

DBE Program Training

Certification, Contract Administration and
Compliance



Training Dates: July 20, 21, 22

Training provided by Martha G. Kenley, National DBE Program Manager, FHWA



1. **Electronic Code of Federal Regulations**
2. **Official Questions and Answers (Q&A's) DBE Program Regulation**
3. **Tips for Goal Setting Disadvantaged Business Enterprise (DBE) Program**
4. **Commercially Useful Function**
5. **1999 DBE Preamble**
6. **2000 DBE Preamble interim Final Rule**
7. **2003 DBE Preamble**
8. **Final Rule**
9. **Presentation**
10. **Notes**

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Title 49: Transportation

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

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

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

Subpart A—General



§ 26.1 What are the objectives of this part?



This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- (b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- (c) To ensure that the Department's **DBE** program is narrowly tailored in accordance with applicable law;

(d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;

(e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;

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

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

§ 26.3 To whom does this part apply?



(a) If you are a recipient of any of the following types of funds, this part applies to you:

(1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102–240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA–21), Pub. L. 105–178, 112 Stat. 107.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102–240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA–21, Pub. L. 105–178.

(3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

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



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

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

(i) One concern controls or has the power to control the other; or

(ii) A third party or parties controls or has the power to control both; or

(iii) An identity of interest between or among parties exists such that affiliation may be found.

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

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a

minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Primary industry classification means the North American Industrial Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the *North American Industry Classification Manual—United States, 1997* which is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA, 22161; by calling 1 (800) 553-6847; or via the Internet at: <http://www.ntis.gov/product/naics.htm>.

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

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

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

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

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

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

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

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

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

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

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

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

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a

case-by-case basis.

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

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

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

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

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

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

(vi) Women;

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

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

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

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

§ 26.7 What discriminatory actions are forbidden?



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(a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your **DBE** program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

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



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

(b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or

any of its operating administrations, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

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

[72 FR 15617, Apr. 2, 2007]

§ 26.11 What records do recipients keep and report?



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

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

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

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

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

(i) Firm name;

(ii) Firm address;

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

(iv) Age of the firm; and

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

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

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

§ 26.13 What assurances must recipients and contractors make?



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

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its **DBE** program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and

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

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

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

§ 26.15 How can recipients apply for exemptions or waivers?



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(a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a **DBE** program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the **DBE** community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that—

(i) There is a reasonable basis to conclude that you could achieve a level of **DBE** participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;

(ii) Conditions in your jurisdiction are appropriate for implementing the proposal;

(iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and

(iv) Your proposal is consistent with applicable law and program requirements of the concerned operating administration's financial assistance program.

(3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your **DBE** program as provided in your proposal, subject to the following conditions:

(i) **DBE** eligibility is determined as provided in subparts D and E of this part, and **DBE** participation is counted as provided in §26.49;

- (ii) Your level of **DBE** participation continues to be consistent with the objectives of this part;
- (iii) There is a reasonable limitation on the duration of your modified program; and
- (iv) Any other conditions the Secretary makes on the grant of the waiver.

(4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

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



§ 26.21 Who must have a **DBE** program?



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

- (1) All FHWA recipients receiving funds authorized by a statute to which this part applies;
- (2) FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) exceeding \$250,000 in FTA funds in a Federal fiscal year;
- (3) FAA recipients receiving grants for airport planning or development who will award prime contracts exceeding \$250,000 in FAA funds in a Federal fiscal year.

(b)(1) You must submit a **DBE** program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not have to submit regular updates of your **DBE** programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your **DBE** program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

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

§ 26.23 What is the requirement for a policy statement?



You must issue a signed and dated policy statement that expresses your commitment to your **DBE** program, states its objectives, and outlines responsibilities for its implementation. You must circulate the statement throughout your organization and to the **DBE** and non-**DBE** business communities that perform work on your DOT-assisted contracts.

§ 26.25 What is the requirement for a liaison officer?



You must have a **DBE** liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning **DBE** program matters. The liaison officer shall be responsible for implementing all aspects of your **DBE** program. You must also have adequate staff to administer the program in compliance with this part.

§ 26.27 What efforts must recipients make concerning **DBE** financial institutions?



You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

§ 26.29 What prompt payment mechanisms must recipients have?



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

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

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

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

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

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

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

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

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

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

(3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs

and other contractors are fully and promptly paid.

[68 FR 35553, June 16, 2003]

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



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

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

[76 FR 5096, Jan. 28, 2011]

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



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

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

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

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



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

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

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

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

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

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

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

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

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



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

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

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

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

§ 26.39 Fostering small business participation.



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

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

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

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

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

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

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

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

[76 FR 5097, Jan. 28, 2011]

Subpart C—Goals, Good Faith Efforts, and Counting



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



(a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.

(c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

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



(a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.

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

§ 26.45 How do recipients set overall goals?



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

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

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

(c) *Step 1.* You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a

base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.

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

(2) Use a *bidders list*. Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same time period. Divide the number of **DBE** bidders and quoters by the number for all businesses to derive a base figure for the relative availability of DBEs in your market.

(3) Use *data from a disparity study*. Use a percentage figure derived from data in a valid, applicable disparity study.

(4) Use *the goal of another DOT recipient*. If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) *Alternative methods*. You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.

(d) *Step 2*. Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

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

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

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

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

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

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

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

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

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this

section, you should express your overall goal as follows:

- (1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming three fiscal years.
- (2) If you are an FTA or FAA recipient, as a percentage of all FT or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the three forthcoming fiscal years.
- (3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.
 - (i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.
 - (ii) A project goal covers the entire length of the project to which it applies.
 - (iii) The project goal should include a projection of the **DBE** participation anticipated to be obtained during each fiscal year covered by the project goal.
 - (iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.
- (f)(1)(i) If you set your overall goal on a fiscal year basis, you must submit it to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency's Web site.
 - (ii) You may adjust your three-year overall goal during the three-year period to which it applies, in order to reflect changed circumstances. You must submit such an adjustment to the concerned operating administration for review and approval.
 - (iii) The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.
 - (iv) While you are required to submit an overall goal to FHWA, FTA, or FAA only every three years, the overall goal and the provisions of Sec. 26.47(c) apply to each year during that three-year period.
 - (v) You may make, for informational purposes, projections of your expected **DBE** achievements during each of the three years covered by your overall goal. However, it is the overall goal itself, and not these informational projections, to which the provisions of section 26.47(c) of this part apply.
- (2) If you are a recipient and set your overall goal on a project or grant basis as provided in paragraph (e)(3) of this section, you must submit the goal for review at a time determined by the FHWA, FTA or FAA Administrator, as applicable.
- (3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence you relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see 26.51(c)).
- (4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.
- (5) If you need additional time to collect data or take other steps to develop an approach to setting

overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

(3)(i) If you are a state highway agency; one of the 50 largest transit authorities as determined by the FTA; or an Operational Evolution Partnership Plan airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed

under paragraphs (c)(1) and (2) of this section to the appropriate operating administration for approval. If the operating administration approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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



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

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

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under §26.39 of this part.

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

(3) Providing technical assistance and other services;

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

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

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

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

(8) Ensuring distribution of your **DBE** directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract

may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

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

(f) To ensure that your **DBE** program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year, unless it becomes necessary in order to meet your overall goal.

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

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

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

Example to paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent **DBE** participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of **DBE** goals. By September, you have already obtained 11 percent **DBE** participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent **DBE** participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the **DBE** participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The **DBE** participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional **DBE** participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your **DBE** participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of

contract goals in that year.

(4) If you obtain **DBE** participation that exceeds your overall goal in two consecutive years through the use of contract goals (*i.e.* , not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

Example to paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent **DBE** participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent **DBE** participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (*i.e.* , from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two *consecutive* years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on **DBE** achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in §26.11.

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

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



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

(1) Documents that it has obtained enough **DBE** participation to meet the goal; or

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

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

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of **DBE** firms that will participate in the contract;

(ii) A description of the work that each **DBE** will perform;

(iii) The dollar amount of the participation of each **DBE** firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a **DBE** subcontractor whose participation it submits to meet a contract goal;

(v) Written confirmation from the **DBE** that it is participating in the contract as provided in the prime contractor's commitment; and

- (vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part); and
- (3) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—
- (i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or
- (ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.
- (c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.
- (d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.
- (1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.
- (2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.
- (3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.
- (4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.
- (5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.
- (e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.
- (f)(1) You must require that a prime contractor not terminate a **DBE** subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute **DBE** firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a **DBE** subcontractor with its own forces or those of an affiliate, a non-**DBE** firm, or with another **DBE** firm.
- (2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the **DBE** firm.
- (3) For purposes of this paragraph, good cause includes the following circumstances:
- (i) The listed **DBE** subcontractor fails or refuses to execute a written contract;
- (ii) The listed **DBE** subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the **DBE** subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
- (iii) The listed **DBE** subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.

- (iv) The listed **DBE** subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
 - (v) The listed **DBE** subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;
 - (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, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another **DBE** subcontractor to substitute for the original **DBE**. These good faith efforts shall be directed at finding another **DBE** to perform at least the same amount of work under the contract as the **DBE** that was terminated, to the extent needed to meet the contract goal you established for the procurement.
- (h) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.
- (i) You must apply the requirements of this section to **DBE** bidders/offerors for prime contracts. In determining whether a **DBE** bidder/offeror for a prime contract has met a contract goal, you count the work the **DBE** has committed to performing with its own forces as well as the work that it has committed to be performed by **DBE** subcontractors and **DBE** suppliers.

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) The **DBE** may also lease trucks from a non-**DBE** firm, including from an owner-operator. The **DBE** who leases trucks from a non-**DBE** is entitled to credit for the total value of transportation services

provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate Department Operating Administration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subpart D—Certification Standards



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



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

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

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

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

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

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

§ 26.63 What rules govern group membership determinations?



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

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

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

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

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

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

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

§ 26.65 What rules govern business size determinations?



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

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible **DBE** in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$22.41 million.

(c) The Department adjusts the number in paragraph (b) of this section annually using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.

[74 FR 15224, Apr. 3, 2009]

§ 26.67 What rules determine social and economic disadvantage?



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

(2)(i) You must require each individual owner of a firm applying to participate as a **DBE**, whose ownership and control are relied upon for **DBE** certification to certify that he or she has a personal net worth that does not exceed \$1.32 million.

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

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

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

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

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

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

were distributed at the present time.

(iv) Notwithstanding any provision of Federal or state law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under section 26.89 of this part or to any other state to which the individual's firm has applied for certification under §26.85 of this part.

(b) *Rebuttal of presumption of disadvantage.* (1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

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

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

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of **DBE** eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(c) [Reserved]

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for **DBE** certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for **DBE** certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35554, June 16, 2003; 76 FR 5099, Jan. 28, 2011]

§ 26.69 What rules govern determinations of ownership?



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

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

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

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

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

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

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

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

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

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

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

(1) The owner's expertise must be—

(i) In a specialized field;

(ii) Of outstanding quality;

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

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

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

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

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

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

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

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

(h)(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual

or non-**DBE** firm who is—

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that—

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a **DBE**; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for **DBE** certification.

(j) You may consider the following factors in determining the ownership of a firm. However, you must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because—

(1) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (h) of this section;

(2) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or

(3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, you must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

§ 26.71 What rules govern determinations concerning control?



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

(b) Only an independent business may be certified as a **DBE**. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential **DBE** is an independent business, you must scrutinize relationships with non-**DBE** firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential **DBE** and non-**DBE** firms or persons associated with non-**DBE** firms compromise the independence of the potential **DBE** firm.

(3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential **DBE** firm.

(4) In considering factors related to the independence of a potential **DBE** firm, you must consider the consistency of relationships between the potential **DBE** and non-**DBE** firms with normal industry practice.

(c) A **DBE** firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in §26.69(j)(2).

(d) The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not socially and economically disadvantaged may be involved in a **DBE** firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

(h) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who

own and control a potential **DBE** firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

(i)(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a **DBE**. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

(j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(k)(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

(l) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a **DBE**; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

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

(n) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You must not require

that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(1) The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available NAICS code for that type of work. If you choose, you may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. If your Directory does not list types of work for any firm in a manner consistent with this paragraph (a)(1), you must update the Directory entry for that firm to meet the requirements of this paragraph (a)(1) by August 28, 2011.

(2) Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

(3) If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a **DBE**, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward **DBE** goals.

(4) A certifier is not precluded from changing a certification classification or description if there is a factual basis in the record. However, certifiers must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5099, Jan. 28, 2011]

§ 26.73 What are other rules affecting certification?



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

(2) You may consider, in making certification decisions, whether a firm has exhibited a pattern of

conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the **DBE** program.

(b)(1) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.

(2) You must not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of this Part, the firm is eligible for certification.

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

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

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

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

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

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

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

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

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

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

Example 6: The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of §26.65(b). Under the rules concerning affiliation, the subsidiary fails

to meet the size standard and cannot be certified.

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

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

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

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

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

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

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

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

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003; 76 FR 5099, Jan. 28, 2011]

Subpart E—Certification Procedures



§ 26.81 What are the requirements for Unified Certification Programs?



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5100, Jan. 28, 2011]

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



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

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

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

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their résumés and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification;

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

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

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

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

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

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

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

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

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

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

(e) [Reserved]

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

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

(h) Once you have certified a **DBE**, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of section 26.87. You may not require DBEs to reapply for certification or require "recertification" of currently certified firms. However, you may conduct a certification review of a certified **DBE** firm, including a new on-site review, three years from the date of the firm's most recent certification, or sooner if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section), a complaint, or other information concerning the firm's eligibility. If you have grounds to question the firm's eligibility, you may conduct an on-site review on an unannounced basis, at the firm's offices and jobsites.

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

(1) Changes in management responsibility among members of a limited liability company are covered by this requirement.

(2) You must attach supporting documentation describing in detail the nature of such changes.

(3) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under §26.109(c).

(j) If you are a **DBE**, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under §26.109(c).

(k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. You may establish a different time frame in your **DBE** program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under §26.89.

(l) As a recipient or UCP, you must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

(m) Except as otherwise provided in this paragraph, if an applicant for **DBE** certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time. As a recipient or UCP, you may not apply the waiting period provided under §26.86(c) of this part before allowing the applicant to resubmit its application. However, you may place the reapplication at the "end of the line," behind other applications that have been made since the firm's previous application was withdrawn. You may also apply the waiting period provided under §26.86(c) of this part to a firm that has established a pattern of frequently withdrawing applications before you make a decision.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003; 76 FR 5100, Jan. 28, 2011]

§ 26.85 Interstate certification.



(a) This section applies with respect to any firm that is currently certified in its home state.

(b) When a firm currently certified in its home state ("State A") applies to another State ("State B") for **DBE** certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures.

(1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.

(2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A's electronic directory or obtaining written confirmation from State A.

(c) In any situation in which State B chooses not to accept State A's certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your firm's certification. This includes affidavits of no change (see §26.83(j)) and any notices of changes (see §26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A's UCP or any other recipient concerning your application or status as a **DBE** firm.

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

(3) If you have filed a certification appeal with DOT (see §26.89), you must inform State B of the fact and provide your letter of appeal and DOT's response to State B.

(4) You must submit an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

(i) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by §26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct.

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (see §26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by "State A" or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) Determine whether there is good cause to believe that State A's certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

(i) Evidence that State A's certification was obtained by fraud;

(ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;

(iii) State A's certification was factually erroneous or was inconsistent with the requirements of this part;

(iv) The State law of State B requires a result different from that of the State law of State A.

(v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(3) If, as State B, unless you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms.

(4) If, as State B, you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for **DBE** eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility, or both. If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the firm's request.

(iii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B's notice. The firm is not otherwise responsible for further demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.

(v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.

(vi) The firm's application for certification is stayed pending the outcome of this process.

(vii) A decision under this paragraph (d)(4) may be appealed to the Departmental Office of Civil Rights under s§26.89 of this part.

(e) As State B, if you have not received from State A a copy of the site visit review report by a date 14 days after you have made a timely request for it, you may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.

(f)(1) As a UCP, when you deny a firm's application, reject the application of a firm certified in State A or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm, in whole or in part, you must make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. You must enter the following information:

(i) The name of the firm;

(ii) The name(s) of the firm's owner(s);

(iii) The type and date of the action;

(iv) The reason for the action.

(2) As a UCP, you must check the DOCR Web site at least once every month to determine whether any firm that is applying to you for certification or that you have already certified is on the list.

(3) For any such firm that is on the list, you must promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, you must provide a copy of the decision to the

requesting UCP within 7 days of receiving the request. As the UCP receiving the decision, you must then consider the information in the decision in determining what, if any, action to take with respect to the certified **DBE** firm or applicant.

(g) You must implement the requirements of this section beginning January 1, 2012.

[76 FR 5100, Jan. 28, 2011]

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



(a) When you deny a request by a firm, which is not currently certified with you, to be certified as a **DBE**, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

(b) When you deny **DBE** certification to a firm certified by the SBA, you must notify the SBA in writing. The notification must include the reason for denial.

(c) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your **DBE** program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm.

(d) When you make an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under §26.89.

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

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



(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in §26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that

information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your **DBE** program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your **DBE** program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (*i.e.* , an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

(4) A change in the certification standards or requirements of the Department since you certified the firm;
or

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. You must send copies of the

notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

(h) [Reserved]

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

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

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

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

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

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003; 76 FR 5101, Jan. 28, 2011]

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



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

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

(3) Send appeals to the following address: Department of Transportation, Office of Civil Rights, 1200 New Jersey Avenue, SE., Washington, DC 20590.

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

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

(1) If you are an appellant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under §26.109(c).

(2) If you are an appellant other than one described in paragraph (c)(1) of this section, the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in paragraph (c)(1) of this section. Failure to provide this information may be deemed a failure to cooperate under §26.109(c).

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a recipient's showing of good cause. To facilitate the Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

(f) As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.

(2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (see paragraph (d) of this section). The Department will also notify the SBA in writing when DOT takes an action on an appeal that results in or confirms a loss of eligibility to any SBA-certified firm. The notice includes the reasons for the Department's decision,

including specific references to the evidence in the record that supports each reason for the decision.

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35556, June 16, 2003; 73 FR 33329, June 12, 2008]

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



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

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

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

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

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

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under §26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

Subpart F—Compliance and Enforcement



§ 26.101 What compliance procedures apply to recipients?



(a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under §26.103 or §26.105 or appropriate program sanctions by the concerned operating

administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.

(b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

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



The provisions of this section apply to enforcement actions under FHWA and FTA programs:

(a) *Noncompliance complaints.* Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in §26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.

(b) *Compliance reviews.* The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.

(c) *Reasonable cause notice.* If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, return receipt requested, a written notice advising you that there is reasonable cause to find you in noncompliance. The notice states the reasons for this finding and directs you to reply within 30 days concerning whether you wish to begin conciliation.

(d) *Conciliation.* (1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

(2) If you and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as being in compliance. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.

(3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.

(4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.

(e) *Enforcement actions.* (1) Enforcement actions are taken as provided in this subpart.

(2) Applicable findings in enforcement proceedings are binding on all DOT offices.

§ 26.105 What enforcement actions apply in FAA programs?



(a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA

financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

(b) The provisions of §26.103(b) and this section apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

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



(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a **DBE** on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.

(b) If you are a firm that, in order to meet **DBE** contract goals or other **DBE** program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.

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

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

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

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5101, Jan. 28, 2011]

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



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

(2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for **DBE** certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under §26.89 of this part or to any other state to which the individual's firm has applied for certification under §26.85 of this part.

(b) *Confidentiality of information on complainants.* Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege.

Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

(c) *Cooperation.* All participants in the Department's **DBE** program (including, but not limited to, recipients, **DBE** firms and applicants for **DBE** certification, complainants and appellants, and contractors using **DBE** firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to **DBE** firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses **DBE** firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

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

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003; 76 FR 5101, Jan. 28, 2011]

Appendix A to Part 26—Guidance Concerning Good Faith Efforts



I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by **DBE** firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a **DBE** goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient **DBE** participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain **DBE** participation sufficient to meet the **DBE** contract goal. Mere *pro forma* efforts are not good faith efforts to meet the **DBE** contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (*i.e.* , obtain a specified amount of **DBE** participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring *bona fide* good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain **DBE** participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the **DBE** goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate **DBE** participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to **DBE** subcontractors and suppliers and to select those portions of the work or material needs consistent with the available **DBE** subcontractors and suppliers, so as to facilitate **DBE** participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including **DBE** subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract **DBE** goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

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

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

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

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

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



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

1. Indicate the DOT Operating Administration (OA) that provides your Federal financial assistance. If assistance comes from more than one OA, use separate reporting forms for each OA. If you are an FTA recipient, indicate your Vendor Number in the space provided.
2. If you are an FAA recipient, indicate the relevant AIP Numbers covered by this report. If more than six, attach a separate sheet.
3. Specify the Federal fiscal year (i.e., October 1 – September 30) in which the covered reporting period falls.
4. State the date of submission of this report.
5. Check the appropriate box that indicates the reporting period that the data provided in this report covers. If this report is due June 1, data should cover October 1 – March 31. If this report is due December 1, data should cover April 1 – September 30. If this report is due to the FAA, data should cover the entire year.
6. Name of the recipient.
7. State your annual DBE goal(s) established for the Federal fiscal year of this report to be submitted to and approved by the relevant OA. Your Overall Goal is to be reported as well as the breakdown for specific Race Conscious and Race Neutral Goals (both of which include gender-conscious/neutral goals). The Race Conscious Goal portion should be based on programs that focus on and provide benefits only for DBEs. The use of contract goals is a primary example of a Race Conscious measure. The Race Neutral Goal portion should include programs that, while benefiting DBEs, are not solely focused on DBE firms. For example, a small business outreach program, technical assistance, and prompt payment clauses can assist a wide variety of businesses in addition to helping DBE firms.
- 8-9. The amounts in items 8(A)-9(I) should include all types of prime contracts awarded and all types of subcontracts awarded or committed, including: professional or consultant services, construction, purchase of materials or supplies, lease or purchase of equipment and any other types of services. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.
- 8(A). Provide the total dollar amount for all prime contracts assisted with DOT funds that were awarded during this reporting period.
- 8(B). Provide the total number of all prime contracts assisted with DOT funds that were awarded during this reporting period.
- 8(C). From the total dollar amount awarded in item 8(A), provide the dollar amount awarded to certified DBEs during this reporting period.
- 8(D). From the total number of prime contracts awarded in item 8(B), specify the number awarded to certified DBEs during this reporting period.
- 8(E). From the total dollars awarded in 8(C), provide the dollar amount awarded to DBEs through the use of Race Conscious methods. See the definition of Race Conscious Goal in item 7 and the explanation of project types in item 8 to include in your calculation.
- 8(F). From the total number of prime contracts awarded in 8(D), specify the number awarded to DBEs through Race Conscious methods.
- 8(G). From the total dollar amount awarded in item 8(C), provide the dollar amount awarded to certified DBEs through the use of Race Neutral methods. See the definition of Race Neutral Goal in item 7 and the explanation of project types in item 8 to include.
- 8(H). From the total number of prime contracts awarded in 8(D), specify the number awarded to DBEs through Race Neutral methods.
- 8(I). Of all prime contracts awarded this reporting period, calculate the percentage going to DBEs. Divide the dollar amount in item 8(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.
- 9(A)-9(I). Items 9(A)-9(I) are derived in the same way as items 8(A)-8(I), except that these calculations should be based on subcontracts rather than prime contracts. Unlike prime contracts, which may only be awarded, subcontracts may be either awarded or committed.
- 10(A)-11(I). For all DBEs awarded prime contracts and awarded or committed subcontracts as indicated in 8(C)-(D) and 9(C)-(D), break the data down further by total dollar amount as well as the number of all contracts going to each ethnic group as well as to non-minority women. The "Other" category includes those DBEs who are not members of the presumptively disadvantaged groups already listed, but who are determined eligible for the DBE program on an individual basis (e.g. a Caucasian male with a disability). The TOTALS value in 10(H) should equal the sum of 8(C) plus 9(C), and similarly, the TOTALS value in 11(H) should equal the sum of 8(D) plus 9(D). Column I should only be filled out if this report is due on December 1, as indicated in item 5. The values for this column are derived by adding the values reported in column H in your first report with the values reported in this second report.
- 12(A). Provide the total number of prime contracts completed during this reporting period that had Race Conscious goals. Race Conscious contracts are those with contract goals or another Race Conscious measure.
- 12(B). Provide the total dollar value of prime contracts completed this reporting period that had Race Conscious goals.
- 12(C). Provide the total dollar amount of DBE participation on all Race Conscious prime contracts completed this reporting period that was necessary to meet the contract goals on them. This applies only to Race Conscious prime contracts.
- 12(D). Provide the actual total DBE participation in dollars on the race conscious prime contracts completed this reporting period.
- 12(E). Of all the prime contracts completed this reporting period, calculate the percentage of DBE participation. Divide the actual total dollar amount in 12(D) by the total dollar value provided in 12(B) to derive this percentage. Round to the nearest tenth.
- 13(A)-13(E). Items 13(A)-13(E) are derived in the same manner as items 12(A)-12(E), except these figures should be based on Race Neutral prime contracts (i.e. those with no race conscious measures).
- 14(A)-14(E). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above.
15. Name of the Authorized Representative preparing this form.
16. Signature of the Authorized Representative.
17. Phone number of the Authorized Representative.
18. Fax number of the Authorized Representative.

