform transportation related work. The NHDOT has awarded forty one (41) transportation related construction contracts in year 2013. Twenty nine (29) contracts (71%) have been awarded to NH based firms and twelve (12) contracts (29%) have been awarded to firms from the neighboring states of Maine, Massachusetts and Vermont. This confirms the NH FHWA-assisted contracting market also extends beyond the borders of the state, and contractors routinely cross state boundaries to bid on and perform transportation related work in New Hampshire. These contractors have been included in the calculation of the base figure if they have been identified as submitting a bid or quote.

E. Ensuring DBE goal percentage reflects “apples to apples” calculations: The DBE goal calculation was derived using the same transportation related items of work in both the numerator and denominator, included all DBE and non-DBE prime contractors and subcontractors that submitted a bid or quote or were approved as a

subcontractor or material supplier and, regardless of whether or not they were actually awarded the contract or subcontract.

F. The use of weighting: The NHDOT disaggregated data by work category and availability on spending in those categories and determined not to apply weighting to adjust its Step One goal figure. The following information assisted in making this determination.

   a. In calendar 2013, the State of NH awarded approximately $161 million dollars in transportation related contracts. Five (5) contracts valued at $25 million dollars (16%) were awarded to three (3) prime contractors that specialize in bridge construction. Eleven (11) contracts valued at $56 million dollars (37%) were awarded to four (4) prime contractors whose primary operations include paving work. The scope of services required for each NHDOT contract may include a variety of different categories of transportation related work. An analysis of all work categories on contracts awarded during calendar year 2013 failed to identify specific work categories with the consistency, dollar volume and DBE participation suitable for weighting.
   b. Eighteen (18) DBE subcontractors perform transportation related work in fifteen (15) primary work categories. These include general and specialty paving, directional drilling, sheer connectors, traffic control, stone work, painting, concrete cutting, pavement marking, concrete products, bridge membrane, electrical, drainage, traffic management systems and guardrail. A detailed analysis of subcontracting work available to be performed by DBEs was done. Although DBEs provide a wide range of services to prime contractors, none of the available DBE work categories provided the consistency and dollar volume necessary to incorporate the use of weighting in the DBE goal calculations.

G. Effects of decertification: Two (2) DBE firms have been decertified by NHDOT. Both decertifications became effective in early 2013 and their impact on DBE goal attainment for the year was minimal. Both firms are currently active, have submitted a bid or quote, and have been included in the denominator of the goal calculation. The dollar volume attributed to these firms in calendar year 2013 was minimal; therefore, no adjustment to the DBE goal based on their decertification is warranted.

H. Changes in the amount of Federal-aid: No adjustments to the DBE goal will be made based on changes in the amount of Federal-aid received.

STEP 2: ADJUSTMENT TO BASE FIGURE

Step Two of the goal setting calculation process is used to determine if any adjustments are necessary to further refine the Step One base figure. The following factors were taken into consideration when contemplating making any Step Two adjustments.

A. Past participation: The NHDOT DBE program is administered in compliance with regulations set forth in 49 CFR 26, therefore, using past participation to adjust the base figure would be appropriate if the adjustment would result in a more precise DBE goal.

The past participation figures below are from NHDOT Federal-aid projects with similar work opportunities and characteristics of future projects to be advertised and awarded. The following DBE participation figures represent actual payments on contracts completed annually, as reported in the FHWA Uniform Report of DBE Commitments/Awards and Payments.

Past Participation of DBEs:	2012	8.62 %
	2009	7.94 %
	2011	6.39 % (median)
	2013	5.95 %
	2010	4.57 %

Based on this information, the NHDOT has elected to make a step 2 goal adjustment to the base figure. The calculation for this adjustment is shown below.

(base figure + median past participation divided by 2) 4.86 + 6.39 = 11.25 /2 = **5.63**%

OTHER CONSIDERATIONS FOR STEP 2 GOAL ADJUSTMENTS

1. Additional sources of information: Additional Step Two adjustments may be considered to counter any past effects of discrimination. However, the NHDOT has maintained a race and gender-neutral DBE program and has not evidenced any reports of discrimination in the award of subcontracts, availability of insurance, bonding or any other business related complaints resulting from discriminatory practices. The Department has ongoing dialog with DBEs, state and local agencies with ties to minority and women's groups, and has not discovered any examples of discrimination that may warrant a Step Two adjustment to rectify a particular problem.

2. Evidence from a disparity study: The NHDOT has not commissioned or conducted a disparity study. The Department contacted a variety of state and municipal agencies, including Administrative Services, Health and Human Services, and consulted with local minority groups, Regional Planning Commissions to determine if any relevant disparity studies have been conducted in the local market area in the past few years, with no positive results. No relevant disparity studies or similar analyses have been found that may provide information relative to discrimination in the local market area by the NHDOT or similar contracting agencies.

3. Local market area firm characteristics: The NHDOT is always in search of new transportation related potential DBE firms with characteristics that would benefit the

transportation field and increase the offerings of DBE related firms. At this time, there is no evidence that an adjustment of this type is necessary.

4. Other relevant data: There has been no other data that suggests additional Step Two adjustments are warranted. There have not been and are no impending decertification's of DBE firms responsible for the overwhelming majority of past participation. The State of New Hampshire Office of Attorney General has no record of suits involving discrimination of minority or women owned businesses. Current DBEs have not expressed any concern with the availability of work and awarding of subcontracts.

BREAKOUT OF ESTIMATED RACE AND GENDER-NEUTRAL AND RACE AND GENDER-CONSCIOUS PARTICIPATION

The NHDOT has established a statewide DBE goal of 5.63%. The NHDOT intends to attain this goal through race and gender-neutral DBE participation The NHDOT has successfully administered a primarily race and gender-neutral DBE program, consistently exceeding DBE goals in previous years.

The NHDOT continues to work with prime contractors to assist their efforts to facilitate race and gender-neutral DBE participation. Race and gender-neutral 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 contract goal, or even if there is a DBE contract 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).

Race and gender-neutral means include, but are not limited to, the following:

1. Carrying out information and communication programs on contracting procedures and specific contract opportunities, such as ensuring the inclusion of DBEs, and other small businesses, on mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors;

2. Providing a copy of the Invitation For Bids, when requested to NHDOT-certified DBE's for each bid letting;

3. Providing introductions to help DBEs, and other small businesses with access to prime contractors in an effort to develop working relationships

4. Ensuring distribution of NHDOT's DBE Directory, through print and electronic means, to potential prime contractors and subcontractors;

5. Providing technical assistance and other services;

6. The Office of Federal Compliance works with prime contractors (by phone, e-mail, and in person) that take out sample proposals for upcoming NHDOT projects, to search for DBEs capable of subcontracting on the project. We identify potential items of work with subcontracting opportunities and contact DBEs capable of performing this work and encourage them to submit a bid to the prime. In this manner, our office is able to proactively incorporate DBEs into the initial proposal stage for the project.

Each time NHDOT submits its overall goal for review and approval by the US DOT, NHDOT will also submit the portion of the overall goal that is expected to be attained through race and gender-conscious means and the basis for that position.

The NHDOT assesses the percent of DBE participation on a quarterly basis. If it is determined the 5.63 % overall DBE goal will not be achieved, NHDOT may place contract goals on future projects as a race and gender-conscious means of meeting any portion of the overall goal not achieved by use of race and gender-neutral means.

The NHDOT may elect to place specific contract goals on selected large-scale projects, if failure of the selected projects to attain the overall statewide DBE goal would have a disproportionate weight and affect the state's ability to meet its overall race and gender-neutral DBE goal.

The following provisions apply to the use of race-conscious contract goals:

1. NHDOT will use contract goals only on those federally assisted projects that have subcontracting possibilities.

2. 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 NHDOT's overall goal, NHDOT will set contract goals so that they will cumulatively result in meeting any portion of NHDOT's overall goal not obtainable through the use of race and gender-neutral means.

3. Contract goals will provide for participation by all certified DBEs and not be subdivided into group-specific contract goals.

To ensure that NHDOT's DBE Program continues to be narrowly tailored to overcome the effects of discrimination, use of contract goals will be adjusted as follows:

1. If NHDOT concludes that it can meet its overall goal through race and gender-neutral means, contracting goals will not be used.

2. If, during the course of any year in which NHDOT uses contract goals, NHDOT determines that the overall goal will be exceeded, NHDOT will reduce or eliminate the use of contract goals to the extent necessary to ensure that the overall use of contract goals does not result in exceeding the overall goal.

To ensure that prime contractors demonstrate good faith efforts necessary to fulfill contract goals (race and gender-conscious measures) assigned to Federally-assisted projects, they will be required to incorporate the following measures pursuant to the bidding process:

1. Offering Assistance. The prime contractor may offer assistance to DBEs and small businesses in the areas of interpreting plans, preparing proposals, providing advice to obtain bonding and insurance, etc. Any assistance requested or provided shall be documented.

2. Discussions with Small Businesses. The prime contractor shall respond to all requests from DBEs and small businesses that are submitting quotes including, but not limited to: quantities, expected overtime, project scheduling, pit information, method of measurement, payment schedule, items of work included in the quote.

3. Accepting and Evaluating All Bids Offered. Prime contractors, DBEs and small businesses shall accept and evaluate all bids offered, regardless of work elements intended to be subcontracted. DBEs and small businesses should not be limited to smaller subcontracts because a larger amount of work is intended to be subcontracted to a larger business.

4. Specific DBE Goal Reporting Requirements. For race and gender-conscious projects with a specific DBE goal, the prime contractor submitting the apparent low bid must submit a DBE Commitment Form within three (3) business days of bid award. The DBE Commitment Form must indicate the total dollar value of DBE commitments. This form is provided by the Office of Federal Compliance and includes the following; name and address of the each DBE to be used, items numbers and descriptions of the work to be completed by each DBE, the estimated dollar value of each participating DBE and the total DBE commitment in dollars and expressed as a percentage of the total contract. Additionally, the prime contractor must submit a Letter of Intent for each DBE listed on the DBE Commitment form. The letter of intent confirms the information submitted on the DBE commitment form and is signed by both the prime contractor and each DBE firm.

Public Participation

The NHDOT works cooperatively to promote DBE program participation with transportation related contractors and associations, women and minority groups, and appropriate state and local agencies. The intent of these ongoing conversations is to inform, educate and involve contractors, minority and women's groups and other concerned interests in the DBE program. This open dialogue has resulted in the

successful implementation of a race and gender neutral DBE program goal, and an environment where DBE's can fairly compete for work on transportation related projects.

The NHDOT has disseminated the proposed DBE goal and methodology in writing, via email, telephone and in person at public contractor compliance training sessions. Communications were sent to a diverse range of individuals and organizations, including currently certified DBEs, DBE and non-DBE prime and subcontractors, consultants, the NH Association of General Contractors, NH Procurement Technical Assistance Program, NH Small Business Administration, NH Small Business Development Center, NH Chapter of NAACP in Portsmouth, Manchester and Nashua, NH Chapter of the National Association of Women in Construction, NH Regional Planning Commissions, various towns and municipalities.

Information and feedback from these individuals and organizations, received in person and via telephone, included suggestions to enhance and provide for additional DBE utilization, and shall be incorporated into future NHDOT outreach efforts. No information or comments were received that would indicate additional consideration should be made to ensure non-discrimination and opportunities for DBEs seeking work on transportation related federal-aid projects

The proposed DBE goal and methodology was published on the NHDOT website on June 16, 2014. No minority focused or trade association media was available or suitable for publication of the DBE goal. Historically, public notices placed in the only statewide newspaper have not generated any comments or feedback, therefore, the NHDOT placed more emphasis on targeted dissemination of the goal directly to the DBE population, contractors, and others with an interest in the DBE program. This was done in an effort to engage the affected population and solicit constructive feedback. Following a review of program requirements, the proposed overall goal will be published in the only statewide newspaper on Sunday, August 3, 2014.

Goal Monitoring

The NHDOT will continue to monitor DBE participation by requesting quarterly reports of payments made from prime and subcontractors to DBEs to gauge participation on active federally assisted projects. If the rate of participation indicates that the NHDOT will not attain or exceed its race and gender-neutral DBE goal at any time during the 3-year cycle, the NHDOT will increase proactive efforts to increase DBE participation. If additional efforts at DBE involvement are unsuccessful, the NHDOT may implement specific project goals as a race and gender-conscious measure to reach its overall statewide goal. NHDOT will continue to monitor attainment of the overall goal and the contract goals to determine whether the intent of project goals has been met and will make a determination whether the project goals need to be continued. In any year in which NHDOT meets part of the goal through race and gender-neutral means and the remainder through contract goals, NHDOT will maintain data separately on DBE payments in those contracts with and without contract goals, respectively. NHDOT will report this data to DOT as provided in 49 CFR § 26.11.

NHDOT FTA DBE Goal for FY 2017-2019

OVERALL GOAL (§ 26.45)

Pursuant to the USDOT amendment effective March 5, 2010, the New Hampshire Department of Transportation (NHDOT) will submit to the Federal Transit Administration (FTA) the DBE goal and methodology at three-year intervals. The first three-year submission was submitted to the FTA on September 20, 2010, and will be submitted by August 1, at three-year intervals thereafter. The Department may make a mid-cycle adjustment to its DBE goal if circumstances that have a significant impact on the current stated goal are experienced. Any mid-cycle adjustment will not take effect until approved by the FTA

GOAL

NHDOT, through its Bureau of Rail and Transit, intends to expend **1.65 %** of the amounts received from Federal financial assistance that is conducive to contracting on DOT-assisted contracts with small business concerns owned and controlled by socially and economically disadvantaged individuals (DBEs). It is the intent that this expenditure be obtained to the extent practicable, through a race and gender-neutral program (see 49 CFR § 26.5 for definitions).

The FTA programs with contracting opportunities identified for this methodology are contained primarily in section 5311. Sections 5309, 5337 and 5339 have limited contracting opportunities for construction, consulting and vehicle rehabilitation, and bus purchases are not reportable. Programs in sections 5303, 5304, 5305, 5310, 5312, 5322, 5324, 5326, and 5329 do not currently offer any contracting opportunities for DBEs. Section 5307 is direct recipient funding and not reportable.

The NHDOT shall make every effort to maximize DBE utilization on all contracts with FTA funding. If future projects are approved which contain additional construction or consulting related services, NHDOT shall ensure measures are put in place for DBEs to obtain a level of utilization appropriate to the type of work absent discrimination. NHDOT would consider a mid-cycle adjustment to the proposed DBE goal if circumstances indicated future FTA projects, once approved, presented significantly better contracting opportunities for DBEs.

METHOD OF ATTAINMENT

Method Selected: 26.45 (c)(1) Use of DBE Directories and Census Bureau Data

NHDOT will calculate the overall goal using the criteria based in 49 CFR § 26.45. The determination will be based on a level of DBE participation relative to all businesses ready, willing and able to participate on FTA- assisted contracts, and reflect a level NHDOT would expect in the absence of discrimination. The overall goal setting procedure is based on the following:

Step 1: Base Figure

Data Sources: The DBE goal was found by determining the number of businesses listed by the 2014 US Census Bureau in the County Business Pattern available for applicable contracting opportunities for Department sub-recipients and on rail and transit projects. The Department filtered the data to determine only firms in the following 9 North American Industry Classification System (NAICS) Sub sectors. For the purposes of this goal setting process, any subrecipient contracting opportunities without a corresponding, ready, willing and able New Hampshire certified DBE were not included in this calculation.

New Hampshire 2014 County Business Patterns Information

NAICS Code	DBE Firms	All Firms
• 323111 – Commercial printing	1	98
• 423420 – Office equipment	2	38
• 423430 – Computer equipment/software	5	77
• 441320 – Tire dealers	1	103
• 541613 – Marketing consulting services	4	122
• 541810 - Advertising agencies	1	49
• 561720 – Janitorial services	1	297
• 621511 – Drug Testing	1	31
• 811121 – Automotive Body, Paint, Interior Repair	1	182
Column totals	17	997

The Department identified 997 ready, willing and able firms in the above listed categories. This number will be used as the denominator. The numerator was found by determining the number of ready, willing and able NH DBE certified firm's within the same NAICS Sub sectors. For the purposes of this goal setting methodology, 17 firms currently DBE certified in New Hampshire were identified and considered ready, willing and able to perform work in the areas identified.

Formula

$$\frac{\text{DBE (17)}}{\text{CBP (997)}} = 1.7\%$$

OTHER CONSIDERATIONS WHEN CALCULATING THE BASE FIGURE:

A. Past participation: The use of past participation as a tool to establish the base figure is not appropriate because it may not be a reflection of the ready, willing and able DBE population that exists today.

B. Use of the most refined data available: The NHDOT relies on the contractor data directly associated to the NAICS codes Sub sectors listed above. Any firm (DBE or non-DBE) not identified in these Sub sectors would be considered by their exclusion, as being not ready, willing and able to participate on FTA-assisted contracts and therefore, should not be included in the calculations for the DBE goal.

C. Look to relevant data sources to supplement your DBE directory: The State of New Hampshire does not have a comparable MBE/WBE program for State contracting opportunities, therefore, no similar data source exists that would yield ready, willing and able minority or women owned businesses for comparison. The NHDOT does not track bids and quotes for all FTA related contracting opportunities, therefore, use of the available bidder's list data for NHDOT road construction projects would not be an accurate representation for use in the FTA goal setting process. The NHDOT has examined contracting opportunities typically available for FTA assisted contracts and compared them to currently certified DBEs to determine the most accurate representation of DBE firms for this goal setting analysis. Contracting opportunities without a comparable DBE firm within the directory were excluded from this calculation.

D. Local market area: Due to the small geographic size of New Hampshire the fact that contracting dollars are distributed throughout New Hampshire, and the demonstrated ability of prime and subcontractors to travel throughout state boundaries to perform transportation related work, the entire state is regarded as one local market area.

E. Ensuring DBE goal percentage reflects "apples to apples" calculations: The DBE goal calculation was derived using the same NAICS code categories in both the numerator and denominator, therefore, is considered an accurate comparison of both DBE and non DBE firms capable of those opportunities currently available in FTA contracting work.

F. Weighting: The NHDOT reviewed past DBE participation on FTA-assisted projects and contracting opportunities for sub recipient operations to determine if one or more areas of work performed by DBEs should be considered for weighting. The NHDOT has determined that work performed by DBEs appears to be evenly distributed throughout the work items considered for the Step 1 base figure. No one item of work accounts for more than 20% of the total reported DBE participation. Additionally, the NHDOT cannot currently identify any areas of work on future FY 2017 – 2019 projects appropriate for DBE subcontracting that would indicate a higher concentration of work and be appropriate for an adjustment to the Step 1 base figure for weighting.

Step 2: Adjustment to Base Figure

The Department assessed the impact of specific factors requiring narrow tailoring of the DBE Program. The following factors were considered in making the decision to adjust the overall DBE goal.

1. Current Capacity to Perform Work: This office has contacted all ready, willing and able DBE firms in an effort to determine if any active firm has reached the capacity to perform work and has found no evidence to support this.

2. Disparity Studies: The NHDOT is not aware of any disparity study performed in New Hampshire for any public agency or private sector company.

3. Past Participation: Initially, the NHDOT did not consider a Step 2 adjustment to the base figure. The rationale was that FY 2013, 2014 and 2015 FTA DBE participation included some opportunity for subcontractors related to highway construction, transportation consulting, design and engineering, while no similar projects had been identified and approved for FY 2017 – 2019. After careful consideration, it is reasonable to conclude future FTA-assisted projects receiving approval will include a variety of contracting opportunities similar to those performed in the past five years. Therefore, the NHDOT shall make the following Step 2 adjustment to the base figure for past participation.

   Past participation:

FY 2009	1.3 %
FY 2010	2.9 %
FY 2011	1.1 %
FY 2012	1.2 %
FY 2013	1.6 %
FY 2014	3.6 %
FY 2015	4.3 %

   Historical median is 1.6 %

Base figure	1.7 %
Median	1.6 %
Sum	3.3 % (divided by 2) = **1.65 % DBE Goal**

4. Consultation and Input from Interested Parties: The NHDOT recognizes the importance of public participation in the DBE goal setting process as required by 49 CFR 26.45 (g)(1). The proposed DBE goal and methodology was posted on the official NHDOT website www.nh.gov/dot and the goal was made available for public inspection during normal business hours at the NHDOT main office located at 7 Hazen Drive, Concord, NH, 03302.

   Additionally, notices detailing the proposed DBE goal providing a description of the goal setting process, the intent to create a level playing for the participation of DBEs on FTA assisted projects, and the importance of active participation by all parties

involved in the contracting process were sent to a large group consisting of businesses and individuals with an interest in contracting, diversity, and NHDOT business. The notice detailed the Departments commitment to diversity and its desire to discuss experiences and issues effecting minority and women owned businesses working or seeking work within the state of NH, regardless of the industry. The notice provided contact information and a request for direct face-to-face discussions if possible. Notices were sent to the following stakeholders:

- All currently certified DBE businesses in the NHDOT database
- All currently ready, willing and able prime and subcontractors contained in the NHDOT Office of Federal Compliance database.
- Association of General Contractors
- The NH Regional Planning Commissions
- Belknap Counties Community Action Program
- Berlin Regional Vocational Center
- Community Action Partnership-Strafford
- Concord Regional Vocational Center
- Lebanon/Hanover Regional Vocational Center
- New England Farm Workers Council
- New Hampshire Department of Education- Vocational Rehab.
- Office of Workforce Opportunity
- New Hampshire Employment Security
- NH Small Business Administration
- NH Chapter of NAACP in Portsmouth, Manchester and Nashua
- NH Chapter of the National Association of Women in Construction
- New Hampshire PTAP Program

Additionally, requests for comments were made by telephone to the largest stakeholders in an effort to increase opportunities for useful dialog.

Based on the discussions with stakeholders and the response to notices received, the NHDOT has determined no additional information was provided sufficient to enable the Department to make a step 2 adjustment.

Proposed FTA DBE Goal

The NHDOT, through its Bureau of Rail and Transit, has determined the overall DBE goal for FTA-funded contracting opportunities for Fiscal Years 2017-2019 to be **1.65%.** The NHDOT will obtain its goal through the administration of a race and gender-neutral program.

Should our contracting opportunities unexpectedly increase, decrease, or significantly change during the three year period such that the submitted goal is rendered obsolete, the NH DOT will appropriately amend both the goal and DBE contracting practices in order to ensure the goal and program as a whole is narrowly tailored and accurately reflects the actual contracting opportunities available during the specified time period.

Attachment 4

Disadvantaged Business Enterprise (DBE)
Special Attention

S P E C I A L A T T E N T I O N

Disadvantaged Business Enterprise (DBE)

Mandatory DBE Project Goal of 6%

Disadvantaged Business Enterprise (DBE) Policy. It shall be the policy of the New Hampshire Department of Transportation (NHDOT) to ensure nondiscriminatory opportunity for Disadvantaged Business Enterprises (DBE's) to participate in the performance of all contracts and subcontracts financed with Federal funds as specified by the regulations of the United States Department of Transportation (USDOT), Federal Highway Administration and as set forth below.

1. Policy. It is the policy of the United States Department of Transportation to ensure nondiscriminatory opportunity for disadvantaged business enterprises, as defined in 49 Code of Federal Regulation (CFR) Part 26, to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds. Consequently, the DBE requirements of 49 CFR Part 26 applies to this contract.

2. Disadvantaged Business Enterprise (DBE) Obligation. The State and its Contractors agree to ensure nondiscriminatory opportunity for disadvantaged business enterprises, as defined in 49 CFR Part 26, to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds. Each subcontract the prime contractor signs with a subcontractor must include this assurance: *The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of USDOT-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 NHDOT deems appropriate.*

3. Sanctions of Non-Compliance. The Contractor is hereby advised that failure of the Contractor, or any Subcontractor performing work under this contract, to carry out the requirements set forth in paragraphs 1 and 2 above shall constitute a breach of contract and, after notification of the United States Department of Transportation, may result in termination of this contract or such remedy as the State deems appropriate.

Overall Statewide DBE Goals. The NHDOT currently employs a race/gender neutral DBE policy to attain its overall statewide DBE goals. This means that unless otherwise stated in the contract, the NHDOT relies on the voluntary cooperation of all contractors to utilize DBE's on every project, sufficient to meet or exceed the current statewide DBE goal**.** Although the majority of statewide DBE goals are currently voluntary, failure of the NHDOT to meet or exceed the overall statewide DBE goal as required by the Federal Highway Administration (FHWA), could necessitate placement of mandatory DBE participation requirements on all future statewide projects.

DBE Participation Requirements. The NHDOT may place a DBE participation requirement on certain projects if failure to obtain sufficient DBE participation would negatively impact the Departments overall statewide DBE goal. Any project that contains specific DBE participation requirements shall be clearly identified and specify the DBE participation requirement at the top of this DBE Special Attention, which will be inserted into the contract. The DBE participation requirement in the contract shall be listed as a percentage of the total contract price. Specific procedures for the "apparent low bidder" are detailed on page 4 of this Special Attention under "DBE Participation Requirement Procedures" and only apply to projects that contain specific DBE participation requirements. Failure to follow these specific procedures,

or to meet or exceed the required DBE Participation or document sufficient "good faith efforts," may result in sanctions, including a reduction of contract payments.

Disadvantaged Business Enterprise (DBE) Program Goals. The New Hampshire Department of Transportation is required to set an overall DBE goal for participation in all transportation related Federal-aid projects. The goal is determined following guidelines set forth in 49 CFR 26.45, and based on the availability of ready, willing and able DBE's who submitted bids for transportation related projects, compared as a percentage of all available contractors who submitted bids for transportation related projects during the same time period. The DBE goal may be adjusted to take into account other factors impacting DBE utilization, in an effort to narrowly tailor the overall DBE goal. The detailed goal setting methodology and current overall DBE goal may be viewed on the NHDOT website at www.nh.gov/dot.

Disadvantaged Business Enterprise (DBE) Definition. A DBE is defined as a business that is owned and controlled by one or more socially and economically disadvantaged person(s). For the purpose of this definition:

A. "Socially and economically disadvantaged person" means an individual who is a citizen or lawful permanent resident of the United States and who is a Woman, Black, Hispanic, Portuguese, Native American, Asian American, or a member of another group, or an individual found to be disadvantaged by an individual determination of social disadvantage as described in 49 CFR 26 appendix E, determinations of social and economic disadvantage.

B. "Owned and controlled" means a business which is:
   (1) A sole proprietorship legitimately owned and controlled by an individual who is a disadvantaged person.
   (2) A partnership, joint venture or limited liability Company in which at least 51% of the beneficial ownership interests is legitimately held by a disadvantaged person(s).
   (3) A corporation or other entity in which at least 51% of the voting interest and 51% of the beneficial ownership interests are legitimately held by a disadvantaged person(s).