****Submit your completed report to your Regional or Division Office.**

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UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS

*Please refer to the instructions sheet for directions on filling out this form**

1. Submitted to: (check only one): FHWA FAA FTA-Vendor Number

2. AIP Numbers (FAA Recipients Only):

3. Federal fiscal year in which reporting period falls: FY _____ 4. Date This Report Submitted: _____
Report due June 1 (for period Oct. 1-Mar. 31) Report due Dec. 1 (for period April 1-Sept. 30)

5. Reporting Period: FAA Annual Report

6. Name of Recipient: _____

7. Annual DBE Goal: _____ % Race Neutral Goal _____ % OVERALL Goal _____ %

	Race Conscious Goal			Race Neutral Goal			OVERALL Goal		
	A	B	C	D	E	F	G	H	I
	Total Dollars	Total Number	Total to DBEs (dollars)	Total to DBEs (number)	Total to DBEs/Race Conscious (dollars)	Total to DBEs/Race Conscious (member)	Total to DBEs/Race Neutral (dollars)	Total to DBEs/Race Neutral (number)	Percentage of total dollars to DBEs
AWARDS/COMMITMENTS MADE DURING THIS REPORTING PERIOD <small>(Only contracts and subcontracts awarded or committed during this reporting period.)</small>									
8. Prime contracts awarded this period									
9. Subcontracts awarded/committed this period									
TOTAL									
DBE AWARDS/COMMITMENTS THIS REPORTING PERIOD-BREAKDOWN BY ETHNICITY & GENDER	A	B	C	D	E	F	G	H	I
	Black American	Hispanic American	Native American	Subcont. Asian American	Asian-Pacific American	Non-Minority Women	Other (i.e., not of any other group listed here)	TOTALS (for this reporting period only)	Year-End TOTALS
10. Total Number of Contracts (Prime and Sub)									
11. Total Dollar Value									
ACTUAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD	A	B	C	D	E	F	G	H	I
	Number of Prime Contracts Completed	Total Dollar Value of Prime Contracts Completed	DBE Participation Needed to Meet Goal (Dollars)	Total DBE Participation (Dollars)	Percentage of Total DBE Participation				
12. Race Conscious									
13. Race Neutral									
14. Totals									
15. Submitted by (Print Name of Authorized Representative)	10. Signature of Authorized Representative								
17. Phone Number	18. Fax Number								

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

Appendix C to Part 26—DBE Business Development Program Guidelines



The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from the recipient.

(A) Each firm that participates in a recipient's business development program (BDP) program is subject to a program term determined by the recipient. The term should consist of two stages; a developmental stage and a transitional stage.

(B) In order for a firm to remain eligible for program participation, it must continue to meet all eligibility

criteria contained in part 26.

(C) By no later than 6 months of program entry, the participant should develop and submit to the recipient a comprehensive business plan setting forth the participant's business targets, objectives and goals. The participant will not be eligible for program benefits until such business plan is submitted and approved by the recipient. The approved business plan will constitute the participant's short and long term goals and the strategy for developmental growth to the point of economic viability in non-traditional areas of work and/or work outside the **DBE** program.

(D) The business plan should contain at least the following:

(1) An analysis of market potential, competitive environment and other business analyses estimating the program participant's prospects for profitable operation during the term of program participation and after graduation from the program.

(2) An analysis of the firm's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts other than those in traditional areas of **DBE** participation.

(3) Specific targets, objectives, and goals for the business development of the participant during the next two years, utilizing the results of the analysis conducted pursuant to paragraphs (C) and (D)(1) of this appendix;

(4) Estimates of contract awards from the **DBE** program and from other sources which are needed to meet the objectives and goals for the years covered by the business plan; and

(5) Such other information as the recipient may require.

(E) Each participant should annually review its currently approved business plan with the recipient and modify the plan as may be appropriate to account for any changes in the firm's structure and redefined needs. The currently approved plan should be considered the applicable plan for all program purposes until the recipient approves in writing a modified plan. The recipient should establish an anniversary date for review of the participant's business plan and contract forecasts.

(F) Each participant should annually forecast in writing its need for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (E) of this appendix. Such forecast should be included in the participant's business plan. The forecast should include:

(1) The aggregate dollar value of contracts to be sought under the **DBE** program, reflecting compliance with the business plan;

(2) The aggregate dollar value of contracts to be sought in areas other than traditional areas of **DBE** participation;

(3) The types of contract opportunities being sought, based on the firm's primary line of business; and

(4) Such other information as may be requested by the recipient to aid in providing effective business development assistance to the participant.

(G) Program participation is divided into two stages; (1) a developmental stage and (2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.

(H) The length of service in the program term should not be a pre-set time frame for either the developmental or transitional stages but should be figured on the number of years considered necessary in normal progression of achieving the firm's established goals and objectives. The setting of such time could be factored on such items as, but not limited to, the number of contracts, aggregate amount of the contract received, years in business, growth potential, etc.

(I) Beginning in the first year of the transitional stage of program participation, each participant should annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations in areas other than traditional areas of **DBE** participation after graduation from the program. The transition management plan should be submitted to the recipient at the same time other modifications are submitted pursuant to the annual review under paragraph (E) of this section. The plan should set forth the same information as required under paragraph (F) of steps the participant will take to continue its business development after the expiration of its program term.

(J) When a participant is recognized as successfully completing the program by substantially achieving the targets, objectives and goals set forth in its program term, and has demonstrated the ability to compete in the marketplace, its further participation within the program may be determined by the recipient.

(K) In determining whether a concern has substantially achieved the goals and objectives of its business plan, the following factors, among others, should be considered by the recipient:

(1) Profitability;

(2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;

(3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;

(4) Ability to obtain bonding;

(5) A positive comparison of the **DBE's** business and financial profile with profiles of non-**DBE** businesses in the same area or similar business category; and

(6) Good management capacity and capability.

(L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient should notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification should set forth findings, based on the facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification should also provide the participant 45 days from the date of service of the letter to submit in writing information that would explain why the proposed basis of graduation is not warranted.

(M) Participation of a **DBE** firm in the program may be discontinued by the recipient prior to expiration of the firm's program term for good cause due to the failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance. Also, the recipient can discontinue the participation of a firm that does not actively pursue and bid on contracts, and a firm that, without justification, regularly fails to respond to solicitations in the type of work it is qualified for and in the geographical areas where it has indicated availability under its approved business plan. The recipient should take such action if over a 2-year period a **DBE** firm exhibits such a pattern.

Appendix D to Part 26—Mentor-Protégé Program Guidelines



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(A) The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the **DBE** program, via the provision of training and assistance from other firms. To operate a mentor-protégé program, a recipient must obtain the approval of the concerned operating administration.

(B)(1) Any mentor-protégé relationship shall be based on a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.

(2) To be eligible for reimbursement, the mentor's services provided and associated costs must be

directly attributable and properly allowable to specific individual contracts. The recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement.

(C) DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified *before* it begins participation in a mentor-protégé arrangement. If the recipient chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/ subcontractor mentor-protégé agreement.

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



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The following guidance is adapted, with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR 124.103(c) and 124.104).

Social Disadvantage

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(1) *Education.* Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) *Employment.* Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

(3) *Business history.* The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

II. With respect to paragraph I.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities—especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments)—

may be socially and economically disadvantaged.

III. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, recipients must also ensure their **DBE** programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

Economic Disadvantage

(A) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(B) *Submission of narrative and financial information.*

(1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

(2) [Reserved]

(C) *Factors to be considered.* In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. Recipients will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

(D) *Transfers within two years.*

(1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the **DBE** program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35559, June 16, 2003]

Appendix F to Part 26—Uniform Certification Application Form



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**INSTRUCTIONS FOR COMPLETING THE DISADVANTAGED BUSINESS ENTERPRISE (DBE)
PROGRAM UNIFORM CERTIFICATION APPLICATION**

NOTE: If you require additional space for any question in this application, please attach additional sheets or copies as needed, taking care to indicate on each attached sheet/copy the section and number of this application to which it refers.

Section 1: CERTIFICATION INFORMATION

A. Prior/Other Certifications

Check the appropriate box indicating for which program your firm is currently certified. If you are already certified as a DBE, indicate in the appropriate box the name of the certifying agency that has previously certified your firm, and also indicate whether your firm has undergone an onsite visit. If your firm has already undergone an onsite visit/review, indicate the most recent date of that review and the state UCP that conducted the review.

NOTE: If your firm is currently certified under the SBA's 8(a) and/or SDB programs, you may not have to complete this application. You should contact your state UCP to find out about a streamlined application process for firms that are already certified under the 8(a) and SDB programs.

B. Prior/Other Applications and Privileges

Indicate whether your firm or any of the persons listed has ever withdrawn an application for a DBE program or an SBA 8(a) or SDB program, or whether any have ever been denied certification, decertified, debarred, suspended, or had bidding privileges denied or restricted by any state or local agency or Federal entity. If your answer is yes, indicate the date of such action, identify the name of the agency, and explain fully the nature of the action in the space provided.

Section 2: GENERAL INFORMATION

A. Contact Information

- (1) State the name and title of the person who will serve as your firm's primary contact under this application.
- (2) State the legal name of your firm, as indicated in your firm's Articles of Incorporation or charter.
- (3) State the primary phone number of your firm.
- (4) State a secondary phone number, if any.
- (5) State your firm's fax number, if any.
- (6) State your firm's or your contact person's email address.
- (7) State your firm's website address, if any.
- (8) State the street address of your firm (i.e., the physical location of its offices – not a post office box address).
- (9) State the mailing address of your firm, if it is different from your firm's street address.

B. Business Profile

- (1) In the box provided, briefly describe the primary business and professional activities in which your firm engages.
- (2) State the Federal Tax ID number of your firm as provided on your firm's filed tax returns, if you have one. This could also be the Social Security number of the owner of your firm.
- (3) State the date on which your firm was officially established, as stated in your firm's Articles of Incorporation or charter.

- (4) State the date on which you and/or each other owner took ownership of the firm.
- (5) Check the appropriate box that describes the manner in which you and each other owner acquired ownership of your firm. If you checked "Other," explain in the space provided.
- (6) Check the appropriate box that indicates whether your firm is "for profit."
NOTE: If you checked "No," then you do NOT qualify for the DBE program and therefore do not need to complete the rest of this application. The DBE program requires all participating firms be for-profit enterprises.
- (7) Check the appropriate box that describes the legal form of ownership of your firm, as indicated in your firm's Articles of Incorporation or charter. If you checked "Other," briefly explain in the space provided.
- (8) Check the appropriate box that indicates whether your firm has ever existed under different ownership, a different type of ownership, or a different name. If you checked "Yes," specify which and briefly explain the circumstances in the space provided.
- (9) Indicate in the spaces provided how many employees your firm has, specifying the number of employees who work on a full-time and part-time basis.
- (10) Specify the total gross receipts of your firm for each of the past three years, as declared in your firm's filed tax returns.

C. Relationships with Other Businesses

- (1) Check the appropriate box that indicates whether your firm is co-located at any of its business locations, or whether your firm shares a telephone number(s), a post office box, any office space, a yard, warehouse, other facilities, any equipment, or any office staff with any other business, organization, or entity of any kind. If you answered "Yes," then specify the name of the other firm(s) and briefly explain the nature of the shared facilities or other items in the space provided.
- (2) Check the appropriate box that indicates whether at present, or at any time in the past:
 - (a) Your firm has been a subsidiary of any other firm;
 - (b) Your firm consisted of a partnership in which one or more of the partners are other firms;
 - (c) Your firm has owned any percentage of any other firm; and
 - (d) Your firm has had any subsidiaries of its own.
- (3) Check the appropriate box that indicates whether any other firm has ever had an ownership interest in your firm.

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- (4) If you answered "Yes" to any of the questions in (2)(a)-(d) or (3), identify the name, address and type of business for each.

D. Immediate Family Member Businesses

Check the appropriate box that indicates whether any of your immediate family members own or manage another company. An "immediate family member" is any person who is your father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law. If you answered "Yes," provide the name of each relative, your relationship to them, the name of the company they own or manage, the type of business, and whether they own or manage the company.

Section 3: OWNERSHIP

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

A. Background Information

- (1) Give the name of the owner.
- (2) State his/her title or position within your firm.
- (3) Give his/her home phone number.
- (4) State his/her home (street) address.
- (5) Check the appropriate box that indicates this owner's gender.
- (6) Check the appropriate box that indicates this owner's ethnicity (check all that apply). If you checked "Other," specify this owner's ethnic group/identity not otherwise listed.
- (7) Check the appropriate box to indicate whether this owner is a U.S. citizen.
- (8) If this owner is not a U.S. citizen, check the appropriate box that indicates whether this owner is a lawfully admitted permanent resident. If this owner is neither a U.S. citizen nor a lawfully admitted permanent resident of the U.S., then this owner is NOT eligible for certification as a DBE owner. This, however, does not necessarily disqualify your firm altogether from the DBE program if another owner is a U.S. citizen or lawfully admitted permanent resident and meets the program's other qualifying requirements.

B. Ownership Interest

- (1) State the number of years during which this owner has been an owner of your firm.
- (2) Indicate the dollar value of this owner's initial investment to acquire an ownership interest in your firm, broken down by cash, real estate, equipment, and/or other investment.
- (3) State the percentage of total ownership control of your firm that this owner possesses.
- (4) State the familial relationship of this owner to each other owner of your firm.
- (5) Indicate the number, percentage of the total, class, date acquired, and method by which this owner acquired his/her shares of stock in your firm.

- (6) Check the appropriate box that indicates whether this owner performs a management or supervisory function for any other business. If you checked "Yes," state the name of the other business and this owner's function or title held in that business.

- (7) Check the appropriate box that indicates whether this owner owns or works for any other firm(s) that has any relationship with your firm. If you checked "Yes," identify the name of the other business and this owner's function or title held in that business. Briefly describe the nature of the business relationship in the space provided.

C. Disadvantaged Status

NOTE: You only need to complete this section for each owner that is applying for DBE qualification (i.e., for each owner who is claiming to be "socially and economically disadvantaged" and whose ownership interest is to be counted toward the control and 51% ownership requirements of the DBE program)

- (1) Indicate in the space provided the total Personal Net Worth (PNW) of each owner who is applying for DBE qualification. Use the PNW calculator form at the end of this application to compute each owner's PNW.
- (2) Check the appropriate box that indicates whether any trust has ever been created for the benefit of this disadvantaged owner. If you answered "Yes," briefly explain the nature, history, purpose, and current value of the trust(s).

Section 4: CONTROL

A. Identify your firm's Officers and Board of Directors:

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

B. Identify your firm's management personnel (by name, title, ethnicity, and gender) who control your firm in the following areas:

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- (1) Making financial decisions on your firm's behalf, including the acquisition of lines of credit, surety bonds, supplies, etc.;
- (2) Estimating and bidding, including calculation of cost estimates, bid preparation and submission;
- (3) Negotiating and contract execution, including participation in any of your firm's negotiations and executing contracts on your firm's behalf;
- (4) Hiring and/or firing of management personnel, including interviewing and conducting performance evaluations;
- (5) Field/Production operations supervision, including site supervision, scheduling, project management services, etc.;
- (6) Office management;
- (7) Marketing and sales;
- (8) Purchasing of major equipment;
- (9) Signing company checks (for any purpose); and
- (10) Conducting any other financial transactions on your firm's behalf not otherwise listed.
- (11) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above perform a management or supervisory function for any other business. If you answered "Yes," identify each person by name, his/her title, the name of the other business in which s/he is involved, and his/her function performed in that other business.
- (12) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above own or work for any other firm(s) that has a relationship with your firm. If you answered "Yes," identify the name of the firm, the name of the person, and the nature of his/her business relationship with that other firm.
- C. Indicate your firm's inventory in the following categories:**
- (1) **Equipment**
State the type, make and model, and current dollar value of each piece of equipment held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm.
- (2) **Vehicles**
State the type, make and model, and current dollar value of each motor vehicle held and/or used by your firm. Indicate whether each vehicle is either owned or leased by your firm.
- (3) **Office Space**
State the street address of each office space held and/or used by your firm. Indicate whether your firm owns or leases the office space and the current dollar value of that property or its lease.
- (4) **Storage Space**
State the street address of each storage space held and/or used by your firm. Indicate whether your firm owns or leases the storage space and the current dollar value of that property or its lease.
- D. Does your firm rely on any other firm for management functions or employee payroll?**
Check the appropriate box that indicates whether your firm relies on any other firm for management functions or for employee payroll. If you answered
- "Yes," briefly explain the nature of that reliance and the extent to which the other firm carries out such functions.
- E. Financial Information**
- (1) **Banking Information**
- (a) State the name of your firm's bank.
- (b) State the main phone number of your firm's bank branch.
- (c) State the address of your firm's bank branch.
- (2) **Bonding Information**
- (a) State your firm's Binder Number.
- (b) State the name of your firm's bond agent and/or broker.
- (c) State your agent's/broker's phone number.
- (d) State your agent's/broker's address.
- (e) State your firm's bonding limits (in dollars), specifying both the Aggregate and Project Limits.
- F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of persons or firms securing the loan, if other than the listed owner:**
State the name and address of each source, the name of the person securing the loan, the original dollar amount and the current balance of each loan, and the purpose for which each loan was made to your firm.
- G. List all contributions or transfers of assets to/from your firm and to/from any of its owners over the past two years:**
Indicate in the spaces provided, the type of contribution or asset that was transferred, its current dollar value, the person or firm from whom it was transferred, the person or firm to whom it was transferred, the relationship between the two persons and/or firms, and the date of the transfer.
- H. List current licenses/permits held by any owner or employee of your firm.**
List the name of each person in your firm who holds a professional license or permit, the type of license or permit, the expiration date of the permit or license, and the license/permit number and issuing State of the license or permit.
- I. List the three largest contracts completed by your firm in the past three years, if any.**
List the name of each owner or contractor for each contract, the name and location of the projects under each contract, the type of work performed on each contract, and the dollar value of each contract.
- J. List the three largest active jobs on which your firm is currently working.**
For each active job listed, state the name of the prime contractor and the project number, the location, the type of work performed, the project start date, the anticipated completion date, and the dollar value of the contract.
- AFFIDAVIT & SIGNATURE**
Carefully read the attached affidavit in its entirety. Fill in the required information for each blank space, and sign and date the affidavit in the presence of a Notary Public, who must then notarize the form.

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**DISADVANTAGED BUSINESS ENTERPRISE PROGRAM
49 C.F.R. PART 26**

UNIFORM CERTIFICATION APPLICATION

ROADMAP FOR APPLICANTS

① Should I apply?

- Is your firm at least 51%-owned by a socially and economically disadvantaged individual(s) who also controls the firm?
- Is the disadvantaged owner a U.S. citizen or lawfully admitted permanent resident of the U.S.?
- Is your firm a small business that meets the Small Business Administration's (SBA's) size standard and does not exceed \$17.42 million in gross annual receipts?
- Is your firm organized as a for-profit business?

⇒ If you answered "Yes" to all of the questions above, you may be eligible to participate in the U.S. DOT DBE program.

② Is there an easier way to apply?

If you are currently certified by the SBA as an 8(a) and/or SDB firm, you may be eligible for a streamlined certification application process. Under this process, the certifying agency to which you are applying will accept your current SBA application package in lieu of requiring you to fill out and submit this form.

NOTE: You must still meet the requirements for the DBE program, including undergoing an on-site review.

③ Be sure to attach all of the required documents listed in the Documents Check List at the end of this form with your completed application.

④ Where can I find more information?

- U.S. DOT – <http://osdbuweb.dot.gov/business/dbe/index.html> (this site provides useful links to the rules and regulations governing the DBE program, questions and answers, and other pertinent information)
- SBA – <http://www.ntis.gov/naics> (provides a listing of NAICS codes) and <http://www.sba.gov/size/index/tableofsize.html> (provides a listing of NAICS codes)
- 49 CFR Part 26 (the rules and regulations governing the DBE program)

Under Sec. 26.107 of 49 CFR Part 26, dated February 2, 1999, if at any time, the Department or a recipient has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, the Department may initiate suspension or debarment proceedings against the person or firm under 49 CFR Part 29, Governmentwide Debarment and Suspension (nonprocurement) and Governmentwide Requirements for Drug-free Workplace (grants), take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, and/or refer the matter to the Department of Justice for criminal prosecution under 18 U.S.C. 1001, which prohibits false statements in Federal programs.

Section 1: CERTIFICATION INFORMATION

A. Prior/Other Certifications

Is your firm currently certified for any of the following programs? <i>(If Yes, check appropriate box(es))</i>	<input type="checkbox"/> DBE	Name of certifying agency:
		Has your firm's state UCP conducted an on-site visit? <input type="checkbox"/> Yes, on / / State: <input type="checkbox"/> No
	<input type="checkbox"/> 8(a) <input type="checkbox"/> SDB	⊗ STOP! If you checked either the 8(a) or SDB box, you <u>may not</u> have to complete this application. Ask your state UCP about the streamlined application process under the SBA-DOT MOU.

B. Prior/Other Applications and Privileges

Has your firm (under any name) or any of its owners, Board of Directors, officers or management personnel, ever withdrawn an application for any of the programs listed above, or ever been denied certification, decertified, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or Federal entity?
 Yes, on / / No
 If Yes, identify State and name of state, local, or Federal agency and explain the nature of the action:

Section 2: GENERAL INFORMATION

A. Contact Information

(1) Contact person and Title:		(2) Legal name of firm:		
(3) Phone #:	(4) Other Phone #:	(5) Fax #:		
(6) E-mail:		(7) Website <i>(if have one)</i> :		
(8) Street address of firm <i>(No P.O. Box)</i> :	City:	County/Parish:	State:	Zip:
(9) Mailing address of firm <i>(if different)</i> :	City:	County/Parish:	State:	Zip:

B. Business Profile

(1) Describe the primary activities of your firm:		(2) Federal Tax ID <i>(if any)</i> :
(3) This firm was established on / /	(4) I/We have owned this firm since: / /	
(5) Method of acquisition <i>(check all that apply)</i> : <input type="checkbox"/> Started new business <input type="checkbox"/> Bought existing business <input type="checkbox"/> Inherited business <input type="checkbox"/> Secured concession <input type="checkbox"/> Merger or consolidation <input type="checkbox"/> Other <i>(explain)</i>		
(6) Is your firm "for profit"? <input type="checkbox"/> Yes <input type="checkbox"/> No		⊗ STOP! If your firm is NOT for-profit, then you do NOT qualify for this program and do NOT need to fill out this application.

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(7) Type of firm (check all that apply):

- Sole Proprietorship
- Partnership
- Corporation
- Limited Liability Partnership
- Limited Liability Corporation
- Joint Venture
- Other, Describe: _____

(8) Has your firm ever existed under different ownership, a different type of ownership, or a different name?
 Yes No
 If Yes, explain: _____

(9) Number of employees: Full-time _____ Part-time _____ Total _____

(10) Specify the gross receipts of the firm for the last 3 years: Year _____ Total receipts \$ _____
 Year _____ Total receipts \$ _____
 Year _____ Total receipts \$ _____

C. Relationships with Other Businesses

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

If Yes, identify: Other Firm's name: _____
 Explain nature of shared facilities: _____

(2) At present, or at any time in the past, has your firm:	(a) been a subsidiary of any other firm?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(b) consisted of a partnership in which one or more of the partners are other firms?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(c) owned any percentage of any other firm?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(d) had any subsidiaries?	<input type="checkbox"/> Yes <input type="checkbox"/> No

(3) Has any other firm had an ownership interest in your firm at present or at any time in the past? Yes No

(4) If you answered "Yes" to any of the questions in (2)(a)-(d) and/or (3), identify the following for each (attach extra sheets, if needed):

Name	Address	Type of Business
1.		
2.		
3.		

D. Immediate Family Member Businesses

Do any of your immediate family members own or manage another company? Yes No

If Yes, then list (attach extra sheets, if needed):

Name	Relationship	Company	Type of Business	Own or Manage?
1.				
2.				

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Section 3: OWNERSHIP

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below *(If more than one owner, attach separate sheets for each additional owner):*

A. Background Information

(1) Name:	(2) Title:	(3) Home Phone #:
(4) Home Address (street and number):		City: State: Zip:
(5) Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female	(6) Ethnic group membership (Check all that apply):	
(7) U.S. Citizen: <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Black	<input type="checkbox"/> Hispanic <input type="checkbox"/> Native American
(8) Lawfully Admitted Permanent Resident: <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Asian Pacific	<input type="checkbox"/> Subcontinent Asian
	<input type="checkbox"/> Other (specify) _____	

B. Ownership Interest

(1) Number of years as owner:	(2) Initial investment to acquire ownership interest in firm:	Type	Dollar Value
(3) Percentage owned:		Cash	\$
(4) Familial relationship to other owners:		Real Estate	\$
		Equipment	\$
		Other	\$
(5) Shares of Stock:			
Number	Percentage	Class	Date acquired
			Method Acquired
(6) Does this owner perform a management or supervisory function for any other business? <input type="checkbox"/> Yes <input type="checkbox"/> No			
If Yes, identify: Name of Business: _____ Function/Title: _____			
(7) Does this owner own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)? <input type="checkbox"/> Yes <input type="checkbox"/> No			
If Yes, identify: Name of Business: _____ Function/Title: _____			
Nature of Business Relationship: _____			

C. Disadvantaged Status – NOTE: Complete this section only for each owner applying for DBE qualification (i.e., for each owner claiming to be socially and economically disadvantaged)

(1) What is the Personal Net Worth (PNW) of the owner(s) applying for DBE qualification? <i>(Use and attach the Personal Net Worth calculator form at the end of this application; attach additional sheets if more than one owner is applying)</i>
(2) Has any trust been created for the benefit of this disadvantaged owner(s)? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, explain <i>(attach additional sheets if needed):</i>

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Section 4: CONTROL

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

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

(3) Do any of the persons listed in (1) and/or (2) above perform a management or supervisory function for any other business? Yes No

If Yes, identify for each: Person: _____ Title: _____
 Business: _____ Function: _____

(4) Do any of the persons listed in (1) and/or (2) above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)? Yes No

If Yes, identify for each: Firm Name: _____ Person: _____
 Nature of Business Relationship: _____

B. Identify your firm's management personnel who control your firm in the following areas (If more than two persons, attach a separate sheet):

	Name	Title	Ethnicity	Gender
(1) Financial Decisions <i>(responsibility for acquisition of lines of credit, surety bonding, supplies, etc.)</i>	a.			
	b.			
(2) Estimating and bidding	a.			
	b.			
(3) Negotiating and Contract Execution	a.			
	b.			
(4) Hiring/firing of management personnel	a.			
	b.			
(5) Field/Production Operations Supervisor	a.			
	b.			
(6) Office management	a.			
	b.			
(7) Marketing/Sales	a.			
	b.			
(8) Purchasing of major equipment	a.			
	b.			
(9) Authorized to Sign Company Checks (for any purpose)	a.			
	b.			
(10) Authorized to make Financial Transactions	a.			
	b.			

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(11) Do any of the persons listed in (1) through (10) above perform a management or supervisory function for any other business? Yes No
 If Yes, identify for each: Person: _____ Title: _____
 Business: _____ Function: _____

(12) Do any of the persons listed in (1) through (10) above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)? Yes No
 If Yes, identify for each: Firm Name: _____ Person: _____
 Nature of Business Relationship: _____

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

(1) Equipment

Type of Equipment	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

(2) Vehicles

Type of Vehicle	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

(3) Office Space

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

(4) Storage Space

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

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

If Yes, explain:

E. Financial Information

(1) Banking Information:
 (a) Name of bank: _____ (b) Phone No: () _____
 (c) Address of bank: _____ City: _____ State: _____ Zip: _____

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(2) **Bonding Information:** If you have bonding capacity, identify: (a) Binder No: _____
 (b) Name of agent/broker _____ (c) Phone No: () _____
 (d) Address of agent/broker: _____ City: _____ State: _____ Zip: _____
 (e) Bonding limit: Aggregate limit \$ _____ Project limit \$ _____

F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of any persons or firms securing the loan, if other than the listed owner:

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

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

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

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

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

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

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

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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.					

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DBE UNIFORM CERTIFICATION APPLICATION SUPPORTING DOCUMENTS CHECKLIST

In order to complete your application for DBE certification, you must attach copies of all of the following documents as they apply to you and your firm.

All Applicants

- Work experience resumes (include places of ownership/employment with corresponding dates), for all owners and officers of your firm
- Personal Financial Statement (form available with this application)
- Personal tax returns for the past three years, if applicable, for each owner claiming disadvantaged status
- Your firm's tax returns (gross receipts) and all related schedules for the past three years
- Documented proof of contributions used to acquire ownership for each owner (e.g., both sides of cancelled checks)
- Your firm's signed loan agreements, security agreements, and bonding forms
- Descriptions of all real estate (including office/storage space, etc.) owned/leased by your firm and documented proof of ownership/signed leases
- List of equipment leased and signed lease agreements
- List of construction equipment and/or vehicles owned and titles/proof of ownership
- Documented proof of any transfers of assets to/from your firm and/or to/from any of its owners over the past two years
- Year-end balance sheets and income statements for the past three years (or life of firm, if less than three years); a new business must provide a current balance sheet
- All relevant licenses, license renewal forms, permits, and haul authority forms
- DBE and SBA 8(a) or SDB certifications, denials, and/or decertifications, if applicable
- Bank authorization and signatory cards
- Schedule of salaries (or other compensation or remuneration) paid to all officers, managers, owners, and/or directors of the firm
- Trust agreements held by any owner claiming disadvantaged status, if any

Partnership or Joint Venture

- Original and any amended Partnership or Joint Venture Agreements

Corporation or LLC

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

Trucking Company

- Documented proof of ownership of the company
- Insurance agreements for each truck owned or operated by your firm
- Title(s) and registration certificate(s) for each truck owned or operated by your firm
- List of U.S. DOT numbers for each truck owned or operated by your firm

Regular Dealer

- Proof of warehouse ownership or lease
- List of product lines carried
- List of distribution equipment owned and/or leased

NOTE: The specific state UCP to which you are applying may have additional required documents that you must also supply with your application. Contact the appropriate certifying agency to which you are applying to find out if more is required.

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AFFIDAVIT OF CERTIFICATION

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

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

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

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

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

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

I agree to provide written notice to the recipient agency or Unified Certification Program (UCP) of any material change in the information contained in the original application within 30 calendar days of such change (e.g., ownership, address, telephone number, etc.).

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

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

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

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

I further certify that my personal net worth does not exceed \$750,000, and that I am economically disadvantaged because my ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

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

Executed on _____ (Date)

Signature _____
(DBE Applicant)

NOTARY CERTIFICATE

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[68 FR 35559, June 16, 2003]

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Official Questions and Answers (Q&A's) DBE Program Regulation (49 CFR 26)

NOTE:

*New Q&A has been added to address if a recipient can count DBE participation for a firm toward contract and overall goals if the firm has not been certified to perform the particular type of work that it intends to perform on a given contract? [Section 26.53\(a\)](#); [26.71\(n\)](#); [26.81\(c\)](#) **Updated July 15, 2009***

*New Q&A has been added to address if in certification actions, how should certifying agencies describe the types of work which a firm is certified to perform as a DBE? [26.71\(n\)](#) **Updated July 15, 2009***

*New Q&A has been added to address what actions should a recipient take before implementing a small business program on federally assisted projects as a race- and gender-neutral means of facilitating DBE participation in meeting the recipient's overall goal? [26.21\(b\)\(2\)](#); [26.43](#); [26.51\(b\)](#) **Updated July 15, 2009***

*New Q&A has been added to address how recipients administer their DBE programs in the context of increases in the American Recovery and Reinvestment Act. [26.45](#), [26.47](#), [26.51](#), [26.53](#) **Updated February 19, 2009***

The General Counsel of the Department of Transportation has reviewed these questions and answers and approved them as consistent with the language and intent of 49 CFR Part 26. These questions and answers therefore represent the institutional position of the Department of Transportation.

These questions and answers provide guidance and information for compliance with the provisions under 49 CFR part 26, pertaining to the implementation of the Department's disadvantaged business enterprise program. Like all guidance material, these questions and answers are not, in themselves, legally binding or mandatory, and do not constitute regulations. They are issued to provide an acceptable means, but not the only means, of compliance with Part 26. While these questions and answers are not mandatory, they are derived from extensive DOT, recipient, and contractor experience and input concerning the determination of compliance with Part 26.

Download the [Questions and Answers](#) in Word Format.

-
- [Section 26](#)
 - [HOW DO I CONTACT DOT FOR ADDITIONAL INFORMATION ON THIS RULE?](#) (Posted - 4/12/99 - Edited 12/7/01)
 - [Section 26 \(b\)](#)
 - [QUESTIONS AND ANSWERS CONCERNING RESPONSE TO WESTERN STATES PAVING COMPANY V. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION](#)
 - [WHAT DID THE COURT SAY IN WESTERN STATES?](#) (Posted - 1/12/06)
 - [WHAT ACTION SHOULD RECIPIENTS TAKE WITH RESPECT TO SUBMITTING THEIR OVERALL GOALS FOR FY 2006?](#) (Posted - 1/12/06)
 - [SHOULD RECIPIENTS WHO WILL BE SUBMITTING ALL RACE-NEUTRAL OVERALL GOALS FOR FY2006 BECAUSE THEY DO NOT HAVE SUFFICIENT EVIDENCE OF DISCRIMINATION OR ITS EFFECTS MAKE ANY CHANGES TO CONTRACTS ISSUED DURING FY2005 OR EARLIER?](#) (Posted - 1/12/06)
 - [IF RECIPIENTS WILL BE OPERATING AN ALL-RACE NEUTRAL DBE PROGRAM IN FY2006 OR SUBSEQUENT YEARS, WHAT SHOULD SUCH A PROGRAM INCLUDE?](#) (Posted - 1/12/06)
 - [WHAT MUST RECIPIENTS DO THAT HAVE ALREADY SUBMITTED THEIR FY2006 GOALS TO MODAL ADMINISTRATIONS FOR APPROVAL?](#) (Posted - 1/12/06)
 - [WILL THE PROCESS USED BY THE MODAL ADMINISTRATIONS TO REVIEW AND APPROVE GOAL SUBMISSIONS MADE BY RECIPIENTS IN THE NINTH CIRCUIT CHANGE?](#) (Posted - 1/12/06)
 - [IF A RECIPIENT LACKS SUFFICIENT EVIDENCE OF DISCRIMINATION OR ITS EFFECTS, WHAT SHOULD IT DO TO REMEDY THE LACK OF INFORMATION?](#) (Posted - 1/12/06)
 - [WHAT SHOULD RECIPIENTS' STUDIES INCLUDE?](#) (Posted - 1/12/06)
 - [CAN THERE BE STATEWIDE OR REGIONAL STUDIES, AS OPPOSED TO A SEPERATE STUDY FOR EACH INDIVIDUAL RECEIPIENT?](#) (Posted - 1/12/06)
 - [WILL FEDERAL FUNDS HELP TO DEFRAY THE COSTS OF RECIPIENTS' STUDIES?](#) (Posted - 1/12/06)
 - [Section 26.21 - 26.15](#)
 - [CAN A RECIPIENT ASK FOR A PROGRAM WAIVER IN CONJUNCTION WITH ITS REVISED DBE PROGRAM?](#) (Posted - 2/23/99)
 - [Section 26.21](#)

RELATED LINKS

- [DOT Civil Rights Page](#)
- [DOT Civil Rights DBE Page](#)
- [FAA Home Page](#)
- [FAA Office of Civil Rights](#)
- [FHWA Home Page](#)
- [FHWA Office of Civil Rights](#)
- [FTA Home Page](#)
- [FTA Office of Civil Rights](#)
- [DBE Code of Federal Regulations \(49 CFR 23\)](#)
- [DBE Code of Federal Regulations \(49 CFR 26\)](#)
- [DBE Fraudulent Letter Alert Reporting DBE Fraud](#)

- ARE RECIPIENTS REQUIRED TO COLLECT ALL BIDDERS' LIST INFORMATION AT THE TIME OF BID? (Posted - 2/17/00)
- CAN SUBRECIPIENTS HAVE THEIR OWN DBE PROGRAMS AND OVERALL GOALS? IF SO, WHO REVIEWS THEM? (Posted - 6/18/08)
-
- Section 26.21(b)(2); 26.43; 26.51(b)
 - What actions should a recipient take before implementing a small business program on federally assisted projects as a race- and gender-neutral means of facilitating DBE participation in meeting the recipient's overall goal? (Posted - 7/15/09)
- Section 26.21(c)
 - CAN A NEW RECIPIENT BE ELIGIBLE TO RECEIVE FEDERAL FINANCIAL ASSISTANCE IF IT DOES NOT HAVE AN APPROVED DBE PROGRAM?
 - WHAT IMPACT DO STATE ANTI-AFFIRMATIVE ACTION LAWS HAVE ON THE DOT DBE PROGRAM? (Posted - 4/12/99)
- Section 26.29(a)
 - AT WHAT TIME DOES THE RULE REQUIRE PRIME CONTRACTORS TO RETURN RETAINAGE TO SUBCONTRACTORS? (Posted - 9/20/99)
- Section 26.29; 26.37(a)
 - IN IMPLEMENTING THE REQUIRED PROMPT PAYMENT CLAUSE, MAY RECIPIENTS REQUIRE PRIME CONTRACTORS TO PROVIDE EVIDENCE OF PAYMENT OF RETAINAGE TO SUBCONTRACTORS? (Posted - 4/12/99)
- Section 26.29(a), 26.37(a)
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The General Counsel of the Department of Transportation has reviewed these goal-setting tips and approved them as consistent with the language and intent of 49 CFR Part 26. This guidance therefore represent the institutional position of the Department of Transportation. These tips on goal-setting provide guidance and information for compliance with the provisions under 49 CFR part 26, pertaining to the implementation of the Department's disadvantaged business enterprise program. Like all guidance material, these tips on goal-setting are not, in themselves, legally binding or mandatory, and do not constitute regulations. They are issued to provide an acceptable means, but not the only means, of compliance with Part 26. While these tips on goal-setting are not mandatory, they are derived from extensive DOT, recipient, and contractor experience and input concerning the determination of compliance with Part 26.

INTRODUCTION:

A number of DOT recipients have requested that we develop additional written guidance on goal-setting and on how to determine what portion of their goal should be race/gender-neutral and what portion should be race/gender-conscious. This document is intended as a response to these requests. It incorporates the experience and best practices culled by DOT officials and recipients over the first year of implementation of the goal-setting portions of the new DBE rule (49 CFR Part 26). This is not intended to represent an exhaustive list of techniques for goal-setting. As always, one hallmark of the new DBE rule is flexibility and therefore we will, and you should, continue to be on the lookout for new and innovative goal-setting processes. Nor is this an exhaustive explication of all of the subjects related to goal-setting covered in the rule. This document is intended only to provide you with some additional guidance as you set goals. It should always be used in conjunction with the rule itself and other relevant, previously issued guidance such as the Questions and Answers About 49 CFR Part 26, found at <http://osdbu.dot.gov>.

I. IN GENERAL:

As we have stressed before, it is extremely important to include all of your calculations and assumptions in your submission. In other words, you must "show your work." When you submit your overall goals (and the race/gender-neutral and race/gender-conscious portions of your goals), it is important that we can follow your thinking process. Set out explicitly what your data sources were, what assumptions you made, how you calculated each step of the process, etc. Along these lines, you should make sure that your goal submission contains a clear description of your public participation process, a good summary of the comments received during that process and a summary of what if any changes were made based on those comments. Without this information, it is difficult for anyone to evaluate the actual goal you have selected. Goal submissions that are not accompanied by a written explanation of how the goal was derived will be sent back for additional explanation.

II. STEP ONE:

The most important thing to remember about Step One of the goal setting process is that you are attempting to come up with a measurement of the actual relative availability of DBEs to perform the types of contracts (both prime and sub) that you intend to let. To say this another way, you are trying to determine what percentage DBEs (or firms that could be certified as DBEs) represent of all firms that are ready, willing, and able to compete for DOT-assisted contracting. This percentage is calculated by dividing the number of DBEs ready, willing, and able to bid for the types of work you will fund this year, by the number of all firms (DBEs and non-DBEs) ready, willing, and able to bid for the types of work you will fund this year. That is, the number of DBEs will be in the numerator, and the number of all firms (DBEs and non-DBEs) will be in the denominator. This is true regardless of the type of data you are employing to measure the relative availability (e.g., bidders list, census data and DBE directory, disparity study, alternate method, etc.) In other words, whatever data is used, the ratio would be:

$$\text{Step One Base Figure} = \frac{\text{Ready, willing, and able DBEs}}{\text{All firms ready, willing, and able (including DBEs and non-DBEs)}}$$

To give a more specific example, if your work for the year involves both heavy construction and trucking, then: where there are 44 DBEs in heavy construction and 14 in trucking, and 300 firms (DBEs and non-DBEs together) in heavy construction and 150 firms (DBEs and non-DBEs together) in trucking, the ratio would look like this:

$$\frac{\begin{array}{l} 44 \text{ DBEs in heavy construction} \\ + 14 \text{ DBEs in trucking} \\ \hline \end{array}}{\begin{array}{l} 300 \text{ firms in heavy construction} \\ + 150 \text{ firms in trucking} \\ \hline \end{array}} = \frac{58}{450} = 12.8\%$$

The following points will assist you in calculating this percentage:

A. **It is Not Acceptable to Use Past Participation as Your Step One Base Figure.** This Step One Base Figure must not be simply a restatement of your past history of participation. Instead, it must represent an attempt to measure the availability of firms that are ready, willing, and able to compete, not just those who have won contracts in the past. For example, assume that after performing the calculations above, you come up with a Step One Base Figure of 12%. Assume also that in the past you have achieved 20% DBE participation. You may not simply substitute 20% for your Step One Base Figure. The appropriate method for the consideration of past participation is discussed below in the portions of this guidance dealing with Step Two of the goal setting process.

B. **Use the Most Refined Data Available.** When using census and other data organized by SIC codes or the NAICS codes (which will eventually replace the SIC system), try to use the most refined data available. This will help you to focus more precisely on the firms with which you or your prime contractors will actually be doing business and help you to avoid overestimating the number of firms in either the numerator or the denominator. For both SIC and NAICS, the data become more refined in the codes with higher numbers of digits. You should take steps to filter out businesses that are not relevant to your calculations where possible. For instance, if you are using a bidders list, and you are aware that some of the firms on that list do not perform the type of work you will contract out, then exclude those firms from your calculation. If you are interested in further information on the NAICS system, you may want to visit the Census Bureau website www.census.gov and look under the header for business, and find the link for the NAICS system.

C. Look to Relevant Data Sources to Supplement Your DBE Directory. You should do everything you can to ensure that your goal setting process truly reflects the actual availability of ready, willing, and able DBEs in your local market area. Toward this end, if you are using your DBE Directory and census data in goal setting and you are concerned that your DBE Directory does not accurately reflect the number of potential DBEs in your area, you should seriously consider supplementing the number of firms in your DBE Directory for the purposes of goal-setting. This is especially important because the census data represent all firms in your area whether or not they are ready, willing and able to perform DOT-assisted contracts. If you do not take extra steps to ensure your list of DBEs and potential DBEs is accurate, you may seriously underestimate the actual relative availability of DBEs. You may do this by carefully examining lists of other DBEs and MBE/WBEs (Minority Business Enterprises/Women Business Enterprises) from other sources, such as other state or local transportation agencies (if the contracting opportunities are comparable), to determine whether they contain firms which should be considered ready, willing, and able DBEs. You should also examine your own data bases such as vendor data bases, bidders lists, pre-bid or pre-proposal conference attendance lists and outreach session attendance lists to determine whether these sources might reveal firms that should be included in your list of ready, willing, and able DBEs. Of course, you must be careful not to double count firms by including them on your list more than once. You also must remember that you are checking these other sources for the purpose of goal setting only. In order to actually be included in your DBE Directory, an otherwise eligible firm must take the additional steps of going through the certification process.

D. Explain How You Determined Your Local Market Area. Remember, the local market area is not necessarily the same as the political jurisdiction in which you are geographically located. Instead, your local market area is the area in which the substantial majority of the contractors and subcontractors with which you do business are located and the area in which you spend the substantial majority of your contracting dollars. It is important that you specify in your submission how you determined the boundaries of your local market area.

E. Ensure That Your Percentage Reflects an "Apples to Apples" Calculation. Whenever you are calculating ratios, make absolutely certain that the DBE firms in the numerator and denominator are as similar as possible to the DBEs and non-DBE firms in the denominator. For instance, if you include DBEs that do trucking in the numerator, make sure to include DBEs and non-DBEs that do trucking in the denominator. Likewise if you are using a bidders list, make certain that you use it for both your numerator and your denominator. In other words, if you are limiting your denominator to only those firms who have actually provided bids or quotes on past contracting opportunities, then be certain that your numerator is similarly limited to only those DBEs that have actually provided bids or quotes in the past. Finally, if you are using a bidders list, remember that it must include all DBE and non-DBE bidders and quoters whether they are prime or subcontractors and whether or not they were actually awarded a contract or a subcontract.

F. Wherever Possible, Use Weighting. Weighting can help ensure that your Step One Base Figure is as accurate as possible. While weighting is not required by the rule, it will make your goal calculation more accurate. For instance, if 90% of your contract dollars will be spent on heavy construction and 10% on trucking, you should weight your calculation of the relative availability of firms by the same percentages. In other words:

$$\left[.9 \left(\frac{\# \text{heavy construction DBEs}}{\# \text{heavy construction firms}} \right) + .1 \left(\frac{\# \text{trucking DBEs}}{\# \text{all trucking firms}} \right) \right] \times 100 = \text{Step One Base Figure, weighted by type of work to be performed}$$

If you were using the number of firms in the example presented in the opening paragraph of this section, the equation you would use would be:

$$\left[.9 \left(\frac{44 \text{ heavy construction DBEs}}{300 \text{ heavy construction firms}} \right) + .1 \left(\frac{14 \text{ trucking DBEs}}{150 \text{ trucking firms}} \right) \right] \times 100 = \left[.9 \left(\frac{44}{300} \right) + .1 \left(\frac{14}{150} \right) \right] \times 100 =$$

$$\left[.9(.1467) + .1(.0933) \right] \times 100 = \left[.1320 + .0933 \right] \times 100 = 14.13$$

In this example, therefore, your Step One Base Figure would be 14.13%. Of course, in your actual goal setting process you will likely have many more than just two categories of contractors. Keep in mind the comments in paragraph "B" above and remember that it is preferable to break down your work into the most refined categories of contractors available and then perform your weighting calculations for each of those categories.

G. Address the Effects of Decertifications in Step One. If you have, or will imminently, decertify a firm (e.g., for exceeding the Personal Net Worth (PNW) cap, or for other reasons) you should address the decertification of that firm in Step One of the process by excluding the firm from the numerator of the ratio, but not from the denominator. Likewise, if you know that a firm (DBE or non-DBE) has gone out of business or is no longer bidding for DOT-assisted contracts, then that firm should be excluded from both the numerator and the denominator of your ratio. Remember: in the vast majority of cases it is not appropriate to make adjustments based on the number of firms that have been decertified because of PNW or other reasons in Step Two of the goal setting process. Instead these adjustments should be made in Step One.

H. Do Not Make Adjustments Based Solely on Changes in the Amount of Federal Assistance You Expect to Receive. It is never appropriate to adjust your measurements of relative DBE availability, either in Step One or in Step Two, solely because the size of your contracting program will change in the next fiscal year. For example, if you assume that non-DBEs will be able to expand to compete for a large influx of new program dollars, you should make the same assumption about DBEs, absent specific evidence to the contrary. Of course, if the type of work for which you expect to contract changes dramatically, this may impact your goal regardless of changes in the level of funding you receive.

I. Feel Free to Suggest Other Ways to Calculate Availability. It is important to remember that the examples listed in the rule are just that - examples. You may propose alternative methods of calculating Step One; just make sure that any such alternative operates to measure the actual relative availability of DBEs.

III. STEP TWO:

Step Two of the goal setting calculation process is intended to adjust your Step One Base Figure to make it as precise as possible. Under the rule, you must consider all evidence available in your jurisdiction to determine whether such an adjustment is necessary. In this context, there are several factors you must consider in making your Step Two adjustments if there are relevant and reliable data available. These factors include:

- past participation (the volume of work DBEs have performed in recent years) or other measure of demonstrated capacity;
- evidence from disparity studies conducted in your market area (including relevant studies commissioned by other contracting agencies in your market area);
- statistical disparities in the ability of DBEs to get financing, bonding and insurance;
- data on employment, self-employment, education and training, union apprenticeship programs; and
- any other data that would help to better measure the percentage of work that DBEs would be likely to obtain in the absence of discrimination.

Remember: while you must consider making adjustments to the base figure for all of the factors listed here, you are not required to make such an adjustment. If the evidence does not suggest such an adjustment is necessary, then no adjustment should be made. Moreover, if the evidence suggests that an adjustment is warranted, it is critically important to ensure that there is a rational relationship between the data you are using to make the adjustment and the actual numerical adjustment made. A clear explanation of which information sources you considered, how you made your Step Two adjustment - or why you determined that no adjustment was warranted - is a very important part of your overall submission.

A. Adjustments Based on Past Participation

A number of questions have arisen with respect to Step Two adjustments based on past participation. Below, we address the questions we have heard most frequently.

1. **What if, in the past, you were in noncompliance with the DBE regulations such that past levels of DBE participation present either an unfairly high or unfairly low picture of DBE capacity?** If, in the past, your DBE program was implemented in noncompliance with the regulations in place at the time, it may be inappropriate to make adjustments for past participation. If the noncompliance resulted in DBEs receiving either an unfairly high or unfairly low percentage of contracts, you should not make an adjustment for past participation based on any year in which the program was administered in noncompliance.

2. **What if the Step One Base Figure and past participation figure are very similar?** If your records suggest levels of past participation very similar to the number you calculated in Step One, then it is not necessary to make any adjustment for past participation. For instance, assume that your Step One Base Figure is 21% and your past participation figure is 22.4%. In that case, you do not need to make an adjustment for past participation. Nevertheless, you must explicitly state that the reason you are not making an adjustment for past participation is that your past participation has been very similar to your Step One Base Figure.