The disadvantaged group owner(s) or stockholder(s) must possess control over management, interest in capital, and interest in earnings commensurate with the percentage of ownership. Disadvantaged participation in a joint venture must also be based on the sharing of real economic interest and must include proportionate control over management, capital, and earnings, as above. If the disadvantaged group ownership interests are real, substantial and continuing and not created solely to meet the requirements of this program, a firm is considered a bona fide DBE.

Certified DBE Directory. The current New Hampshire Unified Disadvantaged Business Enterprise (DBE) Directory is available online at www.nh.gov/dot. This directory contains all currently certified DBE's available for work in New Hampshire, and is updated monthly. Only firm's listed in this directory are eligible for DBE credit on NH Federal-aid projects. If you have questions about DBE certification, or do not have access to the Internet, please call the DBE Coordinator at (603) 271-6612 for assistance.

Counting DBE Participation For Project Goals. In order for payments made to DBE contractors to be counted toward DBE goals, the DBE contractors must perform a commercially useful function (CUF). The DBE must be responsible for execution of the work of the contract and must carry out its responsibilities by actually performing, managing, and supervising the work involved, consistent with standard industry practices.

This means that:

A. The DBE must also be responsible for ordering its own materials and supplies, determining quantity and quality, negotiating price, installing (where applicable) and paying for the material itself;
B. The DBE must perform work commensurate with the amount of its contract;
C. The DBE's contribution cannot be that of an extra participant or a conduit through which funds are passed in order to obtain the appearance of DBE participation;
D. The DBE must exercise responsibility for at least fifty percent of the total cost of its contract with its own work force;
E. None of the DBE's work can be subcontracted back to the prime contractor, nor can the DBE employ the prime's, or other subcontractor's supervisors currently working on the project;
F. The DBE's labor force must be separate and apart form that of the prime contractor or other subcontractors on the project. Transferring crews between primes, subcontractors, and DBE contractors is not acceptable;
G. The DBE owner must hold a Public Works license and any other professional or craft licenses required for the type of work he/she performs on the project;
H. The DBE may rent or lease, at competitive rates, equipment needed on the project from customary leasing sources or from other subcontractors on the project.

Allowable credit for payments made to DBEs for work performed. A contractor may take credit for payments made to a certified DBE that satisfies (CUF) requirements at the following rate.

A. A DBE Prime Contractor; count 100% of the value of work performed by own forces, equipment and materials count towards DBE goals.
B. An approved DBE subcontractor; count 100% of the value of work performed by the DBE's own forces, equipment and materials, <u>excluding the following</u>:
    - The cost of materials/supplies purchased from a non-DBE Prime Contractor.
    - The value of work provided by non-DBE lower tier subcontractors, including non-DBE trucking to deliver asphalt to a DBE contractor.
C. A DBE owner-operator of construction equipment; count 100% of expenditures committed.
D. A DBE manufacturer; count 100% of expenditures committed. The manufacturer must be a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the Contractor.
E. A regular DBE dealer/supplier; count 60% of expenditures committed.
   A regular dealer/supplier is defined as a firm that owns, operates, or maintains a store, warehouse or other establishment, in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. A person may be a dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating or maintaining a place of business, if the person both owns and operates distribution equipment for the products, by the means of a long term agreement, and not by a contract by contract basis.
F. A DBE Broker; count for DBE credit only the fees or commissions charged for assistance in the procurement, and, fees and transportation charges for the delivery of materials or supplies required at the job site, but not the cost of materials procured.
   A broker is defined as any person(s) or firm who arranges or expedites transactions for materials or supplies, and does not take physical possession of the materials or supplies at their place of business for resale.
G. A DBE renter of construction equipment to a contractor; count 20% of expenditures committed, with or without operator.
H. A bona fide DBE service provider; count 100% of reasonable fees or commissions.
   Eligible services include professional, technical, consultant, or managerial, services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for the

performance of the contract. Eligible services also include agencies providing bonding and insurance specifically required for the performance of the contract.

I. A trucking, hauling or delivery operation, count 100% of expenditures committed when trucks are owned, operated, licensed and insured by the DBE and used on the contract and, if applicable, includes the cost of the materials and supplies. 100% of expenditures committed when the DBE leases trucks from another DBE firm including an owner-operator. 100% of reasonable fees, or commissions, the DBE receives as a result of a lease arrangement for trucks from a non-DBE, including an owner-operator.

J. Any combination of the above.

Reporting Requirements for Payments Made To DBE's: On all Federal-aid projects, the Prime Contractor is required to report payments made to DBE's during the life of the contract, on a quarterly basis, for the periods covering January 1st–March 31st, April 1st-June 30th, July 1st-September 30th and October 1st-December 31st, The NHDOT will provide the Contractor with a quarterly DBE payments report, detailing all DBE's subcontracted by the Contractor, per project. The Contractor shall report any payments made to DBE's during the requested reporting period. This documentation shall be submitted to the Office of Federal Compliance within the time period stated on the NHDOT quarterly request. Failure of the Contractor to submit this information may result in the Department withholding progress payments.

Removal of Approved DBE From Transportation Related Project: Contractors may not terminate for convenience, any approved DBE subcontractor and perform the work with their own forces, without prior written consent from the NHDOT.

Procedures for Projects Containing DBE Participation Requirements: The apparent low bidder must document that it has obtained sufficient DBE participation to meet the specific DBE participation requirement; or document adequate good faith efforts to meet the requirement, even though it did not succeed in obtaining enough DBE participation to do so. The apparent low bidder must do the following:

Within 3 working days after the bid opening date, the apparent low bidder shall file with the NHDOT Office of Federal Compliance, a Disadvantaged Business Enterprise (DBE) Commitment Form (DBE Form 1). This form shall list the DBE firms to be utilized on the project. The name and address of the firm, the item numbers and description of work to be completed or materials supplied, and the estimated dollar value of DBE participation. Additionally, a Letter of Intent (DBE Form 2) signed by principals of the apparent low bidder and each DBE firm listed on the DBE Commitment Form shall be submitted. Letters of intent do not represent formal subcontracts between the Prime Contractor and DBE, however, shall represent the anticipated work and participation by the DBE on the project. Adequate documentation of good faith efforts made to obtain DBE participation may be cause to waive a portion of the DBE goal requirement of the project. Guidance on what is considered adequate good faith effort documentation is available from the Office of Federal Compliance.

Failure to provide the required DBE Commitment Form and Letters of Intent which satisfy the required DBE participation requirement and/or acceptable documentation of good faith efforts to obtain DBE utilization within 3 working days after the bid opening date, or by another deadline established by the DBE Coordinator, will be considered a lack of responsiveness on the part of the apparent low bidder.

If for any reason during the progress of project work the Prime Contractor finds that DBEs subcontractors included on the DBE Commitment Form are unable to perform the proposed work, the Prime Contractor, with written approval from the Department, may substitute other DBE firms for those named on the list. If the Prime Contractor is able to clearly document his inability to find qualified substitute firms to meet the project goal, the Prime Contractor may request, in writing, a waiver of that portion of the goal.

If at any time during the life of the Contract it is determined that the Prime Contractor is not fulfilling the mandatory goal requirement or commitment(s) and is not making a good faith effort to fulfill the DBE requirement, the Department may withhold progress payments. Failure of the Prime Contractor to meet the mandatory project goal or the specified DBE commitment(s), whichever is the lowest, may result in a reduction in Contract payment by an amount equal to the difference between the actual Contract dollars multiplied by the applicable commitment percentage and the dollar value of the work actually performed by the DBEs. If the Prime Contractor's failure to meet the DBE goal or commitment(s) in the Contract is the result of circumstances clearly documented to be beyond the control of the Prime Contractor, a written request for waiver of the goal or commitment(s) must be received. The Office of Federal Compliance may waive, in whole or part, the reduction in contract payments specified herein. Fulfillment of the goal percentage shall be determined by dividing the dollars committed to the DBEs by the actual contract dollars.

MUNICIPAL PROJECTS ONLY: Timely submission of invoices to Municipalities: Prime contractors must submit all invoices received for satisfactorily completed work, from any subcontractor/lower-tier subcontractor/material supplier, to Municipalities for payment within 30 days of receipt.

Attachment 5

DBE Application and PNW Forms

Appendix F

UNIFORM CERTIFICATION APPLICATION

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

Roadmap for Applicants

1. Should I apply?

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

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

2. How do I apply?

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

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

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

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

5. Where can I find more information?

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

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

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

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

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

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

Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information

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

B. Prior/Other Certifications and Applications

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

Section 2: GENERAL INFORMATION

A. Business profile:

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

B. Relationships and Dealings with Other Businesses

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

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

(2) Check the appropriate box indicating whether any other firm currently has or had an ownership interest in your firm at present or at any time in the past. If you checked yes, please explain.

(3) Check the appropriate box that indicates whether at present or at any time in the past your firm:

(a) ever existed under different ownership, a different type of ownership, or a different name;

(b) existed as a subsidiary of any other firm;

(c) existed as a partnership in which one or more of the partners are/were other firms;

(d) owned any percentage of any other firm; and

(e) had any subsidiaries of its own.

(f) served as a subcontractor with another firm constituting more than 25% of your firm's receipts.

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

Section 3: MAJORITY OWNER INFORMATION

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

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

(1) Enter the full name of the owner.

(2) Enter his/her title or position within your firm.

(3) Give his/her home phone number.

(4) Enter his/her home (street) address.

(5) Indicate this owner's gender.

(6) Identify the owner's ethnic group membership. If you checked "Other," specify this owner's ethnic group/identity not otherwise listed.

(7) Check the appropriate box to indicate whether this owner is a U.S. citizen or a lawfully admitted permanent resident. If this owner is neither a U.S. citizen nor a lawfully admitted permanent resident of the U.S., then this owner is NOT eligible for certification as a DBE owner.

(8) Enter the number of years during which this owner has been an owner of your firm.

(9) Indicate the percentage of the total ownership this person holds and the date acquired, including (if appropriate), the class of stock owned.

(10) Indicate the dollar value of this owner's initial investment to acquire an ownership interest in your firm, broken down by cash, real estate, equipment, and/or other investment. Describe how you acquired your business and attach documentation substantiating this investment.

B. Additional Owner Information

(1) Describe the familial relationship of this owner to each other owner of your firm and employees.

(2) Indicate whether this owner performs a management or supervisory function for any other business. If you checked "Yes," state the name of the other business and this owner's function/title held in that business.

(3) (a) Check the appropriate box that indicates whether this owner owns or works for any other firm(s) that has <u>any</u> relationship with your firm. If you checked "Yes," identify the name of the other business, the nature of the business relationship, and the owner's function at the firm.

(b) If the owner works for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week, please identify this activity.

(4) (a) Provide the personal net worth of the owner applying for certification in the space provided. Complete and attach the accompanying "Personal Net Worth Statement for DBE/ACDBE Program Eligibility" with your application. Note, complete this section and accompanying statement only for each owner applying for DBE qualification (i.e., for each owner claiming to be socially and economically disadvantaged).

(b) Check the appropriate box that indicates whether any trust has been created for the benefit of the disadvantaged owner(s). If you answered "Yes," you may be asked to provide a copy of the trust instrument.

(5) Check the appropriate to indicate whether any of your immediate family members, managers, or employees, own, manage, or are associated with another company. Immediate family member is defined in 49 C.F.R. §26.5. If you answered "Yes," provide the name of each person, your relationship to them, the name of the company, the type of business, and whether they own or manage the company.

Section 4: CONTROL

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

(1) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each officer.

(2) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each individual serving on your firm's Board of Directors.

(3) Check the appropriate box to indicate whether any of your firm's officers and/or directors listed above performs a management or supervisory function for any other business. If you answered "Yes," identify each person by name, his/her title, the name of the other business in which s/he is involved, and his/her function performed in that other business.

(4) Check the appropriate box that indicates whether any of your firm's officers and/or directors listed above own or work for any other firm(s) that has a relationship with your firm. (e.g., ownership interest, shared office space, financial investments, equipment leases, personnel sharing, etc.) If you answered "Yes," identify the name of the firm, the individual's name, and the nature of his/her business relationship with that other firm.

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

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

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

C. Inventory: Indicate firm inventory in these categories:

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

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

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

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

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

E. Financial / Banking Information

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

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

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

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

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

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

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

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

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

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

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

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

<u>AIRPORT CONCESSION (ACDBE) APPLICANTS</u>

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

<u>AFFIDAVIT & SIGNATURE</u>

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

Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information

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

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

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

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

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

B. Prior/Other Certifications and Applications

(10) Is your firm currently certified for any of the following U.S. DOT programs?
❑ DBE ❑ ACDBE Names of certifying agencies: _____

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

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

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

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

(a) Denied certification or decertified as a DBE, ACDBE, 8(a), SDB, MBE/WBE firm? ❑ Yes ❑No
(b) Withdrawn an application for these programs, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or Federal entity? ❑ Yes ❑ No

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

_____

_____

Section 2: GENERAL INFORMATION

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

_____

_____

_____

_____

_____

_____

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

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

(5) Method of acquisition *(Check all that apply)*:
❑ Started new business ❑ Bought existing business ❑ Inherited business ❑ Secured concession
❑ Merger or consolidation ❑ Other *(explain)* _____

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

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

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

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

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

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

B. Relationships and Dealings with Other Businesses

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

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

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

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

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

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

Section 3: MAJORITY OWNER INFORMATION

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

(1) Full Name: _____

(2) Title: _____

(3) Home Phone #: ( ) _____ - _____

(4) Home Address *(Street and Number)*: _____

City: _____ **State:** _____ **Zip:** _____ - _____

(5) Gender: ❑ Male ❑ Female

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

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

(7) U.S. Citizenship:

❑ U.S. Citizen
❑ Lawfully Admitted Permanent Resident

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

(10) Initial investment to acquire ownership interest in firm:

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

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

B. Additional Owner Information

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

_____
_____
_____

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

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

_____
_____

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

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

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

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

_____

Section 3: OWNER INFORMATION, Cont'd.