3. **Are decertifications ever relevant in Step Two?** As stated in Part II above, it is almost never appropriate to consider the decertification of DBEs in the Step Two adjustment process. There is one exception, however. Decertifications may constitute a reason not to make an adjustment based on past participation where the newly decertified firms account for all, or the overwhelming majority, of past DBE participation and you have good reason to believe that other DBE firms will not be ready, willing, and able to participate in the contracts you intend to let. For example, assume that your Step One Base Figure calculations establish that there are 15 DBE firms that perform the type of work for which you expect to contract this year and that two of those firms will imminently be decertified. Then, as stated above, you must exclude those two firms from the numerator of the ratio established in Step One. In addition, if those two firms were responsible for all or the overwhelming majority of your past participation, and there are no DBE firms poised to do similar types and volume of work, you should seriously consider not making an upward adjustment based on past participation or reducing the upward adjustment to reflect the fact that the firms in question are no longer available DBEs.

4. **What if the types of contracts that you will let this year are very different from the types of contracts that you have let in the past?** If the types of projects you are letting this year are very different from the types of projects let in recent years, you should not assume that your past rates of DBE participation are an accurate reflection of DBE capacity in the type of work you will perform this year. In this scenario, you should seriously consider not making an adjustment for past participation.

5. **If you feel that an adjustment for past participation is necessary, how should you calculate the adjustment?** If you feel that an adjustment based upon past participation is warranted, and you cannot determine any more precise way to make the adjustment, you may average the figure you obtained in Step One with a figure which represents your past participation. In utilizing this method, you will obtain a more precise outcome if you are able to include a number of years' worth of past participation.

a. **Determining the Median Past Participation.** The first step in adjusting your Step One Base Figure for past participation is to determine your "median" past participation percentages. Your goal setting process will be more accurate if you use the median (instead of the average or mean) of your past participation to make your adjustment because the process of determining the median excludes all outliers (abnormally high or abnormally low) past participation percentages. The following principles will help you calculate your median past participation percentage:

- i. The median is the middle number in any group of numbers.
- ii. The best way to determine the median is to first arrange the values in a list from low to high. For example, the numbers 3, 6, and 1 arranged from low to high is: 1, 3, 6.
- iii. If you have an odd number of values from which to determine the median, just take the number which falls in the middle. For example, 3 is the median of 1, 3, and 6.
- iv. If you have an even number of values, then you should average the two numbers which fall in the middle. For example, if you have the numbers 1, 3, 6 and 8, the median would be the average of 3 and 6 or 4.5.
- v. If you only have two numbers, simply average those two numbers together.

b. **Adjusting the Step One Base Figure with the Median Past Participation.** With these principles in mind, you may calculate your median past participation percentage and use that figure to adjust your Step One Base Figure by taking the average of your median past participation figure and your Step One Base Figure. It is important that past participation not be given disproportionate weight and therefore, you should not simply average your Step One Base Figure with a whole list of past years' participation. Instead, you should average the Step One Base Figure with the median of your past years' participation rates.

c. **Example.** An example may be helpful. Assume that your past participation for the past four years has been 18%, 15%, 12% and 11% and that your Step One analysis resulted in a Step One Base Figure of 9%. In order to obtain a Step One Base Figure adjusted for past participation, you must do the following:

- i. First, arrange your past participation values in order from low to high: 11%, 12%, 15%, 18%.
- ii. Then take the middle percentage to obtain your median past participation percentage. If, as here, there are an even number of percentages the median is derived averaging the middle two values (12% and 15%). Obtain the average of 12% and 15% by adding them together and dividing by 2. In other words: $12\% + 15\% = 27\%$, 27% divided by 2 equals 13.5%. Therefore, 13.5% is your median past participation percentage.
- iii. Finally, obtain a Step One Base Figure adjusted for past participation by taking the average of the Step One Base Figure and the median past participation. This average is obtained by adding together the Step One Base Figure (9%) and the median past participation percentage (13.5%) and dividing by 2. In other words, $9\% + 13.5\% = 22.5\%$ divided by 2 = 11.25%. Therefore, 11.25% is your Step One Base Figure adjusted for past participation.

6. **May you use only one year's worth of past participation to make an adjustment?** In most cases, your result will be more accurate if you use the median of several years to make your past participation adjustment. However, if you feel that your goal will be more accurate if you use only one year's worth of past participation you may do so as long as you fully explain your rationale. There is one caveat: if you use only one year's worth of past participation it must be a year in which your goals were set in compliance with Part 26.

7. **Must you consider making an adjustment for past participation even if the result of the adjustment might be to decrease the overall goal? What if the adjustment will increase the overall goal?** Yes, you must consider the advisability of making adjustments based on past participation regardless of whether or not the adjustment would result in increasing or decreasing the base figure derived in Step One.

8. **Must you consider making an adjustment for past participation if this is the first time you have ever had a DBE program?** No, an adjustment for past participation is not required if you are developing a DBE program for the first time and do not have any statistics on past DBE participation. Of course, if you do have statistics on past DBE participation you should consider making an adjustment.

B. Other Factors in Step Two

With respect to the other Step Two factors outlined in the rule, we have heard a number of questions. The following questions and answers may be of assistance to you as you consider Step Two of the goal setting process:

1. **What additional sources of information should be considered in Step Two?** In determining whether or not your base figure should be adjusted to account for the effects of past discrimination, you should consider consulting with the following organizations and institutions to determine whether they can direct you to information about past discrimination in public contracting; discrimination in private contracting; discrimination in credit, bonding or insurance; data on employment, self-employment, training or union apprenticeship programs; and/or data on firm formation:

- a. organizations serving or representing DBEs, minority-owned or women-owned businesses;
- b. state or local offices of procurement;
- c. federal, state or local offices responsible for enforcing civil rights laws;
- d. state or local offices responsible for minority or women's affairs;
- e. state or local offices dealing with business affairs, commerce or small businesses;
- f. state or local offices dealing with the oversight of banks and other credit institutions (sometimes this is the state treasurer's office);
- g. state or local labor offices; local labor organizations; institutions of higher education within your state;
- h. your state's Office of the Attorney General (for information about lawsuits related to contracting or obtaining credit or bonding.)

If you choose to make adjustments to your base figure based upon any of this evidence of past discrimination, be certain that there is a clear and rational relationship between the evidence and the adjustment. This is often very difficult to do and depends entirely on the type of evidence you discover. You may want to contact a consultant or local institution of higher education (departments of economics or statistics) to assist you in making these types of adjustments. Whether or not you make an adjustment based on a particular piece of evidence, make certain that you include a description of all of the evidence you considered with your submission.

2. What are "disparity studies" and why must I consider them? There is absolutely no requirement under the rule that you conduct your own disparity study. Nevertheless, if one has been conducted for your market area, you should consider the data the study contains. Many different types of studies have been referred to as "disparity studies," and the term is used broadly in the regulation to mean any type of study designed to investigate the existence of discrimination in contracting. Some disparity studies consist entirely of complex and lengthy statistical analyses. Some focus less on statistics and more on the collection and organization of anecdotal evidence of discrimination. Both types of studies should be considered in Step Two. Disparity studies vary widely in content and quality. Despite this, all or part of a disparity study relating to your local market area may provide a rich source of information for your goal setting process. If you are unsure about whether or not a disparity study relevant to your goal setting process has been conducted anywhere in your market area, consult with state and local offices of procurement and local government agencies responsible for enforcing civil rights laws and ask them if they know of any such studies. Remember, you may find relevant information in studies commissioned by other contracting agencies in your market area so be sure to examine any such studies for relevance to your goal setting process. If you choose to make an adjustment based upon a disparity study, you must carefully explain precisely what the disparity study evidence was and why the adjustment is warranted. In most cases it will be best to submit the disparity study (or all of the relevant portions of the study) with your proposed goal. If you obtain a disparity study conducted in your market area but, upon reading it, you determine that it is not relevant to your program or it is not reliable, you should not make adjustments based on the study. In this case, simply state your reason for not making the adjustment in your submission.

3. If you have reliable information about the characteristics of the firms available in your local market area, should you use those characteristics to make adjustments in Step Two? If you have accurate information about the characteristics of all the firms that are available to perform work for you such as their size, age, or past experience, you should consider making adjustments to your Step One Base Figure to account for any impact these factors might have on the capacity of firms to perform contracts for you. Of course, you will increasingly have information about some of these factors as you compile a bidders list in accordance with section 26.11. Again, it is important that any such adjustments be made with respect to both DBEs and non-DBEs in your market area. These types of adjustments usually involve quite difficult calculations and will likely involve using regression analysis. If you want to conduct these types of adjustments and do not have the in-house capacity to do so, you must obtain the expertise necessary to make the adjustments correctly. You may want to consider obtaining assistance from a consultant or local institution of higher education (e.g., departments of economics or statistics).

4. What if there is no additional information available related to your goal setting process? If no disparity studies have been conducted in your market area, be sure to state that in your submission to your operating administration. Likewise, if you are unable to find the other types of evidence or data relative to Step Two, make certain you state this in your goal submission.

IV. CALCULATING THE RACE/GENDER-NEUTRAL AND RACE/GENDER-CONSCIOUS SPLIT:

The race/gender-neutral and race/gender-conscious division of the goal is an exceedingly important component of the goal-setting process. As is stated in section 26.51, you must meet the maximum feasible portion of your overall goal by using race/gender-neutral means of facilitating DBE participation. You must also carefully explain why you projected that you could achieve the level of race/gender-neutral participation you propose and the specific reasoning and data that support your conclusion. Many of you have asked for assistance in determining what factors to consider in projecting the portion of your overall goal that you will be able to meet through race/gender neutral means. The following considerations may be helpful:

A. Consider the Amount by Which You Exceeded Your Goals in the Past. The amount by which you exceeded your overall goals in past years can be a useful tool in helping you project the race/gender-neutral participation you can expect in the future. For example, suppose that your past year's goal was 20%, but you obtained 30% DBE participation. The 10% difference between goal and achievement represents participation that went beyond what you told contractors they should do in order to meet the 20% goal. This 10% participation, then, was not made necessary by race/gender-conscious provisions of your program. It may be reasonable for you to assume, as you make your projected split between race/gender-neutral and race/gender-conscious measures for next year, that contractors will again be able to achieve 10% participation over and above the race/gender-conscious portion of your overall goal. If your overall goal were again 20%, this could be evidence supporting a decision for projecting 10% race/gender-neutral and 10% race/gender-conscious split for the coming year.

Your projected split will probably be more accurate if you use past participation data from more than one year. As noted in point #5 under "Adjustments Based on Past Participation," it is advisable to calculate the median of the past years' participation. For example, if your goal was 20% in each of the past three years, and your achievements were 21%, 22%, and 30%, the median amount by which you exceeded your goal was 2% (i.e., the median of 1%, 2% and 10%). You could then use this figure as evidence supporting a projection of 2% race/gender-neutral participation for the coming year. If you do use only one year's past participation for this purpose, be sure that the year you use was one in which you set your goal under the new Part 26 regulations.

B. Consider Past Participation by DBE Prime Contractors. If you obtained any of your past participation through the use of DBE primes, then those attainments should be considered race/gender-neutral and can be used as a basis for estimating a similar level of race/gender-neutral participation in the next program year. For instance, assume that your goal for last year was 20% and your achievement was 20%. If a portion of that 20% resulted from the participation of DBE primes - and thus from race/gender-neutral means - then it may be appropriate to assume that you will be able to achieve similar results through the race/gender-neutral participation of DBE primes in the future. Of course, in this instance it is especially important to ensure that you are comparing similar types of contracts. For example, if last year's participation by DBE primes occurred in a type of contracting in which there are many DBE primes, and this year you intend to do all of your work in industries in which there are few DBE primes, then it would be inappropriate to assume that you will replicate similar levels of participation by DBE primes.

C. Consider Past Participation by DBE Subcontractors on Contracts Without Goals. If you obtained any of your past participation through the use of DBE subcontractors on contracts without DBE goals, then those attainments should be considered race/gender-neutral and can be used as a basis for estimating a similar level of race/gender-neutral participation in the next program year. For instance, assume that your goal for last year was 20% and your achievement was 20%. If a portion of that 20% resulted from the participation of DBE subcontractors on contracts without goals - and thus from race/gender-neutral means - then it may be appropriate to assume that you will be able to achieve similar results in the future. Again, it is extremely important to ensure that you are comparing similar types of contracts. For example, if last year's participation by DBE primes occurred in a type of contracting in which there are many DBE subcontractors, and this year you intend to do all of your work in industries in which there are few DBE subcontractors, then it would be inappropriate to assume that you will replicate similar levels of participation by DBE subcontractors.

D. Consider MBE/WBE/DBE Participation Pursuant to Race/Gender-Neutral State or Local Programs. An excellent source of information about how much DBE participation is likely in the absence of race/gender-conscious measures may be found in similar state or local transportation construction projects that do not use any race/gender-conscious measures at all. For example, if projects funded with purely state/local funds involve no race/gender-conscious measures aimed at increasing the participation of DBEs and these projects achieve a median rate of 8% DBE participation, then you may project that you will achieve 8% DBE participation in your contracting without race/gender-conscious DBE goals. As above, your projection will be more accurate if you use the median of a number of past years.

E. Consider Concrete Plans to Implement New Race-Neutral Methods. If you have instituted new and comprehensive mechanisms aimed at obtaining additional DBE participation through race/gender-neutral means, these efforts might provide the basis for estimating a greater level of race/gender-neutral participation for the upcoming year. The key here is that any such efforts used to justify race/gender-neutral participation in the upcoming fiscal year must be:

1. new,
2. ready for immediate implementation,
3. described in detail, and
4. likely to result in additional DBE participation.

Evidence might include the establishment of a new, comprehensive mentor-protégée program aimed at providing assistance to small businesses; a detailed plan to break up larger projects into smaller subparts for which small businesses and DBEs will be more likely to be able to compete; or the institution of aggressive new efforts to provide bonding and credit to small companies, including DBEs, that have been unable to obtain it in the past.

F. Consider Past History of Inability to Achieve Goals. In determining how much of your goal you should meet through race/gender-neutral means, another factor to consider is a past history of inability to meet goals. If you have relied exclusively on race/gender-conscious measures in the past to meet your overall goals, but have not been able to achieve them, this may justify relying exclusively on race/gender-conscious means to meet your goal for the upcoming year. There are some caveats with respect to this particular factor in determining whether or not you will be likely to achieve a level playing field through race/gender-neutral means. If the goal you have set under Part 26 is significantly lower than your past goals, then your inability to meet your past goals is not a good justification for a completely race/gender-conscious goal under the new rule. However, if your goal under Part 23 was 20% and you only achieved 15% using entirely race/gender-conscious measures, that would be justification for using entirely race/gender-conscious measures only if your goal under the new Part 26 is approximately 20% or higher. **This does not mean that you are prohibited from proposing to use race/gender-neutral means to meet all or part of your goal.** However, if you have a history of being unable to achieve reasonable goals in the past, you will have to demonstrate some additional evidence for your contention that race/gender-neutral means will suffice to meet your goals in the future. Such evidence might include the establishment of a new, comprehensive mentor-protégée program aimed at providing assistance to small businesses or the institution of aggressive new efforts to provide bonding and credit to small companies that have been unable to obtain it in the past.

G. Avoid Double-Counting. It is important to note that some of the types of evidence for race/gender-neutral and race/gender-conscious projections outlined above cannot be used at the same time or it will result in overestimating past race/gender-neutral achievements. For instance, if you both exceeded your goals and used DBE primes in the same year - and thus the DBE primes contributed to you exceeding your goals - then you must be certain not to double count the extent to which the participation of DBE primes provides a basis for a race/gender-neutral projection in the next year. If you exceeded your goal by 10% and at the same time DBE primes accounted for 5% of your total DBE participation, then the total race/gender-neutral participation value for that year would be 10%, not 15%.

H. Monitor DBE Participation to Determine Whether You Need to Adjust Your Use of Race/Gender-Conscious Measures. Of course, once you have projected how much of your goal can be achieved through race/gender-neutral means, it will become critically important for you to monitor DBE participation during the year to determine whether your projections were on target. Your projections are just that: projections. By monitoring actual DBE participation you will be able to determine what, if any, midyear corrections are needed in your mix of race/gender-conscious and race/gender-neutral measures used to achieve your goals. **Remember: you must meet as much of your goal as possible through race/gender-neutral means.** Therefore, if it appears that part way through the fiscal year that you are on track to exceed your goals, you should ratchet back your use of race/gender-conscious goals. Likewise, if you are using all, or mostly, race/gender-neutral measures and it appears that you will not meet your goal, you should consider instituting some race/gender-conscious measures or, at a minimum, more aggressively implementing your race/gender-neutral measures.

V. CONTACT US IF YOU NEED FURTHER ASSISTANCE:

Finally, as always, your operating administration is here to help. We understand that the new goal setting process can seem daunting at first, but we also know that you are up to the task. Never hesitate to call early and often for assistance while you are working on your goals. We will do everything we can to help you level the playing field and ensure an equal opportunity for all firms to play a role in building and maintaining our nation's transportation infrastructure.

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Commercially Useful Function

Of all the many elements in the DBE program there is one that can have the most detrimental impact on the ability of the prime contractor to meet its contract goal as well as the ability of a recipient to meet its overall goal. This one element is commonly referred to as commercially useful function or "CUF". How can just one element of the program have such an impact achieving the results Congress intended when it established the DBE program?

Both the prime contractor and the STA receives credit toward the DBE goal (contract and overall) only when a DBE working on a contract performs a CUF. DBEs generally perform work of a contract either as a contractor, a trucker, a regular dealer or a manufacturer. While each of these categories are evaluated differently when determining whether the DBE has performed a CUF, there is one guiding principle that must be met. Under the terms established in 49 CFR 55, a DBE firm performs a CUF when it is:

"Responsible for execution of the work of the contract or a distinct element of the work . . . by actually performing, managing, and supervising the work involved."

The question contract administrators often face is, "What are the management, supervision, and performance actions of a DBE firm that satisfactorily meets this requirement?" Evaluating these areas will form the basis to render a determination that a DBE has in fact performed a CUF. The subcontract is the one key reference point for any contract administrator and it is essential for this evaluation process. The subcontract has an effective description of the work to be performed by a DBE and is a legally recognized document.

The USDOT has described the following key factors in its DBE regulations to help determine whether a CUF is being performed:

- ❑ Evaluation of the amount of work subcontracted, whether it is consistent with normal industry practices;
- ❑ Whether the amount the firm is paid under the contract is commensurate with the work that is actually being performed to be credited towards the goal;
- ❑ When the DBE furnishes materials, the DBE must be responsible for negotiating the price, for determining the quality and quantity of the material, ordering the material and paying for it. As a contractor a DBE firm would typically be contracted to furnish and install or just to install an item in the contract
- ❑ Whether the DBE's role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed through in order to obtain the appearance of DBE participation. In essence, was the role merely a contrived arrangement for the purpose of meeting the DBE contract goal?

In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate. A DBE must have a necessary and useful role in the transaction, of a kind for which there is a market outside the context of the program. The firm's role must not be a superfluous step added in an attempt to obtain credit towards the goal.

Normal Industry Practice

The most consistent thread through a CUF evaluation is whether the role the DBE is playing in any transaction is consistent with "normal industry practice." The concern is that the normal industry practice is determined largely by non-DBE firms and is often simply a practice repeated enough to set the normal industry practice. However, if normal practices in fact erode the ability of the DBE to control

its work and remain independent, the practice is inconsistent with the DBE program. In such cases, the DBE program requirements must prevail.

One general rule of thumb that can be considered is whether a DBE firm would be performing in the manner it is if there was no DBE program. As further evidence of meeting normal industry practice, does the DBE firm perform this work on non-federal work?

Monitoring

In keeping with normal contract requirements, it is the primary responsibility of the prime contractor to ensure that the DBE firm is performing a CUF. The State Transportation Agency (STA), as the contracting agency, has a further oversight responsibility to ensure that the prime contractor has effectively met this responsibility under his/her contract with the STA.

The STA needs to have sufficient field personnel and general headquarters staff to monitor the performance of work to be performed by DBE firms on all federal aid projects, including those of sub-recipients. Contractors, DBEs, local public agencies, and all employees are required to cooperate in carrying out this responsibility. The STA should establish and enforce monitoring procedures that include the following:

- ❑ Clearly written directives defining the role and interrelationship of the various departmental levels of the STA responsible to monitor and evaluate the contractor's compliance with the contract provisions;
- ❑ Procedures that spell out specific monitoring activities and responsibilities of a project level monitoring program;
- ❑ Exchange of information between departmental, central and field offices in reporting accomplishments, violations and enforcement; and
- ❑ Procedures for the application of appropriate sanctions once a determination of failure to meet the DBE contract requirements is made.

DBE Performance - CUF

Highway firms certified in the DBE program typically perform in four (4) categories: contractor, trucker, regular dealer and manufacturer. The following is an overview of each category, typical CUF questions and a list of documents to review.

CONTRACTOR

A contract administrator will most frequently work with a contractor, versus a regular dealer or manufacturer. Contract administration responsibilities for contractors have a broader scope of review and evaluation. To determine whether a DBE is actually performing their work, five (5) distinct operations must be considered: management, workforce, equipment, materials and performance.

These areas must be evaluated to make a CUF determination, and situations need to be reviewed on a case by case basis. Some of the CUF questions cited below may also be quite adaptable to the other three types of work categories.

Management

The DBE must manage the work that has been contracted to his/her firm. Management includes, but is not limited to:

- ❑ Scheduling work operations
- ❑ Ordering equipment and materials
- ❑ Preparing and submitting certified payrolls
- ❑ Hiring and firing employees.

The DBE owner must supervise daily operations, either personally or with a full time, skilled, and knowledgeable superintendent employed by and paid wages by the DBE. The superintendent must be under the DBE owner's direct supervision. The DBE owner must make all operational and managerial decisions of the firm. Mere performance of administrative duties is not supervision of daily operations.

Red Flags

Red flags are questionable practices, which may warrant further review. The red flags for management operations include, but are not limited to:

- ❑ The DBE provides little or no supervision of the work;
- ❑ The DBE's superintendent is not a regular employee of the firm or supervision is performed by personnel associated with the prime contractor, or another business;
- ❑ Key staff and personnel are not under the control of the DBE firm;
- ❑ The DBE firm's owner is not aware of the status of the work or the performance of the business;
- ❑ Inquiries by department or FHWA representatives are answered by the prime contractor.

Typical CUF questions could include:

- ❑ Is there a written legal document executed by the DBE to perform a distinct element of work?
- ❑ Who does the on-site DBE representative report to?
- ❑ Has this individual ever shown up on any other contractor's payroll?
- ❑ Has the DBE owner been present on the jobsite?

Typical documentation to evaluate:

- ❑ Written contractual obligation document
- ❑ Daily Inspection report
- ❑ Project Inspection and Diary
- ❑ Payrolls

Workforce

In order to be considered an independent business, a DBE firm must keep a regular workforce. DBE firms cannot "share" employees with non-DBE contractors, particularly the prime contractor. The DBE shall perform its work with employees normally employed by and under the DBE's control. All work must be performed with a workforce the DBE firm controls, with a minimum of **30%** of the work to be performed by the DBE firm's regular employees, or those hired by the DBE firm for the project from a source other than the prime contractor. The DBE, in all instances, must have direct supervision of all employees. This arrangement should be approved by the STA prior to commencing the work of the contract.

The DBE firm must be responsible for all payroll and labor compliance requirements for all employees performing on the contract and is expected to prepare and finance the payrolls. Direct or indirect payments by any other contractor are not allowed.

The DBE must perform or exercise responsibility for at least 30% of the total cost of its contract with its own work force. The DBE must not subcontract a greater portion of the work than would be expected on the basis of normal industry practice for the type of work involved.

Red Flags

Some questionable workforce practices, which may warrant further review, include, but are not limited to:

- Supervision of DBE employees by another contractor;
- Actual work is performed by personnel normally employed by the prime contractor or another business;
- Employees are paid by the DBE and the prime contractor.

Typical CUF questions could include:

- Who prepares the DBEs certified payroll?
- Has this individual ever shown up on any other contractor's payroll?
- Who does the DBE on-site representative contact for hiring, firing or to modify the contract due to site condition changes?
- List the name of DBE's crew. Have any of the employees ever shown up on any other contractors' payroll?

Typical Documents to evaluate:

- Written contractual obligation document
- Daily Inspection report
- Project Diary

Equipment

A DBE firm may lease specialized equipment from a contractor, excluding the prime, if it is consistent with normal industry practices and at rates competitive for the area. A rental agreement must specify the terms of the agreement. The lease must be for a short period of time and involve a specialized piece of equipment readily available at the job site. The lease may allow the operator to remain on the lessor's payroll, if this is a generally acceptable practice within the industry. The operation of the equipment must be subject to the full control of the DBE.

The DBE is expected to provide the operator for non-specialized equipment and is responsible for all payroll and labor compliance requirements. A separate lease agreement is required. All lease agreements should be approved by the STA prior to the DBE starting the work.

On a case by case basis, the STA may approve the DBE to lease a specialized piece of equipment from the prime. However, the STA must ensure that this amount is not counted toward the contract goal. Equipment leased and used by the DBE firm with payment deducted from the prime contractor's payment (s) to the DBE is not allowed.

Red Flags

Some questionable equipment practices, which warrant further review, include, but are not limited to:

- ❑ Equipment used by the DBE firm belongs to the prime contractor or another contractor with no formal lease agreement.
- ❑ The equipment signs and markings cover another owner's identity, usually through the use of magnetic signs.
- ❑ A DBE trucking business utilizes trucks owned by the prime contractor.