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

(1) Full Name: _____

(2) Title: _____

(3) Home Phone #: ( ) _____ - _____

(4) Home Address (*Street and Number*): _____

City: _____ **State:** _____ **Zip:** _____ - _____

(5) Gender: ❑ Male ❑ Female

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

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

(7) U.S. Citizenship:

❑ U.S. Citizen
❑ Lawfully Admitted Permanent Resident

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

(10) Initial investment to acquire ownership interest in firm:

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

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

B. Additional Owner Information

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

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

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

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

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

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

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

Section 4: CONTROL

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

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

(3) Do any of the persons listed above perform a management or supervisory function for any other business?
❑ Yes ❑ No If Yes, identify for each:

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

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

(4) Do any of the persons listed in section A above own or work for any other firm(s) that has a relationship with this firm? *(e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)*
❑ Yes ❑ No If Yes, identify for each:

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

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

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

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

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

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

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

_____

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

_____

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

1. Equipment and Vehicles

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

2. Office Space

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AIRPORT CONCESSION (ACDBE) APPLICANTS ONLY MUST COMPLETE THIS SECTION

Identify the following information concerning the ACDBE applicant firm:

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

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

Name of Concession	Location	Type of Concession	Start Date of Concession

AFFIDAVIT OF CERTIFICATION

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

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

I _____ (full name printed), swear or affirm under penalty of law that I am _____(title) of the applicant firm _____ and that I have read and understood all of the questions in this application and that all of the foregoing information and statements submitted in this application and its attachments and supporting documents are true and correct to the best of my knowledge, and that all responses to the questions are full and complete, omitting no material information. The responses include all material information necessary to fully and accurately identify and explain the operations, capabilities and pertinent history of the named firm as well as the ownership, control, and affiliations thereof.

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

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

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

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

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

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

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

_____

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

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

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

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

NOTARY CERTIFICATE

UNIFORM CERTIFICATION APPLICATION
SUPPORTING DOCUMENTS CHECKLIST

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

Required Documents for All Applicants

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

Partnership or Joint Venture

☐ Original and any amended Partnership or Joint Venture Agreements

Corporation or LLC

☐ Official Articles of Incorporation (*signed by the state official*)
☐ Both sides of all corporate stock certificates and your firm's stock transfer ledger
☐ Shareholders' Agreement(s)
☐ Minutes of all stockholders and board of directors meetings
☐ Corporate by-laws and any amendments
☐ Corporate bank resolution and bank signature cards
☐ Official Certificate of Formation and Operating Agreement with any amendments (for LLCs)

Optional Documents to Be Provided on Request

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

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

Suppliers

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

U.S. Department of Transportation

Personal Net Worth Statement For DBE/ACDBE Program Eligibility

As of _____

OMB APPROVAL NO:
EXPIRATION DATE:

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

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

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

Section 2. Notes Payable to Banks and Others

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

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

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

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

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

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

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

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

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

Section 7. Value of Other Business Investments, Other Businesses Owned (excluding applicant firm)
Sole Proprietorships, General Partners, Joint Ventures, Limited Liability Companies, Closely-held and Public Traded Corporations

Section 8. Other Liabilities and Unpaid Taxes (Describe)

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

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

NOTARY CERTIFICATE:
(Insert applicable state acknowledgment, affirmation, or oath)

Signature (DBE/ACDBE Owner) _____ Date _____

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

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

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

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

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

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

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

Assets

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

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

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

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

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

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

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

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

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

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

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

Liabilities

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

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

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

Other Liabilities: On page 1, enter the total value due on all other liabilities not listed in the previous entries. In section 8, page 3, report the name of the individual obligated, names of co-signers, description of the liability, the name of the entity owed, the date of the obligation, payment amounts and terms. Note: Do not include contingent liabilities in this section. Contingent liabilities are liabilities that belong to you only if an event(s) should occur. For example, if you have co-signed on a relative's loan, but you are not responsible for the debt until your relative defaults, that is a contingent liability. Contingent liabilities do not count toward your net worth until they become actual liabilities.

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

Transfers of Assets:

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

Affidavit

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

Attachment 6

DBE Commitment Form and Letter of Intent

NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

COMMITMENT FORM

This is to certify that (THE CONTRACTOR) _____ in accordance with the terms of Section 103.06, Standard Specifications for Road and Bridge Construction has contacted the below listed appropriate disadvantaged business enterprises (DBE) taken from the current DBE Directory; with negotiations leading to compliance of the established goal. The Contractor proposes to utilize the following DBEs as subcontractors, suppliers, manufacturers or regular dealers on this project. Each item involved should be identified.

Low Bidder must submit Commitment Form to NHDOT Office of Federal Compliance within 3 working days of bid opening

Bid opening date: _____/_____/_____ Dollar amount of apparent low bid $ _____

Name and Address of DBE	Item number(s)	Description of work to be completed by DBE's	Estimated dollar value of DBE participation
		TOTAL DBE $	

Percentage of Disadvantaged Business Enterprise (DBE) Participation _____

The undersigned hereby certifies that he or she has read the terms of this commitment and is authorized to bind the bidder to the commitment herein after set forth.
The signing of the commitment form and letter(s) of intent by the Contractor and approval by NHDOT Office of Federal Compliance does not constitute formal subcontractor approval. Such subcontractor approval must be attained.

_____ _____
Project Name **Name of Authorized Officer**

_____ _____
Federal Number **State Number** **Signature of Authorized Officer/Date**

Approved: _____ **Date:** _____
Office of Federal Compliance

DBE Form 1 Complete DBE Directory can be viewed online at:
http://www.nh.gov/dot/business/contractors.htm

NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

LETTER OF INTENT

NOTE TO DBE: This form is to be submitted by your company as its complete quote to a prime bidder. You should retain copies of all quotes submitted. This form does not constitute a formal subcontract with the low bidder.

NOTE TO LOW BIDDER: Acceptance of the quote will constitute a commitment and a copy of each accepted letter of intent must be submitted to the Department together with the standard commitment form. This form does not constitute a formal subcontract with the disadvantaged business enterprise.

Upon approval of the commitment form by the Department, copies of the accepted letters of intent will be forwarded to the committed DBE's.

****

PRIME CONTRACTOR **PROJECT**

To: _____ _____

Address: _____ _____

_____ _____

The undersigned DBE hereby submits our quote to perform the following described work in connection with the above project:

Item No.	Description of Work (Item, Material, Service)	Quantity	Price/Unit	Total Dollar Value
			Total Quotation:	

DBE Firm: _____

Address: _____ _____

DBE Representative

_____

Telephone: _____ _____

Date

Accepted: _____ **Date:** _____

Prime Contractor's Signature

Accepted: _____ **Date:** _____

Office of Federal Compliance

DBE Form 2

Attachment 7

DBE Commitment and Payment Review Form

DBE COMMITMENT AND PAYMENT REVIEW

Project Name:	Start Date:	Mandatory DBE Goal ☐ Yes ☐ No If Yes, what? %
State Project Number:	End Date:	
Federal Project Number:	Dollar Amt:	Interim Review
Prime Contractor/Consultant:		Final Review

Section I: DBE Commitments Made or DBE Subcontractor Agreements Approved For This Project			
DBE Firm Name	DBE Commitment or Subcontracted Amount	Payments Made To DBE	Contract %
Total Payments Made To DBEs and Final Project DBE Utilization %			

Section II: Comments Section (Specific Reasons DBE Commitments Were Underutilized)

Section III: NHDOT Certification
This Project does not have a mandatory DBE goal. Reporting is for informational purposes only.
Prime Contractor/Consultant has achieved or is on schedule to achieve their DBE commitments
Prime Contractor/Consultant has not achieved or is not on schedule to achieve their DBE commitment for this project. The appropriate Compliance Review Officer has been notified.
Signature Date:
Printed name and title: David Cloutier, External EEO Coordinator

Attachment 8

49 Code of Federal Regulation (CFR) Part 26
DBE Program Regulations

e-CFR data is current as of August 24, 2015

Title 49: Transportation

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

Contents

Subpart A—General

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

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

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

Subpart C—Goals, Good Faith Efforts, and Counting

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

Subpart D—Certification Standards

§26.61 How are burdens of proof allocated in the certification process?
§26.63 What rules govern group membership determinations?
§26.65 What rules govern business size determinations?
§26.67 What rules determine social and economic disadvantage?
§26.69 What rules govern determinations of ownership?
§26.71 What rules govern determinations concerning control?
§26.73 What are other rules affecting certification?

Subpart E—Certification Procedures

§26.81 What are the requirements for Unified Certification Programs?
§26.83 What procedures do recipients follow in making certification decisions?
§26.85 Interstate certification.
§26.86 What rules govern recipients' denials of initial requests for certification?
§26.87 What procedures does a recipient use to remove a DBE's eligibility?
§26.88 Summary suspension of certification.
§26.89 What is the process for certification appeals to the Department of Transportation?
§26.91 What actions do recipients take following DOT certification appeal decisions?

Subpart F—Compliance and Enforcement

§26.101 What compliance procedures apply to recipients?
§26.103 What enforcement actions apply in FHWA and FTA programs?
§26.105 What enforcement actions apply in FAA programs?
§26.107 What enforcement actions apply to firms participating in the DBE program?

§26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?
Appendix A to Part 26—Guidance Concerning Good Faith Efforts
Appendix B to Part 26—Uniform Report of DBE Awards or Commitments and Payments Form
Appendix C to Part 26—DBE Business Development Program Guidelines
Appendix D to Part 26—Mentor-Protégé Program Guidelines
Appendix E to Part 26—Individual Determinations of Social and Economic Disadvantage
Appendix F to Part 26—Uniform Certification Application Form
Appendix G to Part 26—Personal Net Worth Statement

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

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

Back to Top

Subpart A—General

Back to 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 promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients.

(g) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and

(h) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

[64 FR 5126, Feb. 2, 1999, as amended at 79 FR 59592, Oct. 2, 2014]

Back to 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. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405.

(2) 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. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405.

(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.

[64 FR 5126, Feb. 2, 1999, as amended at 79 FR 59592, Oct. 2, 2014]

Back to 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.*).

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

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

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

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

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

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

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

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

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

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

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

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

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

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

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

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

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

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

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

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

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

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

Primary industry classification means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site: *http://www.census.gov/eos/www/naics/.*

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

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

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

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

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

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

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

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

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

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

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

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

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.

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

(i) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;

(ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) “Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;

(iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kirbati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

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

(vi) Women;

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

(3) Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

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

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

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35553, June 16, 2003; 76 FR 5096, Jan. 28, 2011; 79 FR 59592, Oct. 2, 2014]

Back to Top

§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.

Back to Top

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

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

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

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

[72 FR 15617, Apr. 2, 2007]

Back to Top

§26.11 What records do recipients keep and report?

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

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

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

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

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

(i) Firm name;

(ii) Firm address;

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

(iv) Age of the firm; and

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

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

(d) You must maintain records documenting a firm's compliance with the requirements of this part. At a minimum, you must keep a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. These records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement. Other certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient's financial assistance agreement, whichever is longer.

(e) The State department of transportation in each UCP established pursuant to §26.81 of this part must report to the Department of Transportation's Office of Civil Rights, by January 1, 2015, and each year thereafter, the percentage and location in the State of certified DBE firms in the UCP Directory controlled by the following:

(1) Women;

(2) Socially and economically disadvantaged individuals (other than women); and

(3) Individuals who are women and are otherwise socially and economically disadvantaged individuals.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 76 FR 5096, Jan. 28, 2011; 79 FR 59593, Oct. 2, 2014]

Back to Top

§26.13 What assurances must recipients and contractors make?

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

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance: The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

(1) Withholding monthly progress payments;

(2) Assessing sanctions;

(3) Liquidated damages; and/or

(4) Disqualifying the contractor from future bidding as non-responsible.

[79 FR 59593, Oct. 2, 2014]

Back to Top

§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.

Back to Top

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

Back to Top

§26.21 Who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(1) All FHWA primary recipients receiving funds authorized by a statute to which this part applies;

(2) FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds $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 the cumulative total value of which exceeds $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; 79 FR 59593, Oct. 2, 2014]

Back to Top

§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.

Back to Top

§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.

Back to Top

§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.

Back to Top

§26.29 What prompt payment mechanisms must recipients have?

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.

(b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. You must use one of the following methods to comply with this requirement:

(1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.

(2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.

(3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.

(c) For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.

(d) Your DBE program must provide appropriate means to enforce the requirements of this section. These means may include appropriate penalties for failure to comply, the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

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

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

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

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

[68 FR 35553, June 16, 2003]

Back to Top

§26.31 What information must you include in your DBE directory?

(a) In the directory required under §26.81(g) of this Part, you must list all firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE.