Typical CUF questions could include:

- ❑ List the major self-propelled (engine) equipment used by the DBE. Determine if the equipment belongs to the DBE. Is it owned or leased?
- ❑ If leased, is there a formal agreement identifying the terms and parties?
- ❑ Does the equipment have the DBE's markings or emblems?
- ❑ Is the equipment under the direct supervision of the DBE?
- ❑ Is the operator of the leased equipment the DBE's employee?
- ❑ If the equipment is leased, is the payment for the equipment deducted from the work performed?

Typical Documents to evaluate:

- ❑ Written contract document
- ❑ Daily Inspection report
- ❑ Project Diaries
- ❑ Lease Agreements

Materials

The DBE must assume the actual and contractual responsibility for the provision of the material to be incorporated into the item of work being performed by the DBE. The DBE must negotiate the cost, arrange delivery, and pay for the materials and supplies for the project. The DBE must prepare the estimate, quantity of material, and be responsible for the quality of materials. Invoices for material should show the payee as the DBE.

Red Flags

Some questionable material practices, which may warrant further review, include, but are not limited to:

- Materials for the DBE are ordered, or paid for by the prime contractor.
- Two Party checks or joint checks are sent by the Prime to the supplier or manufacturer
- Materials or supplies necessary for the DBE firm's performance are delivered to, billed to or paid by another business.
- Payment for materials is deducted by the prime contractor from payments to DBE for work performed.
- A DBE prime contractor only purchases materials while performing little or no work.

Typical CUF questions could include:

- Is there a written legal document executed by the DBE to perform a distinct element of work?
Is the work to be performed by a DBE a “furnish and install” item of work?
- Who makes arrangements for delivery of materials?
- Who are the material invoices made out to?
- Who scheduled delivery of materials?
- In whose name are materials shipped?
- If two party checks are used, who are the parties identified as payable to?

Typical Documentation to evaluate:

- Written contract document
- Delivery Tickets
- Invoices
- Daily Inspection report

Performance

The DBE must be responsible for the performance, management and supervision of a distinct element of the work, in accordance with normal industry practice (except where such practices are inconsistent with the DBE regulations).

Red Flags

Some questionable performance practices, which may warrant further review, include, but are not limited to:

- ❑ Work that is being done jointly by the DBE firm and another contractor;
- ❑ The work to be performed by the DBE is outside of the DBE's known experience or capability;
- ❑ Any portion of the work designated to be performed by a DBE subcontractor is performed by the prime contractor or any other firm;
- ❑ The DBE firm is working without a subcontract agreement approved by the department, except in the case of trucking;
- ❑ A DBE prime contractor subcontracts more than 50% of the contract value;
- ❑ The agreement between the prime contractor and DBE firm artificially inflates the DBE participation;
- ❑ An agreement that erodes the ownership, control or independence of the DBE subcontractor;
- ❑ A DBE firm works for only one prime contractor or a large portion of the firm's contracts are with one contractor;
- ❑ The volume of work is beyond the capacity of the DBE firm.

Typical CUF questions could include:

- ❑ Does the DBE on-site representative effectively manage the job site without any interference from the prime contractor?
- ❑ Does the DBE appear to have control over methods of work on its contract items?
- ❑ Is the DBE actually scheduling work activities, material deliveries and other related actions required for execution of the work?
- ❑ Has any other contractor performed any amount of work specified in the DBE's contract?

Typical Documents to evaluate:

- ❑ Written contractual obligation document
- ❑ Daily Inspection report
- ❑ Project Diary

DBE TRUCKING FIRMS

To be certified in the DBE program as a trucking firm, the DBE firm is only required to own and operate at least one fully licensed, insured, and operational truck used on the contract. To perform a CUF, a DBE firm must also be responsible for the management and supervision of the entire trucking operation on a contract-by-contract basis. There cannot be a contrived arrangement for the purpose of meeting DBE goals.

A DBE can lease a truck(s) from an established equipment leasing business open to the general public. The lease must indicate that the DBE has exclusive use of and control over the truck. This requirement 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. Otherwise, the DBE does not receive full credit for DBE participation.

Leased trucks must display the name and identification number of the DBE. The DBE trucker must also hold the necessary, where appropriate, license, hauling permit, etc., as required by the State to transport material on public highways.

To count DBE trucks toward a contract goal, the following can occur:

- ❑ The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE can count these trucks up to the number of trucks that the DBE owns/leases on the contract.
- ❑ The DBE may also lease trucks from a non-DBE firm and owner operators. The DBE can count the number of trucks up to the amount of the DBE trucks used on the contract.
- ❑ Additional DBE participation can be achieved from non-DBE trucks. However, the additional participation is only entitled to credit for the fee or commission it receives as a result of the lease arrangement.

In order for the STA to monitor the performance of a DBE trucking firm, the work to be performed must be covered by a subcontract or written agreement approved by the STA prior to performing the work. Additional documentation required when the DBE firm leases equipment is a valid lease agreement to be provided to the STA for appropriate action. To be considered valid, the lease agreement must include such items as the lessor's name, list of trucks to be leased by Vehicle Identification Number, (VIN), and the agreed upon amount of the cost and method of payment. It should be the responsibility of the DBE to provide the operator's fuel, maintenance and insurance for all leased trucks.

Typical CUF questions could include:

- ❑ Do the trucks used on the project belong to the DBE?
- ❑ If leased, is there a formal agreement identifying the terms and parties?
- ❑ Are the rates appropriate?
- ❑ Is there an approved subcontract or written agreement?
- ❑ If so, who are the parties? _____
- ❑ Is DBE trucking firm's employees shown on the certified payroll?

Typical Documentation to evaluate:

- ❑ Subcontract or written agreements
- ❑ Lease agreements
- ❑ Payroll records

DBE REGULAR DEALERS

In order for a firm to be deemed a regular dealer, it 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. In addition, 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.

It is important to make a distinction between a regular dealer and a firm that supplies a product on an ad hoc basis in relation to a particular contract or contractor. The latter does not meet the requirements of a regular dealer because supplier like functions is performed on an ad hoc basis or for only one or two contractors with supplier relationships. A regular dealer has a regular trade with a variety of customers. One of the key considerations of being a regular, established dealer is the presence of an inventory of materials and/or supplies. A regular dealer assumes the actual and contractual responsibility for the provision of the material and/or supply.

A firm may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the firm 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.

Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers.

Typical CUF questions could include:

- Does the regular dealer have an established storage facility and inventory?
- Does the dealer have a business that sells to the public on a routine basis in the product being supplied?
- Does the business stock the product for use on the project as a normal stock item?
- Who is delivering and unloading the material?
- Is distribution equipment used in delivering the product the DBE?
- Is it owned or leased?

Typical Documentation to evaluate:

- Purchase Orders
- Invoices
- Delivery Tickets

DBE MANUFACTURERS

As described in 26.55(e)(1)(ii) 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. Another valuable source for defining what constitutes a manufacturer is Webster's dictionary that defines a manufacturer as a process or operation carried out systematically with division of labor and the use of machinery for making any material product from raw material by forming, shaping, and altering it into a form suitable for use. Examples of such items could be a concrete ready mix plant, a crushing operation, fabricating plant either steel or concrete, etc.

Typical CUF questions could include:

- Is the business primary business function to manufacturer construction products?
- Does the business stock the product altered for this project as a normal stock item?
- Is the quality of the materials controlled by the DBE?

Typical Documents to evaluate:

- Purchase orders
- Bill of Laden
- Shipping tickets

Sanctions for Compliance and Enforcement

The prime contractor is ultimately responsible for ensuring that a DBE performs a CUF. Failure of a DBE firm to perform a commercially useful function should result in the STA taking specific definitive actions to enforce the CUF requirement of the contract. Some of the actions a STA could take include but are not limited to the following:

- Deny or limit credit towards the contract goal;
- Require GFE to replace the DBE or meet the goal on remaining work;
- Withhold progress payments;
- Terminate the contract;
- Reduce the contractor(s) prequalification limit.

Some questions that could be part of an evaluation procedure:

- If a CUF was not performed by the DBE, what action was taken to correct the deficiency?
- Did the action taken, correct the deficiency?

List of Typical Documentation to Collect:

- Executed contracts
- Material/ Supply Agreements
- Invoices of materials/supplies
- Equipment Titles of Ownership
- Equipment Lease/Rental Agreements
- Hauling Tickets
- Delivery tickets
- Canceled Checks
- Project Inspection/Diary
- Payroll Records

When a DBE is presumed not to be performing a CUF, the DBE may present evidence to rebut this presumption. Decisions regarding CUF determinations are subject to review by concerned operating administrations, such as the FHWA. However, CUF decisions are not appealable to USDOT, they are contract administration issues.

CUF & Certification

Certification and commercially useful function are separate and distinct issues. Certification decisions address the nature of a firm's ownership and structure while CUF primarily concerns the role a firm has played in a particular transaction. Failure to perform a commercially useful function can be considered during the certification process; however it must not necessarily be the sole factor.

A DBE's repeated failure to perform a CUF may raise questions regarding the firm's control, as it relates to independence, and perhaps ownership. If there is evidence of a pattern of failing to perform a CUF that raises serious issues with the firm's ability to control the work and its independence from the non-DBE firm, the STA should address this matter. A STA may commence a proceeding under 26.87 to determine the continued eligibility of the DBE firm.

In cases of deliberate attempts to circumvent the intent of the DBE program, or fraud, these actions may lead to criminal prosecution of both the prime contractor and the DBE firm.

j. Is the DBE maintaining its own payroll?
 Yes No

k. Who prepares the DBEs certified payroll? _____

l. Is the DBE actually scheduling work activities, material deliveries and other related actions required for prosecution of the work?
 Yes No

m. Did the DBE sublet any items or portions of the work to any other firm?
 Yes No
If yes, what % was sublet? _____%
Name of the firm _____

2. Equipment

a. List the major self-propelled (engine) equipment used by the DBE: _____

b. Does the equipment have the DBE's markings or emblems?
 Yes No
If another firm's markings are discernable, note the Name: _____

c. Is the DBE's equipment?
 Owned Leased from _____

d. If leased, is there a formal agreement identifying the terms and parties?
 Yes No

e. Is the equipment under the direct supervision of the DBE?
 Yes No

f. Is the operator of the leased equipment the DBE's employee?
 Yes No
If not the DBE's whose employee is it? _____

g. If the equipment is leased, is the payment for the equipment deducted from the work performed?
 Yes No

3. Workforce:

a. List the name of DBE's crew as observed during the operation described above:

b. Has any of this crew ever shown up on any other contractors' payroll?
 Yes No

4. Materials:

- a. Is the work to be performed by a DBE a furnish and install item of work?
 Yes No
- b. Is the quality of the materials controlled by the DBE?
 Yes No
- c. If two party checks used, who are the parties identified as payable to:

- d. Who makes arrangements for delivery of materials? _____
- e. Material Invoices made out to: _____
- f. Who scheduled delivery of materials? _____
- g. In whose name area materials shipped? _____
- h. Does the prime contractor direct who the DBE is to obtain the material from and at what price?
 Yes No

4. Performance:

- a. Does the DBE appear to have control over methods of work on its contract items?
 Yes No
- b. Has any other contractor performed any amount of work specified in the DBE contract?
 Yes No

5. Other Work categories:

Truckers:

- a. Is it the DBE's trucks? Yes No
 Are they Owned Leased from _____
- If leased, is there a formal agreement identifying the terms and parties?
 Yes No
- b. Are the rates appropriate?
- c. Is there an approved subcontract or written agreement?
 Yes No
 Who are the parties? _____
- d. Is DBE trucking firms' employees shown on the certified payroll?
 Yes No

Regular Dealers:

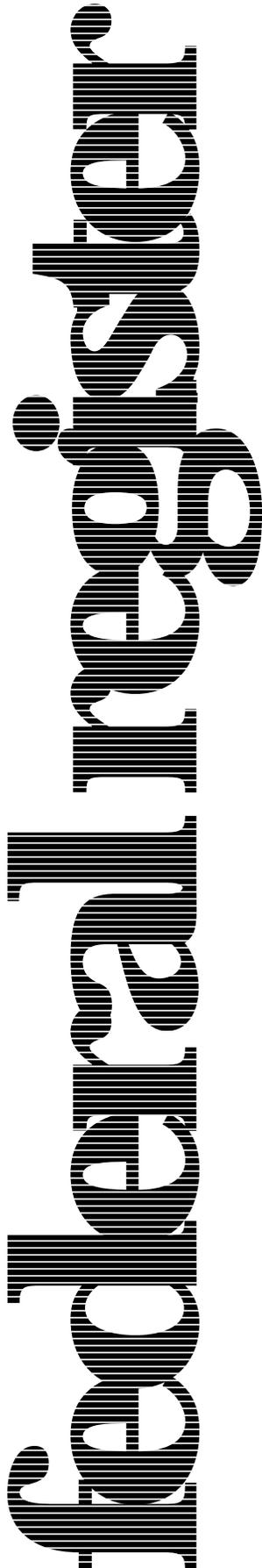
- a. Does the regular dealer have an established storage facility and inventory?
 Yes No
- b. Does the dealer have a business that sells to the public on a routine basis in the product being supplied?
 Yes No
- c. Does the business stock the product for the use on the project as a normal stock item? Yes_____ No_____
- c. Is the quality of the materials controlled by the DBE?
 Yes No
- e. In whose name are the materials shipped? _____
- f. Who is delivering, and unloading the material? _____
- g. Is the distribution equipment used in delivering the product the DBE's?
 Yes No
 Is it Owned
 Leased

4. Manufacturer

- a. Is the business's primary function to manufacturer construction products?
 Yes No
- b. Does the business stock the product altered for this project as a normal stock item?
 Yes No
- b. Is the quality of the materials controlled by the DBE?
 Yes No

General Notes:

Insert Tab Here



Tuesday
February 2, 1999

Part II

**Department of
Transportation**

Office of the Secretary

**49 CFR Parts 23 and 26
Participation by Disadvantaged Business
Enterprises in Department of
Transportation Programs; Final Rule**

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Parts 23 and 26**

[Docket OST-97-2550; Notice 97-5]

RIN 2105-AB92

Participation by Disadvantaged Business Enterprises in Department of Transportation Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: This final rule revises the Department of Transportation's regulations for its disadvantaged business enterprise (DBE) program. The DBE program is intended to remedy past and current discrimination against disadvantaged business enterprises, ensure a "level playing field" and foster equal opportunity in DOT-assisted contracts, improve the flexibility and efficiency of the DBE program, and reduce burdens on small businesses. This final rule replaces the former DBE regulation, which now contains only the rules for the separate DBE program for airport concessions, with a new regulation. The new regulation reflects President Clinton's policy to mend, not end, affirmative action programs. It modifies the Department's DBE program in light of developments in case law requiring "narrow tailoring" of such programs and last year's Congressional debate concerning the continuation of the DBE program. It responds to comments on the Department's December 1992 notice of proposed rulemaking (NPRM) and its May 1997 supplemental notice of proposed rulemaking (SNPRM).

DATES: This rule is effective March 4, 1999. Comments on Paperwork Reduction Act matters should be received by April 5, 1999; however, late-filed comments will be considered to the extent practicable.

ADDRESSES: Persons wishing to comment on Paperwork Reduction Act matters (see discussion at end of preamble) should send comments to Docket Clerk, Docket No. OST-97-2550, Department of Transportation, 400 7th Street, SW., Room 4107, Washington, DC 20590. We emphasize that the docket is open only with respect to Paperwork Reduction Act matters, and the Department is not accepting comments on other aspects of the regulation. We request that, in order to minimize burdens on the docket clerk's staff, commenters send three copies of their comments to the docket. Commenters wishing to have their

submissions acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the commenter. Comments will be available for inspection at the above address from 10 a.m. to 5:00 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590, phone numbers (202) 366-9306 (voice), (202) 366-9313 (fax), (202) 755-7687 (TDD), bob.ashby@ost.dot.gov (email); or David J. Goldberg, Office of Environmental, Civil Rights and General Law, Department of Transportation, 400 7th Street, SW., Room 5432, Washington, DC 20590, phone number (202) 366-8023 (voice), (202) 366-8536 (fax).

SUPPLEMENTARY INFORMATION:**Background**

The Department has the important responsibility of ensuring that firms competing for DOT-assisted contracts are not disadvantaged by unlawful discrimination. For eighteen years, the Department's most important tool for meeting this responsibility has been its Disadvantaged Business Enterprise (DBE) program. This program began in 1980. Originally, the program was a minority/women's business enterprise program established by regulation under the authority of Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes that apply to DOT financial assistance programs. See 49 CFR part 23.

In 1983, Congress enacted, and President Reagan signed, the first statutory DBE provision. This statute applied primarily to small firms owned and controlled by minorities in the Department's highway and transit programs. Firms owned and controlled by women, and the Department's airport program, remained under the original 1980 regulatory provisions. In 1987, Congress enacted, and President Reagan signed, statutes expanding the program to airports and to women-owned firms. In 1991 (for highway and transit programs) and 1992 (for airport programs), Congress enacted, and President Bush signed, statutes reauthorizing the expanded DBE program.

After each statutory amendment, and at other times to resolve program issues, the Department amended part 23. The result has been that part 23 has become

a patchwork quilt of a regulation. In addition, years of interpretation by various grantees and different DOT offices has created confusion and inconsistency in program administration. These problems, particularly in the area of certification, were criticized in General Accounting Office reports. The Department's desire to improve program administration and make the rule a more unified whole led to our publication of a December 1992 notice of proposed rulemaking (NPRM).

The Department received about 600 comments on this NPRM. The Department carefully reviewed these comments and, by early 1995, had prepared a draft final rule responding to them. However, in light of the Supreme Court's June 1995 decision in *Adarand v. Peña* and the Administration's review of affirmative action programs, the Department conducted further review of the DBE program. As a result, rather than issuing a final rule, we issued a supplemental notice of proposed rulemaking (SNPRM) in May 1997. This SNPRM incorporated responses to the comments on the 1992 NPRM and proposed further changes in the program, primarily in response to the "narrow tailoring" requirements of *Adarand*. We received about 300 comments on the SNPRM. The Department has carefully considered these comments, and the final rule responds to them. The final rule also specifically complies with the requirements that the courts have established for a narrowly tailored affirmative action program.

At the same time that the Department was working on this final rule, Congress once again considered reauthorization of the DBE program. In both the House and the Senate, opponents of affirmative action sponsored amendments that would have effectively ended the program. In both cases, bipartisan majorities defeated the amendments. The final highway/transit authorization legislation, known as the Transportation Equity Act for the 21st Century (TEA-21), retains the DBE program. In shaping this final rule, the Department has listened carefully to what both supporters and opponents of the program have said in Congressional debates.

Key Points of the Final Rule

This discussion reviews and responds to the SNPRM comments and the Congressional debates on certain key issues. Congressional debate references are to the *Congressional Record* for March 5 and 6, 1998, for the Senate debate and April 1, 1998, for the House debate, unless otherwise noted.

1. Quotas and Set-Asides

SNPRM Comments: Most comments on this issue came from non-DBE contractors, who argued that the program was a *de facto* quota program. Many of these contractors said that recipients insisted that they meet numerical goals regardless of other considerations, and that the recipients did not take showings of good faith efforts seriously. Some non-DBE contractor organizations argued, in addition, that the program was a quota program because it was based on a statute that had a 10 percent target for the use of businesses defined by a racial classification.

Congressional Debate: Opponents of the DBE program generally asserted that it created quotas or set-asides. Senator McConnell described the entire program, particularly the provision that "not less than 10 percent" of authorized funds go to DBEs, as

* * * a \$17.3 billion quota. In other words, if the government decides that you are the preferred race and gender, then you are able to compete for \$17.3 billion of taxpayer-funded highway contracts. But, if you are the wrong race and gender, then—too bad—you can't compete for that \$17 billion pot. (S1936).

The "not less than 10 percent" language also led opponents, such as Senator Ashcroft, to label the program a "set-aside," (S1405), a term also employed in testimony provided by a law professor from California who said that the statute "imposes a set-aside that's required regardless of the availability of race-neutral solutions." (S1407). Senator Gorton said that the DBE statute provides that "those not defined as disadvantaged in our society are absolutely barred and prohibited from getting certain governmental contracts." (S1415).

On the other hand, supporters of the program were adamant that it was not a quota program. Senator Baucus argued that the program, as implemented by DOT, allows substantial flexibility to recipients and contractors. Recipients could have an overall goal other than 10 percent under current rules, he pointed out. Senator Kerry of Massachusetts added that what the statute does is to "set a national goal. And it is appropriate in this country to set national goals for what we will do to try to break down the walls of discrimination. * * *" (S1408). He also alluded to the flexibility of the Secretary to permit overall goals of less than 10 percent. Senator Robb stated:

I want to stress at the outset that this program is not a "quota program," as some have suggested. There is a great difference

[between] an aspirational goal and a rigid numerical requirement. Quotas utilize rigid numerical requirements as a means of implementing a program. The DBE program uses aspirational goals. (S1425).

With respect to individual contract goals, Senator Baucus said, "once a goal is established for a contract, each contractor must make a good-faith effort to meet the goal—not mathematically required, not quota required, but a good faith effort to meet it." (S1402). Senator Baucus pointed to provisions of the SNPRM concerning overall goals, means of meeting them, and good-faith efforts as further narrowly tailoring the program. The SNPRM confirms, he said, that "contract goals are not binding. If a contractor makes good faith efforts to find qualified women or minority-owned subcontractors, but fails to meet the goal, there is no penalty." (S1403). Senator Robb added that "Contract goals are not operated as quotas because they require that the prime contractor make 'good faith efforts' to find DBEs. If a prime contractor cannot find qualified and competitive DBEs, the goal can be waived." (S1425).

One of the Senators who addressed the quota/set-aside issue in the most detail was Senator Domenici. He concluded that "I do not agree that this minority business program we have in this ISTEA bill before us is a program that mandates quotas and mandates set-asides." (S1426). He made this statement, in part, on the basis of March 5, 1998, letter to him signed by Secretary of Transportation Rodney Slater and Attorney General Janet Reno. In relevant part, this letter (which Senator Domenici inserted into the record) read as follows:

The 10 percent figure contained in the statute is not a mandatory set aside or rigid quota. First, the statute explicitly provides that the Secretary of Transportation may waive the goal for any reason * * * Second, in no way is the 10 percent figure imposed on any state or locality * * * Moreover, state agencies are permitted to waive goals when achievement on a particular contract or even for a specific year is not possible. The DBE program does not set aside a certain percentage of contracts or dollars for a specific set of contractors. Nor does the DBE program require recipients to use set-asides. The DBE program is a goals program which encourages participation without imposing rigid requirements of any type. Neither the Department's current nor proposed regulations permit the use of quotas. The DBE program does not use any rigid numerical requirements that would mandate a fixed number of dollars or contracts for DBEs. (S1427).

The debate in the House proceeded in similar terms. Opponents of the DBE program, such as Representative

Roukema (H2000), Representative Cox (H2004) and Speaker Gingrich (H2009) said the legislation constituted a quota, while proponents, such as Representatives Tauscher (H2001), Poshard (H2003), Bonior (H2004) and Menendez (H2004) said the program did not involve quotas or set-asides.

DOT Response: The DOT DBE program is not a quota or set-aside program, and it is not intended to operate as one. To make this point unmistakably clear, the Department has added explicitly worded new or amended provisions to the rule.

Section 26.41 makes clear that the 10 percent statutory goal contained in ISTEA and TEA-21 is an aspirational goal at the national level. It does not set any funds aside for any person or group. It does not require any recipient or contractor to have 10 percent (or any other percentage) DBE goals or participation. Unlike former part 23, it does not require recipients to take any special administrative steps (e.g., providing a special justification to DOT) if their annual overall goal is less than 10 percent. Recipients must set goals consistent with their own circumstances (see § 26.45). There is no direct link between the national 10 percent aspirational goal and the way a recipient operates its program. The Department will use the 10 percent goal as a means of evaluating the overall performance of the DBE program nationwide. For example, if nationwide DBE participation were to drop precipitously, the Department would reevaluate its efforts to ensure nondiscriminatory access to DOT-assisted contracting opportunities.

Section 26.43 states flatly that recipients are prohibited from using quotas under any circumstances. The section also prohibits set-asides except in the most extreme circumstances where no other approach could be expected to redress egregious discrimination. Section 26.45 makes clear that in setting overall goals, recipients aspire to achieving only the amount of DBE participation that would be obtained in a nondiscriminatory market. Recipients are not to simply pick a number representing a policy objective or responding to any particular constituency.

Section 26.53 also outlines what bidders must do to be responsive and responsible on DOT-assisted contracts having contract goals. They must make good faith efforts to meet these goals. Bidders can meet this requirement either by having enough DBE participation to meet the goal or by documenting good faith efforts, even if those efforts did not actually achieve the

goal. These means of meeting contract goal requirements are fully equivalent. Recipients are prohibited from denying a contract to a bidder simply because it did not obtain enough DBE participation to meet the goal. Recipients must seriously consider bidders' documentation of good faith efforts. To make certain that bidders' showings are taken seriously, the rule requires recipients to offer administrative reconsideration to bidders whose good faith efforts showings are initially rejected.

These provisions leave no room for doubt: there is no place for quotas in the DOT DBE program. In the Department's oversight, we will take care to ensure that recipients implement the program consistent with the intent of Congress and these regulatory prohibitions.