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

[76 FR 5096, Jan. 28, 2011]

Back to Top

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

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

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

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

Back to Top

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

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

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

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

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

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

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

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

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

Back to Top

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

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

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

(c) This mechanism must provide for a running tally of actual DBE attainments (*e.g.,* payments actually made to DBE firms), including a means of comparing these attainments to commitments. In your reports of DBE participation to the Department, you must display both commitments and attainments.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35554, June 16, 2003; 76 FR 5097, Jan. 28, 2011]

Back to Top

§26.39 Fostering small business participation.

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

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

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

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

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

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

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

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

[76 FR 5097, Jan. 28, 2011]

Back to Top

Subpart C—Goals, Good Faith Efforts, and Counting

Back to Top

§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.

Back to Top

§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.

Back to Top

§26.45 How do recipients set overall goals?

(a)(1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.

(2) If you are a FTA or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) $250,000 or less in FTA or FAA funds in prime contracts in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA respectively for that fiscal year. However, if you have an existing DBE program, it must remain in effect and you must seek to fulfill the objectives outlined in §26.1.

(b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the “relative availability of DBEs”). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.

(c) *Step 1.* You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.

(1) *Use DBE Directories and Census Bureau Data.* Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market that perform work in the same NAICS codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site, *www.census.gov/epcd/cbp/view/cbpview.html.*) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted (successful and unsuccessful) on your DOT-assisted prime contracts or subcontracts in the past three years. Determine the number of all businesses that have bid or quoted (successful and unsuccessful) on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all businesses to derive a base figure for the relative availability of DBEs in your market. When using this approach, you must establish a mechanism (documented in your goal submission) to directly capture data on DBE and non-DBE prime and subcontractors that submitted bids or quotes on your DOT-assisted contracts.

(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.* Except as otherwise provided in this paragraph, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market. The exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of paragraph (c)(2) of this section, is not an acceptable alternative means of determining the availability of DBEs.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at your overall goal. If the evidence does not suggest an adjustment is necessary, then no adjustment shall be made.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include:

(i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;

(ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and

(iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.

(2) If available, you must consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:

(i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;

(ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.

(3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the “but for” factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:

(1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming three fiscal years.

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you. In evaluating the adequacy or soundness of the methodology used to derive the overall goal, the operating administration will be guided by goal setting principles and best practices identified by the Department in guidance issued pursuant to §26.9.

(5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:

(i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and

(ii) Avoid imposing undue burdens on non-DBEs.

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

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

(g)(1) In establishing an overall goal, you must provide for consultation and publication. This includes:

(i) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before you are required to submit your methodology to the operating administration for review pursuant to paragraph (f) of this section. You must document in your goal submission the consultation process you engaged in. Notwithstanding paragraph (f)(4) of this section, you may not implement your proposed goal until you have complied with this requirement.

(ii) A published notice announcing your proposed overall goal before submission to the operating administration on August 1st. The notice must be posted on your official Internet Web site and may be posted in any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the operating administration, the revised goal must be posted on your official Internet Web site.

(2) At your discretion, you may inform the public that the proposed overall goal and its rationale are available for inspection during normal business hours at your principal office and for a 30-day comment period. Notice of the comment period must include addresses to which comments may be sent. The public comment period will not extend the August 1st deadline set in paragraph (f) of this section.

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

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 65 FR 68951, Nov. 15, 2000; 68 FR 35553, June 16, 2003; 75 FR 5536, Feb. 3, 2010; 76 FR 5097, Jan. 28, 2011; 79 FR 59593, Oct. 2, 2014]

Back to Top

§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.

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

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

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

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

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

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

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

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

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

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

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

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

Back to Top

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

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

(1) Only those transit vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufacturers, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved, at the time of solicitation are eligible to bid.

(2) A TVM's failure to implement the DBE Program in the manner as prescribed in this section and throughout 49 CFR part 26 will be deemed as non-compliance, which will result in removal from FTA's certified TVMs list, resulting in that manufacturer becoming ineligible to bid.

(3) FTA recipient's failure to comply with the requirements set forth in paragraph (a) of this section may result in formal enforcement action or appropriate sanction as determined by FTA (e.g., FTA declining to participate in the vehicle procurement).

(4) FTA recipients are required to submit within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract in the manner prescribed in the grant agreement.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal.

(1) In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying §26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will bid on during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by the transit vehicle manufacturer's own forces.

(i) You must consider and include in your base figure all domestic contracting opportunities made available to non-DBE firms; and

(ii) You must exclude from this base figure funds attributable to work performed outside the United States and its territories, possessions, and commonwealths.

(iii) In establishing an overall goal, the transit vehicle manufacturer must provide for public participation. This includes consultation with interested parties consistent with §26.45(g).

(2) The requirements of this part with respect to submission and approval of overall goals apply to you as they do to recipients.

(c) Transit vehicle manufacturers awarded must comply with the reporting requirements of §26.11 of this part including the requirement to submit the Uniform Report of Awards or Commitments and Payments, in order to remain eligible to bid on FTA assisted transit vehicle procurements.

(d) Transit vehicle manufacturers must implement all other applicable requirements of this part, except those relating to UCPs and DBE certification procedures.

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

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

[79 FR 59594, Oct. 2, 2014]

Back to Top

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

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

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

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under §26.39 of this part.

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

(3) Providing technical assistance and other services;

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

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

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

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

(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

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

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year, unless it becomes necessary in order meet your overall goal.

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

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

Example to paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (*i.e.*, not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

Example to paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (*i.e.*, from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two *consecutive* years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in §26.11.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011; 79 FR 59595, Oct. 2, 2014]

Back to Top

§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 or offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and

(v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and

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

(A) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(B) No later than 7 days after bid opening as a matter of responsibility. The 7 days shall be reduced to 5 days beginning January 1, 2017.

(ii) Provided that, in a negotiated procurement, including a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient.

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

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

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

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

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

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

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

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

(f)(1)(i) You must require that a prime contractor not terminate a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

(ii) You must include in each prime contract a provision stating:

(A) That the contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains your written consent as provided in this paragraph (f); and

(B) That, unless your consent is provided under this paragraph (f), the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

(2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the DBE firm.

(3) For purposes of this paragraph, good cause includes the following circumstances:

(i) The listed DBE subcontractor fails or refuses to execute a written contract;

(ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contracor;

(iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.

(iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;

(v) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;

(vii) You have determined that the listed DBE subcontractor is not a responsible contractor;

(vi) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;

(vii) The listed DBE is ineligible to receive DBE credit for the type of work required;

(viii) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;

(ix) Other documented good cause that you determine compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

(4) Before transmitting to you its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you, of its intent to request to terminate and/or substitute, and the reason for the request.

(5) The prime contractor must give the DBE five days to respond to the prime contractor's notice and advise you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why you should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (*e.g.,* safety), you may provide a response period shorter than five days.

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

(g) When a DBE subcontractor is terminated as provided in paragraph (f) of this section, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement. The good faith efforts shall be documented by the contractor. If the recipient requests documentation under this provision, the contractor shall submit the documentation within 7 days, which may be extended for an additional 7 days if necessary at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

(h) You must include in each prime contract the contract clause required by §26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth in that section you deem appropriate if the prime contractor fails to comply with the requirements of this section.

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

(j) You must require the contractor awarded the contract to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011; 79 FR 59595, Oct. 2, 2014]

Back to Top

§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 that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT operating administration.

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

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

Example to paragraph (d)(6): DBE Firm X uses two of its own trucks on a contract. It leases two additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four trucks.

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

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

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

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

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

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

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

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

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

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

(4) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) on a contract-by-contract basis.

(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; 79 FR 59595, Oct. 2, 2014]

Back to Top

Subpart D—Certification Standards

Back to Top

§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]

Back to Top

§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]

Back to Top

§26.65 What rules govern business size determinations?

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

(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 $23.98 million.

(c) The Department adjusts the number in paragraph (b) of this section annually using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.

[74 FR 15224, Apr. 3, 2009, as amended at 79 FR 59596, Oct. 2, 2014]

Back to Top

§26.67 What rules determine social and economic disadvantage?

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

(2)(i) You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed $1.32 million.

(ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. To meet this requirement, you must use the DOT personal net worth form provided in appendix G to this part without change or revision. Where necessary to accurately determine an individual's personal net worth, you may, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner's spouse is involved in the operation of the company). Requests for additional information shall not be unduly burdensome or intrusive.

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

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

(B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

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

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

(iv) Notwithstanding any provision of Federal or State law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under §26.89 of this part or to any other State to which the individual's firm has applied for certification under §26.85 of this part.

(b) *Rebuttal of presumption of disadvantage.* (1) An individual's presumption of economic disadvantage may be rebutted in two ways.

(i) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds $1.32 million, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

Example to paragraph (b)(1)(i): An individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than $1.32 million. However, the person's assets collectively (e.g., high income level, a very expensive house, a yacht, extensive real or personal property holdings) may lead a reasonable person to conclude that he or she is not economically disadvantaged. The recipient may rebut the individual's presumption of economic disadvantage under these circumstances, as provided in this section, even though the individual's PNW is less than $1.32 million.

(ii)(A) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination, as a certifying agency, you may consider factors that include, but are not limited to, the following:

(*1*) Whether the average adjusted gross income of the owner over the most recent three year period exceeds $350,000;

(*2*) Whether the income was unusual and not likely to occur in the future;

(*3*) Whether the earnings were offset by losses;

(*4*) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;

(*5*) Other evidence that income is not indicative of lack of economic disadvantage; and

(*6*) Whether the total fair market value of the owner's assets exceed $6 million.

(B) You must have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

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

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

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds $1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage, so long as his or her PNW remains above that amount.

(c) *Transfers within two years.* (1) Except as set forth in paragraph (c)(2) of this section, recipients must attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of recipient's review of the firm's annual affidavit, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients must not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds $1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of appendix E of this part.

[79 FR 59596, Oct. 2, 2014]

Back to Top

§26.69 What rules govern determinations of ownership?

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.

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

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

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

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

(c)(1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

(3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

(4) Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

Examples to paragraph (c): (i) An individual pays $100 to acquire a majority interest in a firm worth $1 million. The individual's contribution to capital would not be viewed as substantial.

(ii) A 51% disadvantaged owner and a non-disadvantaged 49% owner contribute $100 and $10,000, respectively, to acquire a firm grossing $1 million. This may be indicative of a pro forma arrangement that does not meet the requirements of (c)(1).

(iii) The disadvantaged owner of a DBE applicant firm spends $250 to file articles of incorporation and obtains a $100,000 loan, but makes only nominal or sporadic payments to repay the loan. This type of contribution is not of a continuing nature.

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

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

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

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

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

(1) The owner's expertise must be—

(i) In a specialized field;

(ii) Of outstanding quality;

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

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

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

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

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

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

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

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

(h)(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is—

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that—

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

(j) You may consider the following factors in determining the ownership of a firm. However, you must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because—

(1) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (h) of this section;

(2) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or

(3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, you must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

[64 FR 5126, Feb. 2, 1999, as amended at 79 FR 59597, Oct. 2, 2014]

Back to Top

§26.71 What rules govern determinations concerning control?

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

(b) Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

(3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

(4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

(c) A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in §26.69(j)(2).

(d) The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

(h) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

(i)(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal

industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

(j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(k)(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

(l) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the nondisadvantaged individual remains involved with the firm in any capacity, there is a rebuttable presumption of control by the non-disadvantaged individual unless the disadvantaged individual now owning the firm demonstrates to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned and/or controlled the firm.

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

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

(1) The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available NAICS code for that type of work. If you choose, you may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. If your Directory does not list types of work for any firm in a manner consistent with this paragraph (a)(1), you must update the Directory entry for that firm to meet the requirements of this paragraph (a)(1) by August 28, 2011.

(2) Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

(3) If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

(4) A certifier is not precluded from changing a certification classification or description if there is a factual basis in the record. However, certifiers must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licenser is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

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

(q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an

employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5099, Jan. 28, 2011; 79 FR 59597, Oct. 2, 2014]

Back to Top

§26.73 What are other rules affecting certification?

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

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

(b)(1) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.

(2) You must not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of this Part, the firm is eligible for certification.

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

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

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

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

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

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

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

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

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

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

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

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

(g) You must not require a DBE firm to be prequalified as a condition for certification.

(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 §26.65. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in §26.71.

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

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

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

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

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

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003; 76 FR 5099, Jan. 28, 2011; 79 FR 59598, Oct. 2, 2014]

Back to Top

Subpart E—Certification Procedures

Back to Top

§26.81 What are the requirements for Unified Certification Programs?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5100, Jan. 28, 2011]

Back to Top

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

(i) Perform an on-site visit to the firm's principal place of business. You must interview the principal officers and review their résumés and/or work histories. You may interview key personnel of the firm if necessary. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification;

(ii) Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing

(iii) Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank account signature cards;

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

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

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

(vii) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 3 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.

(viii) Require potential DBEs to complete and submit an appropriate application form, except as otherwise provided in §26.85 of this part.

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

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

(4) You must review all information on the form prior to making a decision about the eligibility of the firm. You may request clarification of information contained in the application at any time in the application process.

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

(e) [Reserved]

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

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

(h)(1) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of §26.87 of this part, except as provided in §26.67(b)(1) of this part.

(2) You may not require DBEs to reapply for certification or undergo a recertification process. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section or relating to suspension of certification under §26.88), a complaint, or other information concerning the firm's eligibility. If information comes to your attention that leads you to question the firm's eligibility, you may conduct an on-site review on an unannounced basis, at the firm's offices and job sites.

(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 (e.g., submission of Federal tax returns). If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under §26.109(c).

(k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. You may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under §26.89.

(l) As a recipient or UCP, you must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

(m) Except as otherwise provided in this paragraph, if an applicant for DBE certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time. As a recipient or UCP, you may not apply the waiting period provided under §26.86(c) of this part before allowing the applicant to resubmit its application. However, you may place the reapplication at the "end of the line," behind other applications that have been made since the firm's previous application was withdrawn. You may also apply the waiting period provided under §26.86(c) of this part to a firm that has established a pattern of frequently withdrawing applications before you make a decision.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003; 76 FR 5100, Jan. 28, 2011; 79 FR 59598, Oct. 2, 2014]

Back to Top

§26.85 Interstate certification.

(a) This section applies with respect to any firm that is currently certified in its home state.

(b) When a firm currently certified in its home state ("State A") applies to another State ("State B") for DBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures.

(1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.

(2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A's electronic directory or obtaining written confirmation from State A.

(c) In any situation in which State B chooses not to accept State A's certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your firm's certification. This includes affidavits of no change (*see* §26.83(j)) and any notices of changes (*see* §26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A's UCP or any other recipient concerning your application or status as a DBE firm.

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

(3) If you have filed a certification appeal with DOT (*see* §26.89), you must inform State B of the fact and provide your letter of appeal and DOT's response to State B.

(4) You must submit an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

(i) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by §26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct.

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (*see* §26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by "State A" or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) Determine whether there is good cause to believe that State A's certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

(i) Evidence that State A's certification was obtained by fraud;

(ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;

(iii) State A's certification was factually erroneous or was inconsistent with the requirements of this part;

(iv) The State law of State B requires a result different from that of the State law of State A.

(v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(3) If, as State B, unless you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms.

(4) If, as State B, you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility, or both. If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the firm's request.

(iii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B's notice. The firm is not otherwise responsible for further demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.

(v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.

(vi) The firm's application for certification is stayed pending the outcome of this process.

(vii) A decision under this paragraph (d)(4) may be appealed to the Departmental Office of Civil Rights under s§26.89 of this part.

(e) As State B, if you have not received from State A a copy of the site visit review report by a date 14 days after you have made a timely request for it, you may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.

(f)(1) As a UCP, when you deny a firm's application, reject the application of a firm certified in State A or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm, in whole or in part, you must make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. You must enter the following information:

(i) The name of the firm;

(ii) The name(s) of the firm's owner(s);

(iii) The type and date of the action;

(iv) The reason for the action.

(2) As a UCP, you must check the DOCR Web site at least once every month to determine whether any firm that is applying to you for certification or that you have already certified is on the list.

(3) For any such firm that is on the list, you must promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, you must provide a copy of the decision to the requesting UCP within 7 days of receiving the request. As the UCP receiving the decision, you must then consider the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.

(g) You must implement the requirements of this section beginning January 1, 2012.

[76 FR 5100, Jan. 28, 2011]

Back to Top

§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) [Reserved]

(c) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your DBE program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm. An applicant's appeal of your decision to the Department pursuant to §26.89 does not extend this period.

(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; 79 FR 59598, Oct. 2, 2014]

Back to Top

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

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an

anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in §26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (*i.e.*, an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information relevant to eligibility that has been concealed or misrepresented by the firm;

(4) A change in the certification standards or requirements of the Department since you certified the firm;

(5) Your decision to certify the firm was clearly erroneous;

(6) The firm has failed to cooperate with you (see §26.109(c));

(7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see §26.73(a)(2)); or

(8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.

(h) [Reserved]

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

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

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

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

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

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003; 76 FR 5101, Jan. 28, 2011; 79 FR 59599, Oct. 2, 2014]

Back to Top

§26.88 Summary suspension of certification.

(a) A recipient shall immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) of this part when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

(b)(1) A recipient may immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by §26.83(i) of this part or fails to timely file an affidavit of no change under §26.83(j).

(2) In determining the adequacy of the evidence to issue a suspension under paragraph (b)(1) of this section, the recipient shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

(c) The concerned operating administration may direct the recipient to take action pursuant to paragraph (a) or (b) this section if it determines that information available to it is sufficient to warrant immediate suspension.

(d) When a firm is suspended pursuant to paragraph (a) or (b) of this section, the recipient shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

(e) Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under §26.87 of this part to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

(f) While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward a recipient's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.

(g) Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide to the recipient information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the recipient must either lift the suspension and reinstate the firm's certification or commence a decertification action under §26.87 of this part. If the recipient commences a decertification proceeding, the suspension remains in effect during the proceeding.

(h) The decision to immediately suspend a DBE under paragraph (a) or (b) of this section is not appealable to the US Department of Transportation. The failure of a recipient to either lift the suspension and reinstate the firm or commence a decertification proceeding, as required by paragraph (g) of this section, is appealable to the U.S. Department of Transportation under §26.89 of this part, as a constructive decertification.

[79 FR 59599, Oct. 2, 2014]

Back to Top

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

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

(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: U.S. Department of Transportation, Departmental Office of Civil Rights, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.

(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 setting forth a full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal or in the interest of justice.

(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 as supplemented by the appeal. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may also supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, State, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

(f) As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.

(2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (*see* paragraph (d) of this section). The Department will also notify the SBA in writing when DOT takes an action on an appeal that results in or confirms a loss of eligibility to any SBA-certified firm. The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35556, June 16, 2003; 73 FR 33329, June 12, 2008; 79 FR 59599, Oct. 2, 2014]

Back to Top

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

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

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

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

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

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

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under §26.87. Such recipients must

not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

Back to Top

Subpart F—Compliance and Enforcement

Back to Top

§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.

Back to Top

§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.

Back to Top

§26.105 What enforcement actions apply in FAA programs?

(a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

(b) The provisions of §26.103(b) and this section apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

Back to Top

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

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.

(b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.

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

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5101, Jan. 28, 2011]

Back to Top

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

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

(2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under §26.89 of this part or to any other state to which the individual's firm has applied for certification under §26.85 of this part.

(b) *Confidentiality of information on complainants.* Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

(c) *Cooperation.* All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

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

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003; 76 FR 5101, Jan. 28, 2011]

Back to Top

Appendix A to Part 26—Guidance Concerning Good Faith Efforts

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make sufficient good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix.

The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (*i.e.*, obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. (1) Conducing market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.

(2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional Agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. (1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

(2) A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

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

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

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

V. In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in §26.53(b)(2)((vi), you must also require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

VI. A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.

[79 FR 59600, Oct. 2, 2014]

Back to Top

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

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

Recipients of Department of Transportation (DOT) funds are expected to keep accurate data regarding the contracting opportunities available to firms paid for with DOT dollars. Failure to submit contracting data relative to the DBE program will result in noncompliance with Part 26. All dollar values listed on this form should represent the DOT share attributable to the Operating Administration (OA): Federal Highway Administration (FHWA), Federal Aviation Administration (FAA) or Federal Transit Administration (FTA) to which this report will be submitted.

1. Indicate the DOT (OA) that provides your Federal financial assistance. If assistance comes from more than one OA, use separate reporting forms for each OA. If you are an FTA recipient, indicate your Vendor Number in the space provided.

2. If you are an FAA recipient, indicate the relevant AIP Numbers covered by this report. If you are an FTA recipient, indicate the Grant/Project numbers covered by this report. If more than ten attach a separate sheet.

3. Specify the Federal fiscal year (*i.e.*, October 1-September 30) in which the covered reporting period falls.

4. State the date of submission of this report.

5. Check the appropriate box that indicates the reporting period that the data provided in this report covers. For FHWA and FTA recipients, if this report is due June 1, data should cover October 1-March 31. If this report is due December 1, data should cover April 1-September 30. If the report is due to the FAA, data should cover the entire year.

6. Provide the name and address of the recipient.

7. State your overall DBE goal(s) established for the Federal fiscal year of the report being submitted to and approved by the relevant OA. Your overall goal is to be reported as well as the breakdown for specific Race Conscious and Race Neutral projections (both of which include gender-conscious/neutral projections). The Race Conscious projection should be based on measures that focus on and provide benefits only for DBEs. The use of contract goals is a primary example of a race conscious measure. The Race Neutral projection should include measures that, while benefiting DBEs, are not solely focused on DBE firms. For example, a small business outreach program, technical assistance, and prompt payment clauses can assist a wide variety of businesses in addition to helping DBE firms.

Section A: Awards and Commitments Made During This Period

The amounts in items 8(A)-10(I) should include all types of prime contracts awarded and all types of subcontracts awarded or committed, including: professional or consultant services, construction, purchase of materials or supplies, lease or purchase of equipment and any other types of services. All dollar amounts are to reflect only the Federal share of such contracts and should be rounded to the nearest dollar.

Line 8: Prime contracts awarded this period: The items on this line should correspond to the contracts directly between the recipient and a supply or service contractor, with no intermediaries between the two.

8(A). Provide the *total dollar amount* for all prime contracts assisted with DOT funds and awarded during this reporting period. This value should include the entire Federal share of the contracts without removing any amounts associated with resulting subcontracts.

8(B). Provide the *total number* of all prime contracts assisted with DOT funds and awarded during this reporting period.

8(C). From the total dollar amount awarded in item 8(A), provide the *dollar amount* awarded in prime contracts to certified DBE firms during this reporting period. This amount should not include the amounts sub contracted to other firms.

8(D). From the total number of prime contracts awarded in item 8(B), specify the *number* of prime contracts awarded to certified DBE firms during this reporting period.

8(E&F). This field is closed for data entry. Except for the very rare case of DBE-set asides permitted under 49 CFR part 26, all prime contracts awarded to DBES are regarded as race-neutral.

8(G). From the total dollar amount awarded in item 8(C), provide the *dollar amount* awarded to certified DBEs through the use of Race Neutral methods. See the definition of Race Neutral in item 7 and the explanation in item 8 of project types to include.

8(H). From the total number of prime contracts awarded in 8(D), specify the *number* awarded to DBEs through Race Neutral methods.

8(I). Of all prime contracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the dollar amount in item 8(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.

Line 9: Subcontracts awarded/committed this period: Items 9(A)-9(I) are derived in the same way as items 8(A)-8(I), except that these calculations should be based on subcontracts rather than prime contracts. Unlike prime contracts, which may only be awarded, subcontracts may be either awarded or committed.

9(A). If filling out the form for general reporting, provide the total dollar amount of subcontracts assisted with DOT funds awarded or committed during this period. This value should be a subset of the total dollars awarded in prime contracts in 8(A), and therefore should never be greater than the amount awarded in prime contracts. If filling out the form for project reporting, provide the total dollar amount of subcontracts assisted with DOT funds awarded or committed during this period. This value should be a subset of the total dollars awarded or previously in prime contracts in 8(A). The sum of all subcontract amounts in consecutive periods should never exceed the sum of all prime contract amounts awarded in those periods.

9(B). Provide the total number of all sub contracts assisted with DOT funds that were awarded or committed during this reporting period.

9(C). From the total dollar amount of sub contracts awarded/committed this period in item 9(A), provide the total dollar amount awarded in sub contracts to DBEs.

9(D). From the total number of sub contracts awarded or committed in item 9(B), specify the number of sub contracts awarded or committed to DBEs.

9(E). From the total dollar amount of sub contracts awarded or committed to DBEs this period, provide the amount in dollars to DBEs using Race Conscious measures.

9(F). From the total number of sub contracts awarded orcommitted to DBEs this period, provide the number of sub contracts awarded or committed to DBEs using Race Conscious measures.

9(G). From the total dollar amount of sub contracts awarded/committed to DBEs this period, provide the amount in dollars to DBEs using Race Neutral measures.

9(H). From the total number of sub contracts awarded/committed to DBEs this period, provide the number of sub contracts awarded to DBEs using Race Neutral measures.

9(I). Of all subcontracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the dollar amount in item 9(C) by the dollar amount in item 9(A) to derive this percentage. Round percentage to the nearest tenth.

Line 10: Total contracts awarded or committed this period. These fields should be used to show the total dollar value and number of contracts awarded to DBEs and to calculate the overall percentage of dollars awarded to DBEs.

10(A)-10(B). These fields are unavailable for data entry.

10(C-H). Combine the total values listed on the prime contracts line (Line 8) with the corresponding values on the subcontracts line (Line 9).

10(I). Of all contracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the total dollars awarded to DBEs in item 10(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.

Section B: Breakdown by Ethnicity & Gender of Contracts Awarded to DBEs This Period

11-17. Further breakdown the contracting activity with DBE involvement. The Total Dollar Amount to DBEs in 17(C) should equal the Total Dollar Amount to DBEs in 10(C). Likewise the total number of contracts to DBEs in 17(F) should equal the Total Number of Contracts to DBEs in 10(D).

Line 16: The “Non-Minority” category is reserved for any firms whose owners are not members of the presumptively disadvantaged groups already listed, but who are either “women” OR eligible for the DBE program on an individual basis. All DBE firms must be certified by the Unified Certification Program to be counted in this report.

Section C: Payments on Ongoing Contracts

Line 18(A-E). Submit information on contracts that are currently in progress. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.

18(A). Provide the total dollar amount paid to all firms performing work on contracts.

18(B). Provide the total number of contracts where work was performed during the reporting period.

18(C). From the total number of contracts provided in 18(A) provide the total number of contracts that are currently being performed by DBE firms for which payments have been made.