2. Sanctions for Recipients Who Fail To Meet Overall Goals

SNPRM Comments: The issue of sanctions for recipients who fail to meet overall goals was not a subject of comments on the SNPRM. Since the Department has never imposed such sanctions, this absence of comment is not surprising.

Congressional Debate: DBE program opponents asserted, in connection with their argument that the DBE program is a quota program, that the Department could impose sanctions for failure to meet goals. "The goals have requirements and the real threat of sanctions," Senator McConnell said. (S1488). Citing a provision of a Federal Highway Administration (FHWA) manual saying that if "a state has violated or failed to comply with Federal laws or * * * regulations," FHWA could withhold Federal funding, Senator McConnell said,

In other words, there are sanctions. The same threats appear in * * * the Federal transportation regulations * * * When the Federal government is wielding that kind of weapon from on high, it does not have to punish them. A 10 percent quota is still a quota, even if the States always comply and no one is formally punished. (Id.)

Defenders of the DBE program pointed out that the Department had never punished a recipient for failing to meet an overall goal (e.g., Rep. Tauscher, H2001; Senator Boxer, S1433). Senator Domenici asked Secretary Slater and Attorney General Reno whether there are sanctions, penalties, or fines that may be (or ever have been) imposed on a recipient who does not meet DBE program goals. He entered the following reply in the record:

No state has ever been sanctioned by DOT for not meeting its goals. Nothing in the

statute or regulations imposes sanctions on any state recipient that has attempted in good faith, but failed, to meet its self-imposed goals. (S1427).

Senator Lieberman added that if states fail to meet their own goals, "there is no Federal sanction or enforcement mechanism." (S1493).

DOT Response: The Department has never sanctioned a recipient for failing to meet an overall goal. We do not intend to do so. To eliminate any confusion, we have added a new provision (§ 26.47) that explicitly states that a recipient cannot be penalized, or treated by the Department as being in noncompliance with the rule, simply because its DBE participation falls short of its overall goal. For example, if a recipient's overall goal is 12 percent, and its participation is 8 percent, the Department cannot and will not penalize the recipient simply because its actual DBE participation rate was less than its goal.

Overall goals are not quotas, and the Department does not sanction recipients because their participation levels fall short of their overall goals. Of course, if a recipient does not have a DBE program, does not set a DBE goal, does not implement its DBE program in good faith, or discriminates in the way it operates its program, it can be found in noncompliance. But its noncompliance would never be having failed to "make a number."

3. Economic Disadvantage

SNPRM Comments: Some commenters favored eliminating the presumption of economic disadvantage, saying that applicants should have to prove their economic disadvantage. Other commenters favored obtaining additional financial information from applicants so that, even if the presumption remained in force, recipients would have a better idea of whether applicants really were disadvantaged. The question of the standard for determining disadvantage generated substantial comment, with some commenters favoring, and others objecting to, the proposed use of a personal net worth standard to assist recipients in determining whether an applicant was economically disadvantaged. There was also disagreement among commenters concerning the level at which such a standard should be set (e.g., \$750,000, or something higher or lower). These comments, and the Department's response to them, are further discussed in the section-by-section analysis for § 26.67.

Congressional Debate: The Congress debated the topic of who is regarded as

economically disadvantaged under the statute. DBE opponents, including Senators Ashcroft (S1405) and McConnell (S1418) and Representative Cox (H2004), asserted that outrageously rich people could be eligible to participate as DBEs, frequently using the Sultan of Brunei as an example. The basic thrust of their argument was that if the program does not exclude wealthy members of the designated groups—meaning those who are not, in fact, disadvantaged—then it is "overinclusive" and therefore not narrowly tailored. Senator McConnell added that, because the Department's SNPRM did not include a specific dollar amount for a cap on personal net worth, it would not be effective. (S1486). On the other hand, DBE program supporters cited the SNPRM's proposed net worth cap as an effective device to stop wealthy people from participating in the program. These included Minority Leader Daschle (with a reference to a letter from the Associate Attorney General, S1413), Senator Baucus (S1414, S1423), Senator Lieberman (S1493), Senator Boxer (S1433), and Senator Moseley-Braun, who responded to the Sultan of Brunei example by noting that the program was directed primarily at U.S. citizens (S1420).

DOT Response: The final rule (§ 26.67) specifically imposes a personal net worth cap of \$750,000. This means that, regardless of race, gender or the size of their business, any individual whose personal net worth exceeds \$750,000 is not considered economically disadvantaged and is not eligible for the DBE program. The provision also makes it much easier for recipients to determine whether an individual's net worth exceeds the cap. Applicants will have to submit a statement of personal net worth and supporting documentation to the recipient with their applications. If the information shows net worth above the cap, the recipient would rebut the presumption based on the information in the application itself and the individual would not be eligible for the program. In such a case, it would not be necessary for a third party to challenge the economic disadvantage of an applicant in order to rebut the presumption. While there have been very few documented cases of wealthy individuals seeking to take advantage of the Department's program, the revised provisions of part 26 virtually eliminate even the possibility of this type of abuse.

4. Social Disadvantage

SNPRM Comments: A few commenters suggested that the

presumption of social disadvantage, as well as that of economic disadvantage, be eliminated, so that applicants would have to demonstrate both elements of disadvantage. Any presumption of disadvantage tied to a racial classification, in the view of some of these commenters, undermined the constitutionality of the program. Other commenters noted that persons who are not members of the presumptively disadvantaged groups can be eligible and, in some cases, suggested that the criteria for evaluating such applications be clarified.

Congressional Debate: The presumption of social disadvantage drew fire from DBE program opponents because it was allegedly overinclusive. For example, Senator McConnell produced a map illustrating the over 100 countries of origin leading to inclusion in one of the presumed socially disadvantaged groups, pointing out that people from some countries (e.g., Pakistan) are presumed to be socially disadvantaged while those from other countries (e.g., Poland) are not. (S1418). Senator McConnell said that there was no basis for selecting this definition over any other. (Id.) Senator Hatch also listed the countries from which Asian-Pacific Americans and Subcontinent Asian-Americans can originate, suggesting that it was inappropriate to create "all kinds of special interest groups who are vying for these programs." (S1411).

DBE proponents responded that discrimination against minorities and women in general, and against specific minorities in particular (e.g., African Americans) was very real and formed a basis for the presumption of social disadvantage (see discussion below concerning the existence of discrimination). Senator Baucus also noted that this presumption could be overcome. (S1402).

Opponents also charged that the presumption of social disadvantage was underinclusive; that is, "you underinclude people who have a right to be included in the bid process." (Senator McConnell, S1399). The people who are not included who have a right to be, in the view of opponents, are white males (e.g., Senator Sessions' reference to testimony from Adarand Constructors' owner, S1400). Senator Kennedy disagreed with this assertion, saying

Of course, this program doesn't just help women and minorities. It extends a helping hand to firms owned by white males, as well. They can be certified to [participate] if they prove that they have been disadvantaged. Just ask Randy Pech—owner of the Adarand

Construction Firm—because he is currently seeking certification. (S1482).

Senator Domenici was interested in the same question, and entered into the record the following response from Secretary Slater and Attorney General Reno:

Any individual owning a business may demonstrate that he is socially and economically disadvantaged, even if that individual is not a woman or a minority. Both the current and proposed regulations provide detailed guidance to recipients to assist them in making individual determinations of disadvantaged status. And, in fact, businesses owned by white males have qualified for DBE status. (S1427).

DOT Response: By having passed the DBE statutory provision, after lengthy and specific debate, Congress has once again determined that members of the designated groups should be presumed socially disadvantaged. All of these groups are specifically incorporated by reference in the legislation that Congress debated and approved. This presumption (i.e., a determination that it is not necessary for group members to prove individually that they have been the subject of discrimination or disadvantage) is based on the understanding of Members of Congress about the discrimination that members of these groups have faced. The presumption is rebuttable in the DOT program. If a recipient or third party determines that there is a reasonable basis for concluding that an individual from one of the designated groups is not socially disadvantaged, it can pursue a proceeding under § 26.87 to remove the presumption. Likewise, a white male, or anyone else who is not presumed to be disadvantaged, can make an individual showing of social and economic disadvantage and participate in the program on the same basis as any other disadvantaged individual (see § 26.67).

5. The "Low-Bid System"

SNPRM Comments: Non-DBE contractors expressed concern that a variety of provisions under the program and the SNPRM adversely affected the low-bid system, including contract goals, evaluation credits, and good faith efforts guidance concerning prime contractors' handling of subcontractor prices and consideration of other bidders' success in meeting goals.

Congressional Debate: Opponents of the DBE program assert that the program results in white male contractors not receiving contracts they would otherwise expect to receive. Senator Sessions cited the statement of the Adarand company to this effect. (S1400). Senator Ashcroft said that "if two bids come in from two

subcontractors, one owned by a white male and the other by a racial minority, and the bids are the same, or even close, the job will go to the minority-owned company, not the low bidder." (S1405). Senator Gorton inserted into the record letters from a Spokane subcontractor asserting that, in a number of cases, it had lost subcontracts to DBE firms despite having a lower quote. (S1415–16). Representative Roukema also cited examples of firms who made similar assertions. (H2000).

In contrast, DBE program proponents argued that the program was about leveling the playing field for DBEs. Senator Moseley-Braun cited letters from her constituents for the point that

* * * the DBE program is not about taking away contracts from qualified male-owned businesses and handing them over to unqualified female-owned firms. The program is not about denying contracts to Caucasian low bidders in favor of higher bids that happen to have been submitted by Hispanics or African Americans or Asians or women. (S1420).

Without such a program, her constituents' letters said, they would lose the chance to compete. (Id.). Citing testimony from a Judiciary Committee hearing, Senator Kennedy noted that it was the experience of some DBEs that white male prime contractors had accepted higher bids from other firms to avoid working with DBEs. (S1430).

Why would a general contractor accept a higher bid? It doesn't make sense unless you remember that the traditional business network doesn't include women or minorities * * * [A woman business owner testified] that some general contractors would rather lose money than deal with female contractors. (Id.)

DOT Response: For the most part, statutory low-bid requirements exist only at the prime contracting level. That is, state and local governments, in awarding prime contracts, must select the low bidder in many procurements (there may be exceptions in some types of purchases). Nothing in this regulation requires, under any circumstances, a recipient to accept a higher bid for a prime contract from a DBE when a non-DBE has presented a lower bid. This rule does not interfere with recipients' implementation of state and local low-bid legislation.

The selection of subcontractors by a prime contractor is typically not subject to any low-bid requirements under state or local law. Prime contractors have unfettered discretion to select any subcontractor they wish. Price is clearly a key factor, but nothing legally compels a prime contractor to hire the subcontractor who makes the lowest quote. Other factors, such as the prime

contractor's familiarity and experience with a subcontractor, the quality of a subcontractor's work, the word-of-mouth reputation of the subcontractor in the prime contracting community, or the prime's comfort or discomfort with dealing with a particular subcontractor can be as or more important than price in some situations. It is in this context that § 26.53 requires that prime contractors make good faith efforts to achieve DBE contract goals. The rule does not require that recipients ignore price or quality, let alone obtain a certain amount of DBE participation without regard to other considerations. The good faith efforts requirements are intended to ensure that prime contractors cannot simply refuse to consider qualified, competitive DBE subcontractors. At the same time, the good faith efforts waiver of contract goals serves as a safeguard to ensure that prime contractors will not be forced into accepting an unreasonable or excessive quote from a DBE subcontractor.

6. Constitutionality

SNPRM Comments: Non-DBE contractors and their groups argued that the SNPRM proposals, particularly with respect to overall goals and the use of race-conscious measures, failed to meet the *Adarand* narrow tailoring test. Many of these commenters said that the overall goals were suspect because they did not adequately consider the capacity of DBEs to perform contracts and *Adarand* requires that race-conscious measures may be used only after a recipient has demonstrated that race-neutral means have failed. The use of presumptions based on racial classifications was viewed as intrinsically unconstitutional by these commenters, many of whom cited the language of Judge Kane's decision in the *Adarand* remand to this effect. Some commenters also contended that, absent recipient-specific findings of compelling need, the program could not be constitutional. They said that existing information alleging compelling interest—such as various disparity studies or information compiled by the Department of Justice—was inadequate to meet the compelling interest test. DBEs and recipients who commented defended the constitutionality of the program, often citing experience with discrimination in the marketplace and contending that the SNPRM succeeded in narrowly tailoring the program.

Congressional Debate: Proponents and opponents of the DBE program extensively debated the constitutionality of the DBE statutory provision and the entire DBE program. Generally, opponents argued that the

Supreme Court and District Court decisions in *Adarand* rendered the program unconstitutional, while proponents said that the decisions did not have that effect.

Proponents and opponents of the DBE program agreed that the Supreme Court's *Adarand* decision established a two-part test for the constitutionality of a program that uses a racial classification. The program must be based on a compelling governmental interest and be narrowly tailored to further that interest (e.g., Senator McConnell, S1396; Senator Baucus, S1403). Opponents relied on the finding of a Colorado district court on remand that the program was not narrowly tailored and was thus unconstitutional (Senator McConnell, S 1396; Senator Ashcroft, S1405). Proponents replied that the remand decision represented the views of only one district court (Senator Baucus, S1403), that it failed to properly apply the reasoning of the Supreme Court decision with respect to narrow tailoring (Senator Domenici, S1425), and that the Department's forthcoming regulations would ensure that the program was narrowly tailored (see discussion below).

A. Compelling Interest

(1) *Existence of Discrimination.* Proponents (and some opponents) of the DBE provision said that discrimination and/or disadvantage with respect to minorities and/or women persists. In the House, these included Representative Roukema (H2000-01), Representative Norton (H2003), Representative Poshard (H2003), Representative Menendez (H2004), Representative Davis of Illinois (H2005), Representative Boswell (H2005), Representative Lampson (H2006), Representative Kennedy (H2006), Representative Jackson-Lee (H2006), Representative Edwards (H2007), Representative Andrews (H2007), Representative Rodriguez (H2008), Representative Towns (H2010), Representative Dixon (H2010), and Representative Millender-McDonald (H2011). DBE opponents typically remained silent on this point, neither affirming nor denying the existence of discrimination against women and minorities.

There was a similar pattern in the Senate debates. Opponents typically did not address the present existence of discrimination or disadvantage with respect to minorities and women or its continuing effects, spoke of such discrimination as something that existed in the past (Senator Sessions, S1399; Senator Hatch, S1411), or asserted that race-based disadvantage or

discrimination no longer exists (Senator Ashcroft, S1406).

The Senators who said that such discrimination persists included Senator Baucus (S1403, S1413, S1496), Senator Warner (S1403), Senator Kerry (S1408), Senator Wellstone (S1410), Senator Moseley-Braun (S1419-20), Senator Robb (S1422); Senator Brownback (S1423-24), Senator Domenici (S1425-26), Senator Kennedy (S1429-30, S1482), Senator Specter (S1485), Senator McCain (S1489), Senator Lautenberg (S1490), Senator Durbin (S1491), Senator Daschle (S1492), Senator Lieberman (S1493), Senator Bingaman (S1494), Senator Murray (S1495), and Senator Dorgan (S1495).

(2) *Evidence of discrimination or disadvantage.* In comments on the passage of the TEA-21 conference report in the Senate, Senator Chafee noted a Colorado Department of Transportation disparity study that found a disproportionately small number of women- and minority-owned contractors participating in that state's highway construction industry. More than 99 percent of contracts went to firms owned by white men. (Congressional Record, May 22, 1998; S5413). In the House discussion of the conference report, Representative Norton presented an extensive summary of relevant evidence of discrimination forming the basis for a compelling need for the DBE program. (H3957).

Throughout the debate, the Members who affirmed the existence of discrimination and/or disadvantage asserted a number of factual bases for concluding that the DBE program was necessary. This information is largely drawn from the Senate debate; the briefer House debate contains less detail.

Senator Baucus cited disparities between the earnings of women and men and between the percentage of small businesses women own and the percentage of Federal procurement dollars they receive. He also noted that minorities make up 20 percent of the population, own 9 percent of construction businesses, and get only 4 percent of construction receipts. (S1403). Finally, Senator Baucus, via a letter from the Associate Attorney General, cited to numerous Congressional findings concerning the effects of discrimination in the construction industry and in DOT-assisted programs. (S1413).

Senator Kerry added that women own 9.2 percent of the nation's construction firms but their companies earn only about half of what is earned by male-owned firms. (S1409). Senator Robb

commented that the evidence of racially based disadvantage is "compelling and disturbing." He continued, stating that, "White-owned construction firms receive 50 times as many loan dollars as African-American owned firms that have identical equity." (S1422). Senator Kennedy said that the playing field for women and minorities and other victims of discrimination was still not level. Job discrimination against minorities and the "glass ceiling" for women still persisted, he said, adding that "Nowhere is the deck stacked more heavily against women and minorities than in the construction industry." (S1429). He cited a number of instances in which minority or female contractors encountered overt discrimination in trying to get work. (S1429-30).

Senator Lautenberg said that, for transportation-related contracts, minority-owned firms get only 61 cents for every dollar of work that white male-owned businesses receive. The comparable figure for women-owned firms was 48 cents. He also mentioned that "women-owned businesses have a lower rate of loan delinquency, yet still have far greater difficulty in obtaining loans." (S1490). He then spoke of the continuing effects of past discrimination:

Jim Crow laws were wiped off the books over 30 years ago. However, their pernicious effects on the construction industry remain. Transportation construction has historically relied on the old boy network which, until the last decade, was almost exclusively a white, old boy network. * * * This is an industry that relies heavily on business friendships and relationships established decades, sometimes generations, ago—years before minority-owned firms were even allowed to compete. (Id.)

Senator Durbin referred to recent studies concerning job bias against minorities and women. (S1491). Senator Lieberman referred generally to previous Congressional committee findings and testimony concerning still-existing barriers to full participation for minorities and women. (S1493). He also cited the May 1996 Department of Justice survey of discrimination and its effects in business and contracting. He referred to a recent study in Denver showing that African Americans were 3 times, and Hispanics 1.5 times, more likely than whites to be rejected for business loans. Senator Daschle summed up by saying, "[t]here is clearly a compelling interest in addressing the pervasive discrimination that has characterized the highway construction industry." (S1492).

Throughout the portion of the debate described above, many of the Members stressed that goal-based programs like

the DBE program were the only effective way to combat the continuing effects of discrimination.

Senator Baucus cited the experience of Michigan, in which DBE participation in the state-funded portion of the highway program fell to zero in a nine-month period after the state terminated its DBE program, while the Federal DBE program in Michigan was able to maintain 12.7 percent participation. (S1404). Senator Kerry also raised the Michigan example, and went on to cite similar sharp decreases in DBE participation when Louisiana, Hillsborough County, Florida, and San Jose, California, eliminated affirmative action programs covering state- and locally-funded programs. Senator Kerry asked rhetorically:

* * * is that just the economy of our country speaking, an economy at one moment that is capable of having 12 percent and at another moment, where they lose the incentive to do so, to drop down to zero, to drop down by 99 percent, to drop down by 80 percent, to have .4 at the State level while at the Federal level there are 12 percent? You could not have a more compelling interest if you tried. * * * (S1409-10).

Senator Moseley-Braun added the examples of Arizona, Arkansas, Rhode Island, and Delaware to the jurisdictions cited by other members where state-funded projects without a DBE program have significantly less DBE participation than Federally funded projects subject to the DBE program. She added, "Where there are no DBE programs, women- and minority-owned small businesses are shut out of highway construction." (S1420-21). Senator Kennedy added Nebraska, Missouri, Tampa and Philadelphia to the list of jurisdictions that experienced precipitous drops in DBE participation after goals programs ended. (S1429-30; S1482). He also cited comments from DBE companies that goal programs were needed to surmount discrimination-related barriers. (S1482). Senator Domenici repeated many of the same points as previous DBE proponents concerning the basis for concluding that the program was needed (S1426), as did Senator Kempthorne. (S1494).

Senator Robb emphasized that the DBE program was essential to combating discrimination and ensuring economic opportunity, explicitly linking the fall-off in DBE participation to continuing discrimination:

Where DBE programs at the State level have been eliminated, participation by qualified women and qualified minorities in government transportation contracts has plummeted. There is no way to know whether this discrimination is intentional or subconscious, but the effect is the same. This

experience demonstrates the sad but inescapable truth that, when it comes to providing economic opportunities to women and minorities, passivity equals inequality. (S1422).

3. *Narrow tailoring.*—DBE proponents cited the Department's proposed DBE rule as the vehicle that would ensure that the DBE program would be narrowly tailored. They cited features of the SNPRM including a new mechanism for calculation of overall goals, giving priority to race-neutral measures in meeting goals, a greater emphasis on good faith efforts, DBE diversification, added flexibility for recipients, net worth provisions, ability to challenge presumptions of social and economic disadvantage, and flexibility in goal-setting. In comments on the Senate consideration of the TEA-21 conference report, Senator Baucus concluded by saying:

As I explained in my statements during the debate on the McConnell amendment * * * the program is narrowly tailored, both under the current and the new regulations, which emphasize flexible goals tied to the capacity of firms in the local market, the use of race-neutral measures, and the appropriate use of waivers for good faith efforts. (Congressional Record, May 22, 1998; S5414).

Following Senator Baucus' remarks, Senator Chafee, Chairman of the committee of jurisdiction, requested that he be associated with Senator Baucus' remarks on constitutionality. (S5414).

DBE opponents denied that regulatory change could result in a narrowly tailored program. Senator Smith said "The administration's attempt to comply with the Court's decision by fiddling around with the DOT regulations does not meet the constitutional litmus test." (S1398). The most frequent argument against the efficacy of regulatory change was that a racial classification is inherently unable to be narrowly tailored. (Senator Sessions, S1399-1400; Senator Ashcroft, S1407).

DOT Response: The 1998 debate over DBE legislation was the most thorough in which Congress has engaged since the beginning of the program. The record of this debate clearly supports the Department's view that there is a compelling governmental interest in remedying discrimination and its effects in DOT-assisted contracting. Congress clearly determined that real, pervasive, and injurious discrimination exists. Congress backed up that determination with reference to a wide range of factual material, including private and public contracting, DOT-assisted and state- and locally-funded programs and the financing of the contracting industry. By retaining the DBE statutory provisions

against this factual background, Congress clearly found that there was a compelling governmental interest in having the program.

The courts, including the court in the *Adarand Constructors Inc. v. Peña*, 965 F.Supp. 1556 (D. Colo., 1997) and the court in *In re: Sherbrooke Sodding*, 6-96-CV-41 (D. Minn. 1998), agree that Congress has the power to legislate on a nationwide basis to address nationwide problems. Congress has a unique role as the national legislature to look at the whole of the United States for the basis to find a compelling governmental interest supporting the use of race-based remedies. Congress is not required to make particularized findings of discrimination in individual localities to which a nationwide program may apply. Nor is Congress required to find that the Federal government itself has discriminated before applying a race-conscious remedy. (Id. at 1573).

Having reviewed the extensive evidence of discrimination and its relationship to DOT-assisted contracting, the District Court in *Adarand* determined that current and previous DBE provisions were a "considered response by Congress to the effects of discrimination on the ability of minorities to participate in the mainstream of federal contracting." (Id. at 1576). The court stated that "Congress has a strong basis in evidence for enacting the challenged statutes, which thus serve a 'compelling governmental interest.'" (Id. at 1577). The extensive Congressional debate and information supporting the enactment of the 1998 DBE provision significantly strengthens the existing basis for declaring that this program serves a compelling governmental interest.

The basis for District Court's view that the program at issue in *Adarand* is unconstitutional is stated most clearly in the following passage:

Contrary to the [Supreme] Court's pronouncement that strict scrutiny is not 'fatal in fact,' I find it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such [a] program is both underinclusive and overinclusive. (Id. at 1580).

By underinclusive, the court said it meant that caucasians and members of non-designated minority groups are excluded. By overinclusive, it said it meant that all the members of the designated groups are presumed to be economically and/or socially disadvantaged, without Congress having inquired whether a particular entity seeking a racial preference has suffered from the effects of past discrimination (citing the Supreme Court's *Crosby*

decision, which concerned the powers of state and local governments to use race-based remedies). (Id.)

As Senator Domenici pointed out (S1425), the key words in the District Court's opinion are "Contrary to the [Supreme] Court's pronouncement. * * *" The District Court's analysis departs markedly from the controlling decision of the Supreme Court on this issue (*Adarand v. Peña*, 515 U.S. 200 (1995)). The Supreme Court's language with which the District Court disagreed is the following:

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." [citation omitted] The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it * * * When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases. (515 U.S. at 237).

The Supreme Court evidently considers the "not fatal in fact" language to have continuing vitality, having cited it in a subsequent case (*U.S. v. Virginia*, 518 U.S. 515, note 6 (1996)).

Under the District Court's analysis, Congress could never use a race-based classification, no matter how compelling the need, because any such classification would intrinsically fail to be narrowly tailored. This approach effectively moots the determination of whether there is a compelling governmental interest. The Supreme Court's approach, by contrast, permits a racial classification to be used, given the existence of a compelling interest, if it is narrowly tailored.