18(D). From the total dollar amount paid to all firms in 18(A), provide the total dollar value paid to DBE firms currently performing work during this period.

18(E). Provide the total number of DBE firms that received payment during this reporting period. For example, while 3 contracts may be active during this period, one DBE firm may be providing supplies or services on all three contracts. This field should only list the number of DBE firms performing work.

18(F). Of all payments made during this period, calculate the percentage going to DBEs. Divide the total dollar value to DBEs in item 18(D) by the total dollars of all payments in 18(B). Round percentage to the nearest tenth.

Section D: Actual Payments on Contracts Completed This Reporting Period

This section should provide information only on contracts that are closed during this period. All dollar amounts are to reflect the entire Federal share of such contracts, and should be rounded to the nearest dollar.

19(A). Provide the total number of contracts completed during this reporting period that used Race Conscious measures. Race Conscious contracts are those with contract goals or another race conscious measure.

19(B). Provide the total dollar value of prime contracts completed this reporting period that had race conscious measures.

19(C). From the total dollar value of prime contracts completed this period in 19(B), provide the total dollar amount of dollars awarded or committed to DBE firms in order to meet the contract goals. This applies only to Race Conscious contracts.

19(D). Provide the actual total DBE participation in dollars on the race conscious contracts completed this reporting period.

19(E). Of all the contracts completed this reporting period using Race Conscious measures, calculate the percentage of DBE participation. Divide the total dollar amount to DBEs in item 19(D) by the total dollar value provided in 19(B) to derive this percentage. Round to the nearest tenth.

20(A)-20(E). Items 21(A)-21(E) are derived in the same manner as items 19(A)-19(E), except these figures should be based on contracts completed using Race Neutral measures.

20(C). This field is closed.

21(A)-21(D). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above.

21(C). This field is closed.

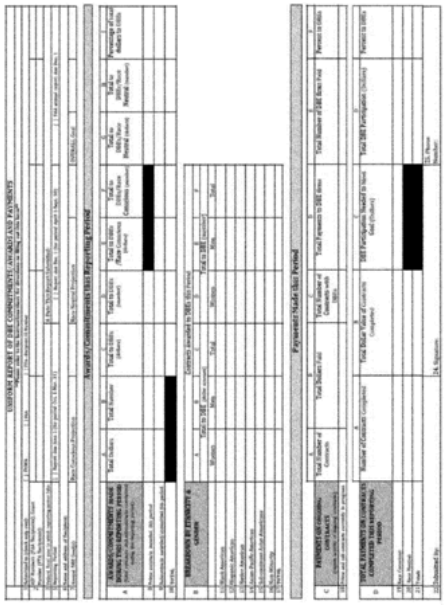
21(E). Calculate the overall percentage of dollars to DBEs on completed contracts. Divide the Total DBE participation dollar value in 21(D) by the Total Dollar Value of Contracts Completed in 21(B) to derive this percentage. Round to the nearest tenth.

23. Name of the Authorized Representative preparing this form.

24. Signature of the Authorized Representative.

25. Phone number of the Authorized Representative.

**Submit your completed report to your Regional or Division Office.



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[79 FR 59601, Oct. 2, 2014]

Back to Top

Appendix C to Part 26—DBE Business Development Program Guidelines

The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from the recipient.

(A) Each firm that participates in a recipient's business development program (BDP) program is subject to a program term determined by the recipient. The term should consist of two stages; a developmental stage and a transitional stage.

(B) In order for a firm to remain eligible for program participation, it must continue to meet all eligibility criteria contained in part 26.

(C) By no later than 6 months of program entry, the participant should develop and submit to the recipient a comprehensive business plan setting forth the participant's business targets, objectives and goals. The participant will not be eligible for program benefits until such business plan is submitted and approved by the recipient. The approved business plan will constitute the participant's short and long term goals and the strategy for developmental growth to the point of economic viability in non-traditional areas of work and/or work outside the DBE program.

(D) The business plan should contain at least the following:

(1) An analysis of market potential, competitive environment and other business analyses estimating the program participant's prospects for profitable operation during the term of program participation and after graduation from the program.

(2) An analysis of the firm's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts other than those in traditional areas of DBE participation.

(3) Specific targets, objectives, and goals for the business development of the participant during the next two years, utilizing the results of the analysis conducted pursuant to paragraphs (C) and (D)(1) of this appendix;

(4) Estimates of contract awards from the DBE program and from other sources which are needed to meet the objectives and goals for the years covered by the business plan; and

(5) Such other information as the recipient may require.

(E) Each participant should annually review its currently approved business plan with the recipient and modify the plan as may be appropriate to account for any changes in the firm's structure and redefined needs. The currently approved plan should be considered the applicable plan for all program purposes until the recipient approves in writing a modified plan. The recipient should establish an anniversary date for review of the participant's business plan and contract forecasts.

(F) Each participant should annually forecast in writing its need for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (E) of this appendix. Such forecast should be included in the participant's business plan. The forecast should include:

(1) The aggregate dollar value of contracts to be sought under the DBE program, reflecting compliance with the business plan;

(2) The aggregate dollar value of contracts to be sought in areas other than traditional areas of DBE participation;

(3) The types of contract opportunities being sought, based on the firm's primary line of business; and

(4) Such other information as may be requested by the recipient to aid in providing effective business development assistance to the participant.

(G) Program participation is divided into two stages; (1) a developmental stage and (2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.

(H) The length of service in the program term should not be a pre-set time frame for either the developmental or transitional stages but should be figured on the number of years considered necessary in normal progression of achieving the firm's established goals and objectives. The setting of such time could be factored on such items as, but not limited to, the number of contracts, aggregate amount of the contract received, years in business, growth potential, etc.

(I) Beginning in the first year of the transitional stage of program participation, each participant should annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations in areas other than traditional areas of DBE participation after graduation from the program. The transition management plan should be submitted to the recipient at the same time other modifications are submitted pursuant to the annual review under paragraph (E) of this section. The plan should set forth the same information as required under paragraph (F) of steps the participant will take to continue its business development after the expiration of its program term.

(J) When a participant is recognized as successfully completing the program by substantially achieving the targets, objectives and goals set forth in its program term, and has demonstrated the ability to compete in the marketplace, its further participation within the program may be determined by the recipient.

(K) In determining whether a concern has substantially achieved the goals and objectives of its business plan, the following factors, among others, should be considered by the recipient:

(1) Profitability;

(2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;

(3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;

(4) Ability to obtain bonding;

(5) A positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category; and

(6) Good management capacity and capability.

(L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient should notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification should set forth findings, based on the facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification should also provide the participant 45 days from the date of service of the letter to submit in writing information that would explain why the proposed basis of graduation is not warranted.

(M) Participation of a DBE firm in the program may be discontinued by the recipient prior to expiration of the firm's program term for good cause due to the failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance. Also, the recipient can discontinue the participation of a firm that does not actively pursue and bid on contracts, and a firm that, without justification, regularly fails to respond to solicitations in the type of work it is qualified for and in the geographical areas where it has indicated availability under its approved business plan. The recipient should take such action if over a 2-year period a DBE firm exhibits such a pattern.

Back to Top

Appendix D to Part 26—Mentor-Protégé Program Guidelines

(A) The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from other firms. To operate a mentor-protégé program, a recipient must obtain the approval of the concerned operating administration.

(B)(1) Any mentor-protégé relationship shall be based on a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.

(2) To be eligible for reimbursement, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts. The recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement.

(C) DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified *before* it begins participation in a mentor-protégé arrangement. If the recipient chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/ subcontractor mentor-protégé agreement.

Back to Top

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

The following guidance is adapted, with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR 124.103(c) and 124.104).

SOCIAL DISADVANTAGE

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(1) *Education.* Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) *Employment.* Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

(3) *Business history.* The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

II. With respect to paragraph I.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities—especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments)—may be socially and economically disadvantaged.

III. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, recipients must also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

ECONOMIC DISADVANTAGE

(A) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(B) *Submission of narrative and financial information.* (1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

(2) [Reserved]

(C) *Factors to be considered.* In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. Recipients will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

(D) *Transfers within two years.* (1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35559, June 16, 2003]

Back to Top

General Reporting

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

Awards/Commitments this Reporting Period

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

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

Payments Made this Period

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

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

49 CFR Part 26 Appendix B: Version 6(a)

Attachment 9

Uniform Report of DBE Commitments/Awards and Payments

Attachment 10

Unified Certification Agreement

U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

March 21, 2003

David Chandler
Chief of Labor Compliance
New Hampshire Department of Transportation
John O. Morton Building
1 Hazen Drive
Concord, New Hampshire 03302-0483

Dear Mr. Chandler:

The Department of Transportation (DOT) has reviewed the Unified Certification Program (UCP) you submitted to us on behalf of the New Hampshire Department of Transportation and other recipients of DOT financial assistance in New Hampshire. Your January 24, 2003 supplemental response, which is made part of the UCP, successfully accommodated the comments that DOT staff had provided to you on an earlier draft.

Consequently, I am pleased to approve the New Hampshire UCP as provided by the Department's disadvantaged business enterprise regulations (49 CFR § 26.81(a)(4)). Please remember that any inconsistency or ambiguity in the UCP agreement shall be resolved by giving precedence to the following in this order: 49 CFR 23/26, USDOT Directives, DBE Program as approved by DOT and applicable New Hampshire regulations.

We look forward to working with you as you implement the UCP.

Sincerely yours,

Kirk K. Van Tine
General Counsel

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

CAROL A. MURRAY
Commissioner

GILBERT S. ROGERS
Assistant Commissioner

January 24, 2003

US Department of Transportation

Office of the General Council
Unified Certification Program
Attn: Bob Ashby
Room 10428
400 Seventh Street, SW
Washington, DC 20590

Dear Mr. Ashby,

The New Hampshire Department of Transportation (NHDOT) submits the following responses to the Review Team's consolidated comments, which are intended to supplement and clarify New Hampshire's Unified Certification Plan (UCP), previously submitted to the U.S. Department of Transportation (USDOT) on March 6, 2002:

1. **Certification Resources**: Since the inception of the DBE Program, the NHDOT has served as the certifying agency for all USDOT recipients in New Hampshire. Through its Labor Compliance Office the NHDOT has been responsible for implementing all aspects of the DBE program, on behalf of all New Hampshire USDOT recipients, including all certification requirements of 49 CFR Part 26, Subpart E.

   The NHDOT Labor Compliance Office is staffed with sufficient resources to carry out the responsibilities imposed by the UCP, including oversight and administration of the DBE certification program. The following personnel assigned to the Labor Compliance Office have specific duties and responsibilities related to the administration of the DBE Program:

   - **Chief of Labor Compliance**, who is designated as the NHDOT DBE Liaison Officer (DBELO). The DBELO has the responsibility for implementing all aspects of the DBE program and insuring compliance provisions of 49 CFR Part 26. For the UCP, the DBELO is designated as the certifying official for all DBE program applicants. In this capacity, the DBELO makes all certification recommendations on behalf of NHDOT and all other New Hampshire USDOT recipients, and cooperates fully with oversight, review, and monitoring activities of the same.

- **DBE Coordinator**, who is assigned to the DBE program and is responsible for administering the day-to-day management of the program.

- **DBE Supportive Services Consultant**, who provides technical assistance, marketing, and certification program support through a one-year consultant contract.

The personnel listed above routinely perform duties essential to fulfilling program requirements, including certification on behalf of all USDOT recipients. The NHDOT will continue to bear sole responsibility for all costs and expenses associated with the UCP; there will not be any cost sharing from other recipients in order to fulfill any UCP requirement, including the maintenance, publication, and distribution of a Unified DBE Directory. The NHDOT currently publishes and distributes the Directory in hard copy three times annually. The Directory is also available to the public electronically on the NHDOT website, where it is updated monthly. An annual DBE update verifies the continued eligibility status of each firm. The Directory is searchable by DBE scope of work and can be viewed and/or downloaded at: http://www.state.nh.us/dot/business.htm.

2. **Certification Process and Procedure:** Our certification application form and other documentation requirements are described more fully in our Program Plan, approved by USDOT, and incorporated herein by reference.

The certification process and application form are available in MS Word or Adobe formats, plus Program Information, other documentation requirements and resources can be easily accessed through the NHDOT Website, Business Center page. Information and forms are also available via regular mail and fax.

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

Jay Ankenbrock, DBE Coordinator
Labor Compliance Office
New Hampshire Department of Transportation
1 Hazen Drive
PO Box 483
Concord, NH 03302-0483
Phone: 603-271-6612
Fax: 603-271-8817
e-mail: jankenbrock@dot.state.nh.us

The NHDOT processes all certification applications in a timely manner: The DBE Coordinator reviews DBE applications received by the Labor Compliance Office within five business days. For New Hampshire based businesses a copy is forwarded to the DBE Supportive Services Consultant for review as well. Within one week of receipt of the application the applicant is contacted by the DBE Coordinator to set up a date and time for a site visit. Site visits are generally made within the following fourteen days. Throughout the review and site visit process all criteria in 49 CFR Part 26, Subpart D-Certification Standards, are used to determine the applicant's eligibility. Within five business days of the site visit, a report is submitted to the DBE Liaison Officer for final review and approval. The DBELO makes a determination within two business days, and the appropriate documents are forwarded to the applicant.

The DBE Coordinator verifies home-State certification documentation, Personal Net Worth, and business size of all firms seeking reciprocal certification. The Coordinator in turn submits this documentation along with a recommendation to the DBE Liaison Officer. Firms not certified by the UCP in the state in which it maintains its principle place of business, and that do not have certification based on USDOT 49 CFR, Part 26 criteria, will not be certified.