What is the test for narrow tailoring? As set forth in *United States v. Paradise*, 480 U.S. 149, 171 (1987), the test includes several factors: "the necessity for relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the goals to the relevant labor market; and the impact of the relief on the rights of third parties." In *Adarand*, the Supreme Court specifically invited inquiry into whether there was any consideration of the use of race-neutral means to increase minority business participation (related to the efficacy of alternative remedies) and whether the program was appropriately limited so that it will not last longer than the discrimination it is designed to eliminate (related to the duration of relief). (515 U.S. at 238).

This final rule successfully addresses each element of this test:

- *The necessity of relief.* Throughout the debate on the compelling governmental interest, the bipartisan majority of both houses of Congress repeatedly described the necessity of the DBE program's goal-based approach to remedying the effects of discrimination in DOT-assisted contracting. The most significant evidence demonstrating the necessity of a goal-oriented program is the evidence cited of the fall-off in DBE participation in state contracting when goal-oriented programs end, compared to participation rates in the Federal DBE program.

- *Efficacy of alternative remedies.* This element of the narrow tailoring standard is related to the Supreme Court's inquiry concerning race-neutral programs. Under § 26.51 of this rule, recipients are required to meet the maximum feasible portion of their overall goals by using race-neutral measures. Recipients are not required to have contract goals on each contract. Instead, they are instructed to use contract goals only for any portion of their overall goal they cannot meet through race-neutral measures. Contract goals are intended as a safety net to be used when race-neutral means are not effective to ensure that a recipient can achieve "level playing field." Moreover, the regulations provide that recipients must reduce the use of contract goals when other means are sufficient to meet their overall goals. This ensures that race-conscious relief is used only to the extent necessary and is replaced by race-neutral as quickly as possible.

- *Flexibility of relief.* Flexibility is built into the program in a variety of ways. Recipients set their own goals, based on local market conditions; their goals are not imposed by the federal government nor do recipients have to tie them to any uniform national percentage. (§ 26.45). Recipients also choose their own method for goal setting and can choose to base the goal on the evidence that they believe best reflects their market conditions. (§ 26.45). Recipients have broad discretion to choose whether or not to use a goal on any given contract, and if they do choose to use a contract goal, they are free to set it at any level they believe is appropriate for the type and location of the specific work involved. (§ 26.51). The rule also ensures flexibility for contractors by requiring that any contract goal be waived entirely for a prime contractor that demonstrates that it made good faith efforts but was still unable to meet the goal. (§ 26.53). The rule also allows recipients that believe they can achieve equal opportunity for DBEs through different approaches to get waivers releasing

them from almost any of the specific requirements of the rule. (§ 26.103). Recipients can also get exemptions from the rule if they have unique circumstances that make complying with the rule impractical. (§ 26.103).

- *Duration of relief.* The TEA-21 DBE program will end in 2004 unless reauthorized by the Congress. In each successive reauthorization bill for the surface transportation and airport programs, Congress will have the opportunity to examine the current state of transportation contracting and determine whether the DBE program statutes are still necessary to remedy the continuing effects of discrimination. In addition, the duration of relief for individuals and firms are limited by the personal net worth threshold and business size caps. When an individual's personal wealth grows beyond the threshold, he or she will lose the presumption of disadvantage. (§ 26.67). Similarly, when a firm's receipts grows beyond the small business size standards, it loses its eligibility to participate in the program. (§ 26.65). Finally, to ensure that race-conscious remedies are not used any longer than absolutely necessary, § 26.51 requires recipients to reduce the use of contract goals and rely on race-neutral measures to the extent that they are effective.

- *Relationship of goals to the relevant market.* The overall goal setting provisions of § 26.45 require that recipient set overall goals based on demonstrable evidence of the relative availability of ready, willing and able DBEs in the areas from which each recipient obtains contractors. These provisions ensure that there is as close a fit as possible between the goals set by each recipient and the realities of its relevant market. When a recipient sets contract goals, § 26.51 provides that these goals are to be set realistically in relation to the availability of DBEs for the type and location of work involved.

- *Impact of relief on the rights of third parties.* The legitimate interests of third parties (e.g., prime contractors, non-DBE subcontractors) are only minimally impacted by the DBE program, since the program is aimed at replicating a market in which there are no effects of discrimination and the program affects only a relatively small percentage of total federal-aid funds. The design of the overall and contract goal provisions ensures that the use of race-conscious remedies having the potential to affect the interests of third parties is limited to the extent necessary to counter the effects of discrimination. Individual prime contractors are further protected from suffering any undue

burdens by § 26.51, which prevents a prime contractor from losing a contract if it made good faith efforts but was still unable to meet a goal. Non-DBE firms are also protected by § 26.33, which directs recipients to take appropriate steps to address areas of overconcentration of DBE firms in certain types of work that could unduly burden non-DBE firms seeking the same type of work.

- *Inclusion of appropriate beneficiaries.* The certification provisions of Subparts D and E, and particularly the social and economic disadvantage provisions of § 26.67, ensure that only firms owned and controlled by individuals who are in fact socially and economically disadvantaged can participate in the program. Eligibility provisions guard against overinclusiveness by ensuring that individuals with too great net worth are not presumed disadvantaged and by permitting the recipient—on its own initiative or as the result of a complaint—to follow procedures to rebut the presumption of social and/or economic disadvantage. They guard against underinclusiveness by permitting any business owner, including a white male, to demonstrate social and economic disadvantage on an individual basis.

Section-by-Section Analysis

Section 26.1 What Are the Objectives of This Part?

There were relatively few comments on this section of the SNPRM, most of which agreed with the proposed language. We have adopted the suggestion of some commenters that specific reference be made to the role of the DBE program in helping DBEs overcome barriers (e.g., access to capital and bonding) to equal participation. We have also added a specific reference to the role of the program in creating a level playing field on which DBEs can compete fairly for DOT-assisted contracts. Some non-DBE contractors urged that language be added to explicitly oppose "reverse discrimination." The rule clearly states that nondiscrimination is the program's first objective and the Department reiterates here that it opposes unlawful discrimination of any kind.

Section 26.3 To Whom Does This Part Apply?

This provision is unchanged from the SNPRM, except for references to the new TEA-21 statutory provisions. A few commenters wanted this provision to apply to Federal Railroad Administration (FRA) programs, as did

the original version of former part 23. However, FRA does not have specific statutory authority for a DBE program parallel to the TEA-21 language. One commenter asked if the language saying that DBE requirements do not apply to contracts without any DOT funding is inconsistent with Federal Transit Administration (FTA) guidance on applicability. While the structure of the FTA program is such that FTA funds are commingled with local funds in many transit authority contracts (e.g., any contract involving FTA operating assistance funds), to which DBE requirements would apply, a contract which is funded entirely with local funds—and without any Federal funds—would not be subject to requirements under this rule.

Section 26.5 What Do The Terms Used in This Part Mean?

There were relatively few comments on the definitions proposed in the SNPRM. One commenter wanted to substitute the term "historically underutilized business" for DBE. Given the continued use of the DBE term in Congressional consideration of the program, the continued use of the "socially and economically disadvantaged individuals" language in the statute, and the familiarity of concerned parties with the DBE term, we do not believe changing the term would be a good idea.

A few commenters asked for additional definitions or elaboration of existing definitions (e.g., "form of arrangement," "financial assistance program," "commercially useful function"). These terms are either already defined sufficiently or are best understood in context of the operational sections in which they are embedded, and abstract definitions in this section would not add much to anyone's ability to make the program work well. Consequently, we are not adding them. Otherwise the final rule adopts the SNPRM proposals for definitions with only minor editorial changes.

The Department has added, for the sake of clarity and consistency with other Federal programs, definitions of the terms Alaskan native, Alaskan native corporation (ANC), Indian tribe, immediate family member, Native Hawaiian, Native Hawaiian organization, principal place of business, primary industry classification, and tribally-owned concern. These definitions are taken from the SBA's new small disadvantaged business program regulation (13 CFR § 124.3). The definitions of the designated groups included in the definition of "socially

and economically disadvantaged individual" also derive from the SBA regulations, as the Department's DBE statutes require. We believe these will be useful terms of art in implementing the DBE program.

A few commenters requested definitions for the terms "race-conscious" and "race-neutral," and we have provided definitions. A race-conscious program is one that focuses on, and provides benefits only for, DBEs. The use of contract goals is the primary example of a race-conscious measure in the DBE program. A race-neutral program is one that, while benefiting DBEs, is not solely focused on DBE firms. For example, small business outreach programs, technical assistance programs, and prompt payment clauses can assist a wide variety of small businesses, not just DBEs.

Section 26.7 What Discriminatory Actions Are Forbidden?

One commenter wanted to add prohibitions of discrimination based on age, disability and religion. The Department is not doing so, because discrimination on these grounds is already prohibited by other statutes (e.g., the Americans with Disabilities Act with respect to disability). Also, statutes which form the basis for this rule focus on race, color, national origin, and sex. Congress determined that remedial action focused on these areas is necessary. These grounds for discrimination are also most relevant to problems in the DBE program that have been alleged to exist (e.g., disparate treatment of DBE certification applicants by race or sex). Some opponents of the program said that the DBE program discriminates against non-DBEs. However, the Department believes that the program is constitutional and does not violate equal protection requirements. A reference to DOT Title VI regulations has been deleted as unnecessary; otherwise, this provision is the same as in the SNPRM.

Section 26.9 How Does the Department Issue Guidance and Interpretations Under This Part?

Commenters, most of whom were recipients, focused on two issues in this section. First, a majority of the comments favored the "coordination mechanism" concept for ensuring consistent DOT guidance and interpretations. The few that disagreed with this approach did so out of a concern that the mechanism would add delays to the process. These commenters favored additional training

or an 800 number hot line to speed up the process.

We believe that proper coordination of interpretations and guidance is vital to the successful implementation of this rule. As the preambles to the 1992 and 1997 proposed rules mentioned, inconsistent implementation of part 23 has been a continuing problem, which has been criticized by a General Accounting Office report and which has created unnecessary difficulty for recipients, contractors, and the Department itself. A process for ensuring that the Department speaks with one voice on DBE implementation matters, and for letting the public know when DOT has spoken, will greatly improve the service we give our customers.

We do not believe this coordination process will result in significant delays in providing guidance. Nor will it inhibit the ability of DOT staff and customers to communicate with one another. For example, the process does not apply to informal advice provided by staff to recipients or contractors over the phone or in a letter or e-mail. It does maintain, however, the important distinction between informal staff assistance on one hand and a binding institutional position on the other.

For clarity in the process, we have modified the language of the rule text to make clear that interpretations and guidance are binding, official Departmental positions if the Secretary signs them or if the document includes a statement that they have been reviewed and approved by the General Counsel. The General Counsel will consult fully with all concerned offices as part of this review process.

We intend to post significant guidance documents and interpretations on the Department's web site to make them widely and quickly available. As some commenters suggested, we are also continuing to consider forming an advisory committee (or working group of an existing committee) to facilitate customer input into DBE program matters. This is separate from the coordination mechanism, however, which is an internal DOT process.

The rule's provisions regarding exemptions and waivers, previously found in the SNPRM's § 26.9 (c) and (d), are now included as a separate section at § 26.15.

Section 26.11 What Records do Recipients Keep and Report?

The Department asked, in the SNPRM, whether it would be advisable to have one standard reporting form for information about the DBE program. Currently, each operating

administration (OA) has its own reporting form and requirements. Virtually all the commenters that addressed this issue favored a single, DOT-wide reporting form. Commenters also had a wide variety of suggestions for what data should be reported, formats, and retention periods.

The Department is adopting the suggestion of having a single reporting form, which we believe will reduce administrative burdens for recipients, particularly those who receive funds from more than one OA. Because we do not want to delay the issuance of this rule while a form is being developed, we are reserving the date on which this single form requirement will go into effect. We will take comments on the specifics of reporting into account and consult with interested parties as we devise the form, which will be published subsequently in Appendix B to this rule. The Appendix will also address the issues of reporting frequency and record retention periods. Meanwhile, recipients will continue to report as directed by the concerned OA(s), using existing reporting forms.

The rule is also adding a requirement that recipients develop and maintain a "bidders" list. The bidders list is intended to be a count of all firms that are participating, or attempting to participate, on DOT-assisted contracts. The list must include all firms that bid on prime contracts or bid or quote subcontracts on DOT-assisted projects, including both DBEs and non-DBEs. Bidders lists appear to be a promising method for accurately determining the availability of DBE and non-DBE firms and the Department believes that developing bidders data will be useful for recipients. Creating and maintaining a bidders list will give recipients another valuable way to measure the relative availability of ready, willing and able DBEs when setting their overall goals. (See § 26.45). We realize that identifying subcontractors, particularly non-DBEs and all subcontractors that were unsuccessful in their attempts to obtain contracts, may well be a difficult task for many recipients. Mindful of that potential burden, the rule will not impose any procedural requirements for how the data is collected. Recipients are free to choose whether or not they wish to gather this data through their existing bidding and reporting processes. Recipients are encouraged to make use of all of the data already available to them and all methods of reporting and communication with their contracting community that they already have in place. In addition, the Department suggests that recipients consider using a widely publicized public notice or a

widely disseminated survey to encourage all firms that have bid or quoted contracts to make themselves known to recipients.

Once recipients have created the list of bidders, they will have to supplement that information with the age of each firm (since establishment) and the annual gross receipts of the firm (or an average of its annual gross receipts). Recipients can gather this additional information by sending a questionnaire to the firms on the list, or by any other means that the recipient believes will yield reliable information. The recipient's plan for how to create and maintain the list and gather the required information must be included in its DBE program.

Section 26.13 What Assurances Must Recipients and Contractors Make?

There were few comments on this section. Most of these supported the proposal. One comment suggested specific mention of prompt payment, but in view of the substantive requirements on this subject, we do not believe such a mention is needed. Some commenters favored requiring additional public participation as part of the assurance for recipients. Again, given substantive provisions of this rule concerning public participation, we do not believe that repetition here is needed. One commenter said that incorporating the requirements of part 26 in the contract was confusing, since many provisions of part 26 apply only to recipients. We have rewritten the assurance for contractors in response to this concern, specifying that contractors are responsible only for carrying out the requirements of part 26 that apply to them.

Section 26.15 How Can Recipients Apply for Exemptions or Waivers?

There has been some confusion as to this rule's distinction between exemption and waiver. Put simply, exemptions are for unique situations that are most likely not to be either generally applicable to all recipients or to have been contemplated in the rulemaking process. If such a situation occurs and it makes it impractical for a particular recipient to comply with a provision of part 26, the recipient should apply for an exemption from that provision. The waiver provision, by contrast, is not designed for extraordinary circumstances where a recipient may not be able to comply with part 26. Waiver is for a situation where a recipient believes that it can better accomplish the objectives of the DBE program through means other than the specific provisions of part 26.

There were a number of comments about the proposed program waiver provision. Most commenters on this issue favored the proposal, believing it could add flexibility to the way recipients implement the DBE program. A few commenters were concerned that too liberal use of the waiver provision might undermine the goals of the rule.

The Department believes that the waiver provision is an important aspect of the DBE program. The provision ensures that the Department and a recipient can work together to respond to any unique local circumstances. Recipients are encouraged to carefully review the circumstances in their own jurisdictions to determine what mechanisms are best suited to achieving compliance with the overall objectives of the DBE program. If a recipient believes it is appropriate to operate its program differently from the way that a provision of Subpart B or C provides, including, but not limited to, any provisions regarding administrative requirements, overall or contract goals, good faith efforts or counting provisions, it can apply for a waiver. For example, waiver requests could pertain to such subjects as the use of a race-conscious measure other than a contract goal, different ways of counting DBE participation in certain industries, use of separate overall or contract goals to address demonstrated discrimination against specific categories of socially and economically disadvantaged individuals, the use or wording of assurances, differences in information collection requirements and methods, etc.

The Department will, of course, carefully review any applications for waivers to make sure that innovative state or local programs are able to meet the objectives of the statutes and regulation. Decisions on waiver requests are made by the Secretary. This authority has not been delegated to other officials. The waiver provision, which the Department believes will help assist recipients to "narrowly tailor" the program to state and local circumstances and ensure nondiscrimination, remains in the final rule.

Section 26.21 Who Must Have a DBE Program?

The only substantive comment concerning this provision asked that Federal Railroad Administration (FRA) programs be included. The Department is not including FRA programs under this rule because FRA does not have a specific DBE program statute parallel to those covering the Federal Aviation Administration (FAA), FTA, and

FHWA. FRA could consider issuing a rule similar to part 26 under its own, separate statutory authority. The Department shortened paragraph (b)(1) to make it easier to understand. Within 180 days of the effective date of this rule, all recipients with existing programs must submit revised programs to the relevant OA for approval. The only changes from existing programs that recipients would have to make are changes needed to accommodate differences between former part 23 and part 26. Future new recipients would, of course, submit a DBE program as part of the approval process for financial assistance.

Section 26.23 What is the Requirement for a Policy Statement?

Section 26.25 What is the Requirement for a Liaison Officer?

Section 26.27 What Efforts Must Recipients Make Concerning DBE Financial Institutions?

There were no substantive comments concerning §§ 26.23–26.27, and the Department is adopting them as proposed.

Section 26.29 What Prompt Payment Mechanisms Must Recipients Have?

There was substantial comment on the issue of prompt payment. A majority of commenters supported the concept of prompt payment provisions. Some recipients pointed out that they already had prompt payment provisions on the books. DBEs generally supported mandating prompt payment provisions though they, as well as other commenters, recognized that slow payment is a problem affecting many subcontractors, not just DBEs. Some of these comments suggested making prompt payment requirements applicable to subcontracts in general, not just DBE subcontracts. Some recipients were concerned about getting in the middle of disputes between prime contractors and subcontractors. Some commenters wanted the Department to mandate prompt payment provisions, while others preferred that their use by recipients remain optional.

Having considered the variety of views expressed on this subject, the Department believes that prompt payment provisions are an important race-neutral mechanism that can benefit DBEs and all other small businesses. Under part 26, all recipients must include a provision in their contracts requiring prime contractors to make prompt payments to their subcontractors, DBE and non-DBE alike. It is clear that DBE subcontractors are significantly—and, to the extent that

they tend to be smaller than non-DBEs, disproportionately—affected by late payments from prime contractors. Lack of prompt payment constitutes a very real barrier to the ability of DBEs to compete in the marketplace. It is appropriate for the Department to require recipients to take reasonable steps to deal with this barrier. We recognize that delayed payments do not affect only DBE contractors; a prompt payment requirement applying to all subcontracts is an excellent example of a race-neutral measure that will assist DBEs, and we are therefore requiring that recipients' prompt payment mechanisms apply to all subcontracts on Federally-assisted contracts.

Paragraph (a) of this section requires recipients to put into their DBE programs a requirement for a prompt payment contract clause. This clause would appear in every prime contract on which there are subcontracting possibilities, and it would obligate the prime contractor to pay subcontractors within a given number of days from the receipt of each payment the recipient makes to the prime contractor. Payment is required only for satisfactory completion of the subcontractor's work. The clause would also apply to the return of retainage from the prime to the subcontractor. Retainage would have to be returned within a given number of days from the time the subcontractor's work had been satisfactorily completed, even if the prime contract had not yet been completed. A majority of commenters on the retainage issue favored a requirement of this kind.

The number of days involved would be selected by the recipient, subject to OA approval as part of the recipient's DBE program. In approving these time frames, the OAs will consider whether they are realistic and sufficiently brief to ensure genuinely prompt payment. Recipients who already operate under prompt payment statutes may use their existing authority in implementing this requirement. It may be necessary to add to existing contract clauses in some cases (e.g., if existing prompt payment requirements do not cover retainage).

Paragraph (b) lists a series of additional measures that the regulation authorizes, but does not require, recipients to use. These include alternative dispute resolution, holding of payments to primes until subcontractors are paid, and other mechanisms that the recipient may devise. All these mechanisms could be made part of the recipient's DBE programs.

Section 26.31 What Requirements Pertain to the DBE Directory?

Recipients maintain directories listing certified DBEs. The issue most discussed by commenters on this section was whether the directory should include material concerning the qualifications of the firm to do various sorts of work. For example, has the firm been pre-qualified by the recipient? Can it do creditable work? What kinds of work does the firm prefer to do? Some commenters also asked that the directory should list the geographical areas in which the firm is willing to work. Other commenters opposed the idea of including this kind of information in the directory.

The Department believes that the directory and the certification process are closely intertwined. The primary purpose of the directory is to show the results of the certification process. Consequently, the directory should list all firms that the recipient has certified, along with basic identifying information for the firm. Since certification under this rule pertains to the various kinds of work a firm's disadvantaged owners can control, it is important to list those kinds of work in the directory. For example, if a firm seeks to work in fields A, B, and C, but the recipient has determined that its disadvantaged owners can control its operations only with respect to A and B, then the directory would recite that the firm is certified to perform work as a DBE in fields A and B.

The focus of the directory is intended to be eligibility. A directory is a list of firms that have been certified as eligible DBEs, with sufficient identifying information to permit interested firms to contact the DBEs. We do not intend to turn a recipient's directory into a comprehensive business resource manual. For example, information about firms' qualifications, geographical preferences for work, performance track record, capitalization, etc. are not required to be part of the directory. Some commenters favored including one or more of these elements, but we are concerned that other business information—however useful in its own right—could clutter up the directory and dilute its focus on certification.

Section 26.33 What Steps Must a Recipient Take to Address Overconcentration of DBEs in Certain Types of Work?

For some time, the Department has heard allegations that DBEs are overconcentrated in certain fields of highway construction work (e.g., guardrail, fencing, landscaping, traffic

control, striping). The concern expressed is that there are so many DBEs in these areas that non-DBEs are frozen out of the opportunity to work. In an attempt to respond to these concerns, the SNPRM asked for comment on a series of options for "diversification" mechanisms, various incentives and disincentives designed to shift DBE participation to other types of work.

The Department received a great deal of comment on these proposals, almost all of it negative. There were few comments suggesting that overconcentration was a serious problem, and many comments said that the alleged problem was not real. Some FTA and FAA recipients said that if there was a problem with overconcentration, it was limited to the highway construction program. As a general matter, recipients said that the proposed mechanisms were costly, cumbersome, and too prescriptive.

Prime contractors opposed the provisions because they would make it more difficult for them to find DBEs with which to meet their goals, while DBEs opposed them because they felt the provisions would penalize success and force them out of areas of business in which they were experienced. Many commenters suggested using outreach or business development plans as ways of assisting DBEs to move into additional areas of work.

The Department does not have data from commenters or other sources to support a finding that "overconcentration" is a serious, nationwide problem. However, as part of the narrow tailoring of the DBE program, we believe it would be useful to give recipients the authority to address overconcentration problems where they may occur. In keeping with the increased flexibility that this rule provides recipients, we give recipients discretion to identify situations where overconcentration is unduly burdening non-DBE firms. If a recipient finds an area of overconcentration, it would have to devise means of addressing the problem that work in their local situations. Possible means of dealing with the problem could include assisting prime contractors to find DBEs in non-traditional fields or varying the use of contract goals to lessen any burden on particular types of non-DBE specialty contractors. While recipients would have to obtain DOT approval of determinations of overconcentration and measures for dealing with them, the Department is not prescribing any specific mechanisms for doing so.

Section 26.35 What Role do Business Development and Mentor-Protégé Programs Have in the DBE Program?

In the SNPRM, both mentor-protégé programs and business development programs (BDPs) were cast as tools to use for diversification. They still may be used for that purpose, as noted in § 26.33. However, the Department believes that they may have a broader application, and their use in the final rule is not limited to diversification purposes. BDPs, in particular, are good examples of race-neutral methods recipients can use to promote the participation of DBEs and other small businesses in their contracting programs.

There were few comments on these provisions. Recipients wanted flexibility, and suggested that these kinds of programs should be optional. Their comments said that such programs were resource-intensive, and that Federal financial assistance for them would be welcome. One contractor's organization offered its own mentor-protégé plan as a model. A few comments voiced suspicion of mentor-protégé plans, on the basis that they allowed fronts and frauds into the program.

The final rule makes the use of BDPs and mentor-protégé programs optional for recipients. An operating administration can direct a particular recipient to institute a BDP, but BDPs are not mandatory across the board. The operating administration would negotiate with the recipient before mandating a BDP.

One feature added to this provision allows recipients to establish a kind of mini-graduation requirement for firms that voluntarily participate in BDPs. One of the purposes of a BDP is to equip DBE firms to compete in the market outside the DBE program. Therefore, a recipient could ask BDP participants to agree—as a condition of receiving BDP assistance—to agree to leave the DBE program after a certain number of years, or after certain business development objectives had been achieved.

Standing alone, mentor-protégé programs are not an adequate substitute for the DBE program. While they can be an important tool to help selected firms, they cannot be counted on to level the playing field for DBEs in general. An effective mentor-protégé program requires close monitoring to guard against abuse, which further limits the number of DBEs they can assist. Even with these limits, a mentor-protégé program that has safeguards to prevent large non-DBE firms from circumventing the DBE program can be a useful

component of a recipient's overall strategy to ensure equal opportunities for DBEs.

The final rule includes safeguards intended to prevent the misuse of mentor-protégé programs. Only firms that a recipient has already certified as DBEs (necessarily including a determination that they are independent firms) can participate as protégés. This is intended to preclude non-DBE firms from creating captive DBE firms to serve as protégés. A non-DBE mentor firm cannot get credit for more than half its goal on any contract by using its own protégé. Moreover, a non-DBE mentor firm cannot get DBE credit for using its own protégé on more than every other contract performed by the protégé. That is, if Mentor Firm X uses Protégé Firm Y to perform a subcontract, X cannot get DBE credit for using Y on another subcontract until Y had first worked on an intervening prime contract or subcontract with a different prime contractor.