Decertification: In the event we propose to remove a DBE's certification, we follow procedures consistent with §26.87. To ensure separation of functions in the decertification process, the NHDOT Hearings Examiner serves as the decision maker in all proceedings. Prior to any decertification hearing, the Hearings Examiner will not have participated in any way in a preliminary finding regarding a firm's ineligibility.

If a decision is made to decertify or deny a firm's application, the firm may not reapply for six months. A written explanation documenting the reasons for denial or removal is provided.

3. **Appeals Process:** The NHDOT provides the following clarification of the process for certification appeals to the Department of Transportation, as more fully detailed in our DBE Program Plan:

Any firm or complainant may appeal our decision in a certification matter to DOT for a period of ninety days of the date of the final decision. Such appeals may be sent to:

U.S. Department of Transportation
Office of Civil Rights
Certification Appeals Branch
400 7th Street, SW, Room 2104
Washington, DC 20590

We will promptly implement any DOT certification appeal decisions affecting the eligibility of DBEs for the UCP (e.g., certify a firm if DOT has determined that our denial of its application was erroneous).

We hope that this addendum has clarified New Hampshire's UCP, as originally submitted. Feel free to contact me if you require any additional information or documentation concerning our program.

Sincerely yours,

David Chandler
Chief of Labor Compliance

U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

RECEIVED
JUN 20 2002
NH DOT
LABOR COMPLIANCE

June 14, 2002

Ms. Rachel Gagnon
DBE Liaison Officer
The State of New Hampshire
Department of Transportation
1 Hazen Drive
Concord, New Hampshire 03302-0483

RE: Unified Certification Program Agreement

Dear Ms. Gagnon:

Thank you for submitting the Unified Certification Program (UCP) for the State of New Hampshire. Your submission was received by the Department of Transportation (DOT) on March 18, 2002. The DOT regulations require that the Secretary review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions within 180 days of receipt or it will be deemed accepted. See 49 C.F.R. §26.81(4). By memorandum dated March 13, 2002, the Secretary delegated this authority to the General Counsel.

As part of the review process, the General Counsel established an internal process in which a team of DOT employees will review the UCP. The team is comprised of at least one person from each Modal Administration (the Federal Aviation Administration, the Federal Highway Administration and the Federal Transit Administration) as well as someone from the General Counsel's Office and the Departmental Office of Civil Rights or the Office of Small and Disadvantaged Business Utilization. However, I will be your point of contact, so please feel free to contact me with any questions you have. I can be reached at (202) 366-0365.

Based on our review, we are remanding New Hampshire's UCP to you for revisions. Please call me if you wish to discuss the attached comments.

Sincerely,

Laura Aguilar

Laura.Aguilar@OST.DOT.GOV
Office of the General Counsel

Alternate POC
Bob Ashby 1(202)366-9306

Attachment

CONSOLIDATED COMMENTS
ON NEW HAMPSHIRE'S UCP
(June 14, 2002)

SEE "INTRNT"

You submitted a Unified Certification Program Agreement (UCP) indicating that the signatories will follow the UCP. However, there is no explanation of what the UCP is or how it will operate. For example, the agreement indicates that a DBE Liaison Officer will make all certification decisions on behalf of the New Hampshire Department of Transportation (NHDOT) and its recipients. Are any recipients other than NHDOT doing certifications now or in the recent past? If so, there needs to be a process for consolidating the existing certifications and resolving any inconsistencies.

There are several requirements of §26.81 (a)(2) that are not referenced in the document. These requirements, many of which are outlined below, should be explicitly stated *and explained* in the UCP.

1. The UCP must follow all certification procedures and standards of 49 CFR Part 26, Subpart E, on the same basis as recipients. Explain the actual procedures. For example, where does an applicant firm submit its application? With a recipient? Directly to the DBE Liaison Officer? Will the DBE Liaison Officer also process the application and conduct the on-site reviews? Will the DBE Liaison Officer also do concessionaire certifications for firms applying for DBE eligibility as concessionaires? How will the applications be processed? What are the time frames for making decisions on certification matters? What is the process for ineligibility complaints and decertification?

TERMS

2. The UCP must cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations.

TERMS

3. The UCP must implement DOT directives and guidance concerning certification matters. The agreement must also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of 49 CFR Part 26, Subpart E. What resources are needed for NHDOT to fulfill its certification responsibilities for all recipients in New Hampshire? Will these resources be different from what presently exists? Are the needed resources committed and do other recipients share in the cost of the UCP? If yes, what arrangement is in place to reflect this and to authorize an exchange of funds?

IS THE LIAISON OFFICER

4. The agreement is required to 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 (i.e., a timetable or calendar). If the UCP will be implemented upon approval of DOT, then no timetable is necessary.

ALREADY IMPLEMENTED

5. 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 it principal place of business. Explain how such firms will be handled under the UCP.

6. Explain how decisions will be communicated to other interested parties (both firms and other recipients).

7. Each UCP is required to maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under these regulations), the information required by 49 CFR Part 26, Section 26.31. The UCP must make the directory available to the public electronically, on the Internet, as well as in print. The UCP must update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made. Explain who will maintain the directory and how often it will be updated. Will DBE firms submit changes or annual updates to the DBE Liaison Officer?

8. All direct recipients must be signatories to the UCP and indirect recipients must be covered by the agreement (e.g., subgrant agreement). Does your submission represent all recipients in the state that are required to participate in the UCP? How will subrecipients be bound by the UCP?

The UCP may take any form acceptable to the recipients in New Hampshire; however, this submission fails to state what the program is and how it will be implemented.

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

CAROL A. MURRAY
Commissioner

GILBERT S. ROGERS
Assistant Commissioner

March 6, 2002

US Department of Transportation
Office of the General Counsel
Uniform Certification Program
Room 10428
400 Seventh Street, SW
Washington, DC 20590

Re: Unified Certification Program Agreement

Enclosed are two copies of the signed UCP Agreement for the State of New Hampshire. Also, enclosed is the electronic copy, on disk and in a Microsoft Word format.

If this office can be of further assistance, please contact 603-271-6612.

Sincerely,

Rachel E. Gagnon
DBE Liaison Officer

cc: David Chandler, Chief of Labor Compliance
Walter Waidelich, Federal Highway Administration

JOHN O. MORTON BUILDING - 1 HAZEN DRIVE - P.O. BOX 483 - CONCORD, N.H. 03302-0483.
TELEPHONE: 603-271-3734 - FAX: 603-271-3914 - TDD ACCESS: RELAY NH 1-800-735-2964 - WWW.NHDOT.COM

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM
Unified Certification Program Agreement

Reference: Subpart E of 49 CFR part 26, Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.

Background: With the publication of DBE Program in the Federal Register on February 8th, 1999, The U.S Department of Transportation (USDOT) established new standards for the implementation of the Disadvantaged Enterprise Program. These new procedures required that each State Highway Agency establish a Unified Certification Program (UCP) by March 4th, 2002.

The establishment of a UCP will recognize current procedures as the "approved" standard for DBE certification. As with past certification procedures, the UCP will not place undue burden on the NHDOT or its operating administrations.

Intent: The intent of the UCP is to establish standard procedures and make certification decisions on behalf of all USDOT recipients in the state with respect to the DBE program.

Terms: This agreement acknowledges the NHDOT's DBE Liaison Officer as the certifying official for all DBE program applicants. In this capacity, the DBE Liaison Officer will make all certification decisions on behalf of the NHDOT and its recipients and cooperate fully with oversight, review, and monitoring activities of the same. Additionally, the NHDOT's DBE Liaison Officer will ensure that all program recipients' EEO obligations are met.

In recognition of the Unified Certification Program, we, the signatories herein, dually agree to the terms set forth by this agreement and the mutual objectives listed below:

1. All USDOT recipients will participate in the UCP.

2. The NHDOT DBE Liaison Officer shall manage the UCP and make all DBE certification decisions on behalf of the NHDOT and its recipients.

3. All certifications shall be considered contract pre-certifications.

4. The 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 which it maintains as the principal place of business.

5. The NHDOT DBE Liaison Officer will maintain a unified DBE Directory for all firms certified under the auspices of the UCP, to be posted and available to the public electronically on the NHDOT website and in print.

SIGNATORIES

Rachel E. Gagnon, DBE Liaison Officer	3/4/02 Date	NH Department of Transportation Labor Compliance Office (FHWA)
James F. Marshall, Director of Public Works and Transportation	2/28/02 Date	NH Department of Transportation Bureau of Rail & Transit (Transit)
Van Chesnut	3/5/02 Date	Advanced Transit, Inc. (Transit)
Steven Wells	2/22/02 Date	COAST (Transit)
Micky McIver	2-19-02 Date	Community Action Program Belknap-Merrimack Counties (Transit)
David Smith	2/22/02 Date	Manchester Transit Authority (Transit)
Sheila O'Riordan	2/27/02 Date	City of Nashua (Transit)
Jack W. Ferns, Director of Aeronautics	2/28/02 Date	NH Department of Transportation Bureau of Aeronautics (Aviation)
Eric Kaminsky, Airport Manager	2/10/02 Date	Berlin Municipal Airport (Aviation)
Jayne O'Connor, Chairman MWRA Commission	2/12/02 Date	Mount Washington Regional Airport (Aviation)
Timothy J. Edwards, Airport Manager	Date	Lebanon Regional Airport (Aviation)
Peter Chase, Fire Chief	FOR PETER CHASE 2-27-02 Date	Claremont Regional Airport (Aviation)
Duncan Ballentyne, City Manager	3-4-02 Date	Concord Regional Airport (Aviation)
Ed Mattern, Airport Director	2-27-02 Date	Dillant-Hopkins Airport (Keene) (Aviation)
Elizabeth Cepaitis, Chairman	Date	Boirefield Airport (Nashua) (Aviation)
Kevin A. Dillion, Airport Manager	2/21/2002 Date	Manchester Airport (Aviation)
George Meyer	2/28/02 Date	Pease Development Authority (Aviation)
Mark Fraser, Chairman	2/26/02 Date	Laconia Regional Airport (Aviation)

Attachment 11

Annual Affidavit of No Change

NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION
DISADVANTAGED BUSINESS ENTERPRISE (DBE)
AFFIDAVIT OF NO CHANGE

---This form must be signed by <u>each</u> disadvantaged owner and notarized---

Firm Name: _____

Mailing Address: _____

Street Address (if different): _____

Telephone: (_____) _____-_____ Fax: (_____) _____-_____

E-Mail: _____

Federal Identification Number: _____

Any misrepresentation made in this Affidavit will be grounds for initiating proceedings to remove your firm's DBE certification status with the New Hampshire DBE Certification Program. If your firm does not meet the eligibility criteria to be certified as a DBE and attempts to participate in the DBE program are based on false, fraudulent or deceitful representations, the U. S. Department of Transportation may initiate suspension or debarment proceedings against your firm; and other enforcement action may be taken against you including referral for prosecution under applicable Federal and State statutes.

As required by Title 49, Code of Federal Regulations (CFR) Part 26, Subpart E, Section 26.83(j), I/We, the undersigned, affirm that there have been no changes in my/our firm's circumstances affecting its ability to meet the size, disadvantaged status, ownership, or control requirements of 49 CFR Part 26.

I/We, the undersigned, affirm the personal net worth of each owner, whose ownership is relied upon for disadvantaged status, does not exceed $1,320,000.

I/We further affirm that there have been no material changes in the information provided with my/our firm's application for certification, except for any changes about which I/we have previously provided written notification to the New Hampshire Department of Transportation, Office of Federal Compliance, DBE Certification Department pursuant to 49 CFR §26.83(i).

I/We further affirm that the above referenced firm, including its affiliates as defined by the Small Business Administration (SBA), continues to meet the SBA business size criteria and the overall gross receipts cap of 49 CFR Part 26. More specifically, I/we affirm that the average annual gross receipts for my/our firm and its affiliates, as defined by SBA regulations (see 13 CFR §121.402), do not exceed the thresholds referenced in 49 CFR §26.65 over the firm's previous three fiscal years.

I/we have provided gross receipts for the previous three fiscal years for the above referenced firm, including its affiliates.

Year _____ Gross Receipts of DBE Firm $_____ Gross Receipts of Affiliate Firms $_____
Year _____ Gross Receipts of DBE Firm $_____ Gross Receipts of Affiliate Firms $_____
Year _____ Gross Receipts of DBE Firm $_____ Gross Receipts of Affiliate Firms $_____

I/We have provided herewith the following supporting documentation of my/our firm's size and gross receipts to support this affidavit:

- Signed and dated copies of Federal Tax return(s) for the most recently filed tax year (including **all** Schedules) for the DBE firm ***and all of its affiliates***. If a sole proprietorship, Personal Federal Tax returns must be submitted.

Under penalty of perjury of the laws of the United States, I/we certify to the truthfulness of the affirmations made in this affidavit and the accuracy of the information in the supporting documentation provided herewith.

_____ _____
Printed Name Signature

_____ _____
Printed Name Signature

State of _____, City/County of _____

On this ____ day of _____, 20___, before me appeared the above-named individual(s) to me personally known, who being duly sworn, did execute the foregoing affidavit and did state that he/she/they was/were properly authorized to execute this affidavit and did so as a free act and deed.

(Seal/Stamp)

_____ Commission Expires: _____
Notary Public