To make mentor-protégé relationships feasible, the rule provides that mentors and protégés are not treated as affiliates of one another for size determination purposes. Mentor-protégé programs and BDPs must be approved by the concerned operating administration before they take effect. Recipients who already have such programs in place would make them part of their revised DBE programs sent to the concerned OA within 180 days of the effective date of part 26.

Section 26.37 What Are a Recipient's Responsibilities for Monitoring the Performance of Other Program Participants?

The few comments on this section asked for more detail and clarification. In the interest of flexibility, the Department is reluctant to be prescriptive in the matter of monitoring and enforcement mechanisms. What we are looking for is a strong and effective set of monitoring and compliance provisions in each recipient's DBE program. These mechanisms could be most anything available to the recipient under Federal, state, or local law (e.g., liquidated damages provisions, responsibility determinations, suspension and debarment rules, etc.)

One of the main purposes of these provisions is to make sure that DBEs actually perform work committed to them at contract award. The results that recipients must measure consist of payments actually made to DBEs, not just promises at the award stage. Credit toward goals can be awarded only when payments (including, for example, the return of retainage payments) are

actually made to DBEs. Under the final rule, recipients would keep a running tally of the extent to which, on each contract, performance had matched promises. Prime contractors whose performance fell short of original commitments would be subject to the compliance mechanisms the recipient had made applicable.

Section 26.41 What Is the Role of the Statutory 10 Percent Goal in This Program?

This is a new section, intended to explain what role the 10 percent statutory goal plays in the DBE program. Under former part 23, the 10 percent figure derived from the statute had a role in the setting of overall goals by recipients. For example, if recipients had a goal of less than 10 percent, the rule required them to make a special justification.

This section makes clear that the 10 percent goal is an aspirational goal that applies to the Department of Transportation on a national level, not to individual recipients. It is a goal that the Department can use to evaluate its overall national success in achieving the objectives that Congress has established for this program. However, the national 10 percent goal is not tied to recipients' goal-setting decisions. Recipients set goals based on what will achieve a level playing field for DBEs in their own programs, without regard to the national goal. Recipients are not required to set their overall or contract goals at 10 percent or any other particular level. Recipients are no longer required to make a special justification if their overall goals are less than 10 percent.

As discussed in connection with the Congressional debate on the TEA-21 DBE provision, Congress viewed flexibility concerning the statutory 10 percent goal as an important feature of narrow tailoring and made clear that it was setting a national goal, not a goal for any individual recipient. The Department wants to ensure that state and local programs have sufficient flexibility to implement their programs in a narrowly tailored way. This section is part of the Department's effort toward that end.

Section 26.43 Can Recipients Use Quotas or Set-Asides as Part of This Program?

The DBE program has often been labeled as a "quota" or "set-aside" program, especially, though not exclusively, by its opponents. This label is, and always has been, incorrect. Fifteen years ago, in the preamble to the Department's first rule implementing a DBE statute, the Department carefully

specified that neither quotas nor set-asides were required (see 48 FR 33437-38; July 21, 1983). This remains true today. However, in light of *Adarand* and this year's Congressional debates on the DBE statutes, we believe this point deserves additional emphasis. This regulation prohibits quotas under any circumstances and makes clear that set-asides can only be used as a means of last resort for redressing egregious discrimination.

A number of non-DBE contractors and their organizations continued to assert, in comments on the SNPRM, that the DBE program operates as a quota program. This section makes clear that recipients cannot use quotas on DOT-assisted contracts under any circumstances. A quota is a simple numerical requirement that a recipient or contractor must meet, without consideration of other factors. For example, if a recipient sets a 12 percent goal on a particular contract and refuses to award the contract to any bidder who does not have 12 percent DBE participation, either refusing to look at showings of good faith efforts or arbitrarily disregarding them, then the recipient has used a quota. The Department's regulations have never endorsed this practice. The issue of good faith efforts is discussed further below in connection with § 26.51.

A set-aside is a very specific tool. A contracting agency sets a contract aside for DBEs if it permits no one but DBEs to compete for the contract. Firms other than DBEs are not eligible to bid. The Department's DBE program has never required the use of set-asides and has allowed recipients to use set-asides only under very limited circumstances.

Under the SNPRM, a recipient could use a set-aside on a DOT-assisted contract only if other methods of meeting overall goals were demonstrated to be unavailing and the recipient had legal authority independent of part 26. Comments were divided concerning the use of set-asides. A number of non-DBE contractors opposed the use of set-asides, some of them saying that set-asides might be something they could live with if their use were balanced by the elimination of DBE contract goals on other contracts in the same field. Some recipients and DBEs said, however, that set-asides were a useful tool to achieve goals, particularly for start-up contractors or small contracts.

The Department has carefully reviewed these comments and continues to believe that set-asides should not be used in the DBE program unless they are absolutely necessary to address a specific problem when no other means

would suffice. If a recipient has been unable to remedy the effects of egregious discrimination through other means, it may, as a last resort, make limited use of set-asides to the extent necessary to resolve the problem.

Section 26.45 How Do Recipients Set Overall Goals?

Since its inception, the recipient's overall goal has been the heart of the DBE program. Responding to *Adarand*, DOT clarified the theory and purpose of the overall goal in the SNPRM. In the proposed rule, the Department made clear that the purpose of the overall goal—and, in fact, the DBE program as a whole—is to achieve a "level playing field" for DBEs seeking to participate in federal-aid transportation contracting. To reach a level playing field, recipients need to examine their programs and their markets and determine the amount of participation they would expect DBEs to achieve in the absence of discrimination and the effects of past discrimination. The focus of the goal section of the SNPRM was to propose ways to measure what a level playing field would look like and to seek input on the availability of data to make such a measurement.

The Proposed Rule and Comments

The Department proposed several options that recipients might use for setting overall goals, including three alternative formulas for measuring the availability of ready, willing and able DBEs in local markets. The specific formulas will be discussed below, but generally, they each called for setting a goal that reflected the percentage of locally available firms that were DBEs (i.e. dividing the number of DBEs by the number of all businesses). On all of the alternatives, the SNPRM sought comments on both the feasibility and practical value of the options, as well as the prospects for combining any of the approaches and the question of whether to mandate a single approach or allow each recipient to choose amongst the options. We invited commenters to propose changes to any of the details of the options or to devise entirely new ones. Finally, we asked commenters for their input on the availability of reliable data for use with each of the options.

Hundreds of commenters of all types—including DBEs and non-DBEs, prime and subcontractors, state and local recipients, industry and interest groups and private individuals—responded with a wealth of feedback, opinions and data. It is an understatement to say that there was no consensus among commenters as to the best way to set overall goals. Support for

the proposed options was almost evenly spread over the choices presented, with many commenters firmly against all of the options. Still more suggested that the current, non-formulaic method was the best way to ensure the flexibility to respond to local market conditions. Similarly, among those who expressed an opinion, commenters were split between the propriety of choosing a single "best" method and imposing it on all recipients and allowing recipients to choose amongst all the options. One of the few universal themes in the goal-setting comments was the problem of the availability of reliable data on the number of DBE and non-DBE contractors.

There were a few common threads that different groups of commenters tended to apply to all of the formulas. Among recipients, many comments focused on the lack of data about non-DBE contractors, especially subcontractors. Recipients often noted that they would not have the information needed for the denominator of any of the formulas (i.e. the total number of available businesses). Non-DBE contractors—and industry groups representing them—generally believed that there should be a capacity measure built into any goal setting mechanism. Finally, DBEs—and their industry associations—were concerned that all of the formulas would create goals based only on the current number of DBEs, locking in the effects of past discrimination by ignoring the fact that the lack of opportunities in the past has suppressed the number of DBE firms available today.

Under the proposed rule's Alternative 1, recipients would calculate the percentage of DBE firms in their directories among all firms available to work on their DOT-assisted contracts. Under Alternative 2, recipients would calculate the percentage of all minority- and women-owned firms in certain SIC codes in their areas among all firms in these SIC codes in the same areas. Under Alternative 3, recipients would calculate a percentage based on the average number of DBE firms that had worked on their DOT-assisted contracts in recent years divided by the average number of all firms that had worked on their DOT-assisted contracts in the same period. The SNPRM also proposed that recipients could use other means, such as disparity studies or goals developed by other recipients serving the same area, as a basis for their goals.

Each of the three proposed alternatives received some support, though this was often the rather tepid endorsement of commenters who felt that one or another alternative was the

best of a bad lot. Non-DBE contractors often claimed that the alternatives would unfairly increase goals, while DBE contractors often claimed that the same proposals would unfairly decrease goals.

Commenters said that data for determining the denominators of the equations in Alternatives 1 and 2, as well as the numerator in Alternative 2, did not exist and that it would be a major, time-consuming job to begin to obtain the data. Adaptation of existing information from other sources (e.g., Census data) was said to have significant statistical difficulties. The difficulty of getting data on out-of-state firms was emphasized in some comments.

Commenters looked on the alternatives as cumbersome, creating unreasonable administrative burdens, and as producing statistical results that were skewed in various ways. The use of DBE directories as the source of the numerator in Alternative 1 was criticized on the basis that directories may contain firms that never actually participate in DOT-assisted contracts. It was suggested that the number of firms bidding rather than the number of firms certified would be a more reliable guide, but it was also pointed out that, because subcontractors seldom formally bid for work, this data would be hard to obtain. Some commenters proposed adding overall population statistics to the mix.

A significant number of commenters—primarily non-DBE contractors, but including some recipients and other commenters as well—emphasized the need to take “capacity” into account. Most popular among these comments was using a capacity version of Alternative 3. These comments did not propose a method of determining the capacity of the firms contracting with the recipient.

The Final Rule

In view of the complexity and importance of the goal setting process and the many issues raised by commenters, the Department has decided to adopt a two step process for goal setting. The process is intended to provide the maximum flexibility for recipients while ensuring that goals are based on the availability of ready, willing and able DBEs in each recipient's relevant market. The Department believes that this approach is critical to meeting our constitutional obligation to ensure that the program is narrowly tailored to remedy the effects of discrimination. The first step of the process will be to create a baseline figure for the relative availability of ready, willing and able DBEs in each

recipient's market. The second step will be to make adjustments from the base figure, relying on an examination of additional evidence, past experience, local expertise and anticipated changes in DOT-assisted contracting over the coming year.

Step 1: Determining a Base Figure for the Overall Goal

The base figure is intended to be a measurement of the current percentage of ready, willing and able businesses that are DBEs. Ensuring that this figure is based on demonstrable evidence of each recipient's relevant market conditions will help to ensure that the program remains narrowly tailored. To be explicit, recipients cannot simply use the 10 percent national goal, their goal from the previous year, or their DBE participation level from the previous year as their base figure. Instead, all recipients must take an actual measurement of their marketplace, using the best evidence they have available, and derive a base figure that is as fair and accurate a representation as possible of the percentage of available businesses that are DBEs.

There are many different ways to measure the contracting market and assess the relative availability of DBEs. As discussed above, the SNPRM proposed three alternate formulas to measure relative availability, none of which were particularly popular with commenters. In this final rule, the Department is placing primary emphasis on the principles underlying the measurement, mandating only that a measurement of the relative availability of DBEs be made on the basis of demonstrable evidence of relevant market conditions, rather than requiring that any particular procedure or formula be used. The final rule contains a number of examples of how to create a base figure which recipients are free to adopt in their entirety or to use as guidelines for how to devise their own measurement.

There are several reasons we have taken this approach. First, the Department is aware of the differences in available data in various markets across the nation. The flexibility inherent in this approach will ensure that all recipients can use the procedure to set a reasonable goal and allow each recipient to use the best data available to it. As discussed in another section, this rule will also provide for the development of more standard data for future goal setting. Second, for many recipients, setting goals in this way will be a new exercise. By fixing only the basic principle, but allowing the methodology to change, recipients will

have the opportunity to fine tune the process each year as their experience grows and the data available to them improve. Finally, the rule makes sure that every recipient will have at least one reasonable and practical goal setting method available to them.

The first example for setting a base figure relies on data sources that are immediately available to all recipients: their DBE directories, and a Census Bureau database that DOT and the Census Bureau will make available to all recipients that wish to use it. This example has its roots in the first two goal setting formulas proposed in the SNPRM. Recipients would first assess the number of ready, willing and able DBEs based on their own directories. For some recipients this will be as simple as counting the number of firms in their directory. For others, particularly those using directories maintained by other agencies, the directories will have to be “filtered” for firms involved in transportation contracting. The resulting number of DBEs would become the numerator. The denominator would then be derived from the Census Bureau's County Business Pattern (CBP) database. We will provide user-friendly electronic access to the database via the internet to allow recipients to input the geographic area and SIC codes in which they contract and receive a number for the availability of all businesses.

There are several issues that must be addressed when comparing numbers derived from two different data sources, some of which were raised in the comments on the SNPRM. Recipients will need to ensure that the scope of businesses included in the numerator is as close as possible to the scope included in the denominator. Using as close as possible to the same SIC codes and geographic base is very important. A recipient using its own DBE directory, particularly one that contains only firms in the fields in which it contracts, will still need to determine what fields it will use for the denominator when sorting through the CBP database. The best way to do this would be to examine their contracting program and determine the SIC codes in which they let the substantial majority of their contracts and subcontracts. The geographic area used for both the numerator and the denominator should cover the area from which the recipient draws the substantial majority of its contractors. While it may be sufficient for some state recipients to use their state borders as their contracting area, local transit and airport recipients will rarely have such an obvious choice. Those recipients will need to more carefully examine the

geographic area from which they draw contractors and base their calculation of both the numerator and denominator of the equation on the same area.

The Department and the Census Bureau will make the CBP data available in a format that gives recipients as much flexibility as possible to tailor the data to their contracting programs. Recipients will be able to extract the data in one block for all of the SIC codes they expect to contract in, or by individual SIC codes, allowing them to

weight the relative availability of DBEs in various fields, giving more weight to the fields in which they spend more money. For example, let us assume a recipient estimates that it will expend 10% of its federal aid funds within SIC code 15, 40% in SIC code 16, 25% in SIC code 17, and the remaining 25% on contracting spread over SIC codes 07, 42 and 87. The recipient could separately determine the relative availability of DBEs for each of the three major construction SIC codes (i.e., 15, 16 and

17) and the relative availability of DBEs in the other three SIC codes grouped together and weight each according to the amount of money to be spent in each area. In this example, the recipient could calculate its weighted base figure by first determining the number of DBEs in its directory for each of the groups, then extracting the availability of CBP businesses for the same groups. It would then perform the following calculation to arrive at a base figure for step one of the goal setting process:

$$\text{Base Figure} = \left[.10 \frac{(\text{DBEs in SIC 15})}{\text{CBPs in SIC 15}} + .40 \frac{(\text{DBEs in 16})}{\text{CBPs in 16}} + .25 \frac{(\text{DBEs in 17})}{\text{CBPs in 17}} + .25 \frac{(\text{DBEs in 07,42,87})}{\text{CBPs in 07,42,87}} \right] \times 100$$

As has been stated generally, this formula is offered only as an example of a way that a recipient could choose to use the CBP database. Recipients using the CBP data should choose whether to weight their calculation, and whether to do so by individual SIC codes or by groups of SIC codes, based on their own assessment of what method will best fit their spending pattern.¹

Finally, there is still the question of the propriety of comparing data from two sources as different as DBE directories and the CBP. As mentioned above, some commenters asserted that the directories may contain firms that do not normally perform DOT-assisted contracts. This problem is greatest, of course, for directories maintained by other agencies for purposes beyond DOT-assisted contracting. We believe that the recipient's knowledge of its contracting needs and the contents of its DBE directory will allow it to solve this problem by sorting the directories by SIC code to extract only the firms likely to be interested in DOT-assisted contracting. Any remaining effect from DBEs that are certified in the relevant SIC codes but still do not intend to compete for DOT-assisted contracts will be more than offset by the hurdles involved in actually becoming a DBE. It is important to note here that the certification process itself, with its paperwork, review and on-site inspection, create a filter on the number of existing firms that will be counted in the numerator without there being any equivalent filter culling firms out of the denominator. Ultimately, the Department chose these two data sources for the example because, while they may not be perfect, they represent

the best universally available current data on both the presence of DBEs and the presence of all businesses in local markets. Any recipient that believes it has available to it better sources of local data from which to make a similar calculation for its base figure is encouraged to use them.

The second example for calculating a base figure is using a bidders list to determine the relative availability of DBEs. The concept is similar to the one described above. The recipient would divide the number of available ready, willing and able DBEs by the number for all firms. The difference is that instead of measuring availability by DBE certifications and Census data, the recipient would measure availability by the number of firms that have directly participated in, or attempted to participate in, DOT-assisted contracting in the recent past. This approach has its roots in Alternative 3 from the SNPRM. Of fundamental importance to this approach is that the recipient would need to include all firms that have sought DOT-assisted contracts, regardless of whether they did so by bidding on a prime contract or quoting a job as a subcontractor. Because most DOT recipients derive the substantial majority of their DBE participation through subcontracting, it is absolutely essential that all DBE and non-DBE firms that quote subcontracts be included in the bidders list.² Bidders lists are a very focussed measure of ready, willing and able firms because they filter the pool of available firms by requiring a demonstration of their ability to participate in the process through tracking and identifying

contracting opportunities, understanding the requirements of a particular job and assembling a bid for it. Another attractive feature of the bidding "filter" is that it applies equally to both DBEs and non-DBEs.

The third example included in the final rule for setting a base figure is using data derived from a disparity study. As was discussed in the SNPRM, the Department is not requiring recipients to do a disparity study, but is only making clear that use of disparity study data by recipients that have them or choose to conduct them is a valid means of setting a goal. Disparity studies generally contain a wide array of statistical data, as well as anecdotal data and analysis that can be particularly useful in the goal setting process. We list disparity studies here, not because they are needed to justify operating the DBE program—Congress has already established the compelling need for the DBE program—but because the data a good disparity study provides can be an excellent guide for a recipient to use to set a narrowly tailored goal.

The Department will not set out specific requirements for what data or analysis is required before a disparity study can be used for setting a goal, because we believe that the design and conduct of the study is best left to the local officials and the professional organizations with which they contract to conduct the studies. Instead, we again offer simple general principles that should apply to all studies used for goal setting. Any study data relied on in the goal setting process should be as recent as possible and be focussed on the transportation contracting industry. When setting the goal, first use the study's statistical evidence to set a base figure for the relative availability of DBEs. Other study information, whether it is anecdotal data, analysis or statistical information about related

¹ While it is not statistically necessary to account for 100% of program dollars when performing this type of weighting, the greater the percentage accounted for, the more accurate the resulting calculation will be.

² To prevent any confusion, it is important to note that the DBE program does not use the so-called "benchmarking" system employed in direct Federal procurement. The benchmarking system relies on a unique database created specifically for use in the federal procurement program.

fields, should be included when making adjustments to the base figure (discussed in more detail below), but not included in the base figure for the relative availability of DBEs.

The last specific example included in the rule is using the goal of another recipient as the base figure for goal setting. This option was also included in the SNPRM. It is intended to avoid duplicative work and to lighten the burden the goal setting process might put on smaller recipients. It is important to note that a recipient could only use another recipient's goal if it was set in accordance with this rule and the other recipient performed similar contracting in a similar market area. Using another recipient's approved goal would only satisfy the first step of the goal setting process. It would serve as the base figure, and could not be used to skip over step two of the process. The recipient would need to examine the same additional evidence it would otherwise use to determine whether to adjust its goal from the base figure, as well as being required to make adjustments to account for differences in its local market or contracting program.

The final rule also maintains the option of devising an alternative method of calculating a base figure for the goal setting process. Explicitly listing this option serves to emphasize the point that the options in the rule are examples meant as guidelines intended to ensure maximum flexibility for recipients. Recipients can use this option to take advantage of their unique expertise or any unique source of data that they have that may not be available to other recipients. The concerned operating administration will review and approve the proposals of recipients that believe they can calculate a base figure that will better reflect their relevant market than any of the examples provided in this rule. Approval will be contingent on the proposals following the same principles that apply to any recipient: the methodology must be based on demonstrable data of relevant market conditions and be designed to reach a goal that the recipient would expect DBEs to achieve in the absence of discrimination.

Step 2: Adjusting the Base Figure

As alluded to above, measuring the relative availability of DBEs to derive a base figure is only the first step of the goal setting process. To ensure that they arrive at goals that truly and accurately reflect the participation they would expect absent the effects of discrimination, recipients must go beyond the formulaic measurement of

current availability to account for other evidence of conditions affecting DBEs. To accomplish this second step, recipients must first survey their jurisdiction to determine what types of relevant evidence is available to them. Then, relying on their own knowledge of their contracting markets they must review the evidence to determine whether either an up or down adjustment from the base figure is needed.

One universally available form of evidence that all recipients should consider is the proven capacity of DBEs to perform work on DOT-assisted contracts. All recipients have been tracking and reporting the dollar volume of work that is contracted and subcontracted to DBEs each year. Viewed in isolation, the past achievements of DBEs do not reflect the availability of DBEs relative to all available businesses, but it is an important and current measure of the ability of DBEs to perform on DOT-assisted contracts.

Though not universally available, there are hundreds of existing disparity studies that contain a wealth of statistical and anecdotal evidence on the utilization of disadvantaged businesses. In addition to being a possible source of data for Step 1 of the goal setting process, disparity studies should be considered during Step 2 of the process. The base figure from Step 1 is intended to determine the relative availability of DBEs. The data and analysis in a disparity study can help a recipient determine whether those existing businesses are under- or over-utilized. If a recipient has a study with disparity ratios showing that existing DBEs are receiving significantly less work than expected, an upward adjustment from the base figure is called for. Similarly, if the disparity ratio shows overutilization, a downward adjustment to the base figure would be warranted. The anecdotal evidence and analysis of contracting requirements and conditions that may have a discriminatory impact on DBEs are also important sources that should be examined when determining what adjustment to make to the base figure.³ Finally, disparity studies that are conducted within a recipient's jurisdiction should be examined even if they were not done specifically for the recipient. For example, a state highway agency may find useful data and

³ It is important to note that adjusting the goal is only part of the response a recipient should make to evidence of discriminatory barriers for DBEs. All recipients have a primary responsibility to ensure non-discrimination in their programs and should act aggressively to remove any discriminatory barriers in their programs.

analysis in either a statewide disparity study covering other agencies or in a disparity study examining contracting in a county or city within the state.

If a recipient uses another recipient's goal as its base figure under Step 1 of the goal setting process, it will have to make additional adjustments to ensure that its final goal is narrowly tailored to its market and contracting program. For example, if a local transit or airport authority adopts a statewide goal as its base figure, it must determine the extent that local relative availability of DBEs differs from the relative availability of DBEs in the contracting area relied on by the state. The local recipient would also need to examine the differences in the type of contracting work in its program and determine whether there are significant differences in the relative availability of DBEs in any fields that are unique to its program—or unique to the program of the other recipient. Similarly, if one local recipient used the goal of another local recipient in the same market as its base figure, it would also need to adjust for differences in the contracting fields used by the two programs.

Finally, the rule contains a brief list of other types of data a recipient could consider when adjusting its base figure to arrive at an overall goal. The list is by no means intended to be exhaustive. Instead, it is meant as a guide to the types of information a recipient should look for in Step 2 of the goal setting process. There is a wide array of relevant local, regional and national information about the utilization of disadvantaged businesses. Recipients are encouraged to cast as wide a net as they can to carefully examine their contracting programs and the public and private markets in which they operate.

Additional Goal Setting Issues

The Department proposed, in both the 1992 NPRM and the 1997 SNPRM, that overall goals be calculated as a percentage of DOT funds a recipient expects to expend in DOT-assisted contracts. This is different from the existing part 23 rule, which asked recipients to set overall goals on the basis of all funds, including state and local funds, to be expended in DOT-assisted contracts. This change is for accounting and administrative convenience and is not intended to have a substantive effect on the program. While not the subject of many comments, those who did comment on the proposal favored the change. The final rule adopts this approach.

A few recipients commented that public participation concerning goal setting was bothersome. Nevertheless,

we view it as an essential part of the goal setting process. There are many stakeholders involved in setting goals, and it is reasonable that they should be involved in the process and have an opportunity for comment. The part 23 provision requiring getting a state governor's approval of a goal of less than 10 percent has been eliminated, both because overall goals are no longer tied to the national 10 percent goal and to reduce administrative burdens.

The goal setting provision of the final rule continues to direct recipients to set one annual overall goal for DBEs, rather than group-specific goals separating minority and women-owned businesses.

Section 26.47 Can Recipients Be Penalized for Failing To Meet Overall Goals?

This is a new section of the regulation, the purpose of which is to clarify the Department's views on the situations in which it is appropriate to impose sanctions on recipients with respect to goals. The provision states explicitly what has long been the Department's policy: no recipient is sanctioned, or found in noncompliance, simply because it fails to meet its overall goal. In fact, through the history of the DBE program, the Department never has sanctioned a recipient for failing to obtain a particular amount of DBE participation.

On the other hand, if a recipient fails to set an overall goal which the concerned operating administration approves, or fails to operate its program in good faith toward the objective of meeting the goal, it is subject to a finding of noncompliance and possible sanctions. For example, if a recipient refuses to establish a goal or, having established one, does little or nothing to work toward attaining it, it would be reasonable for the Department to find the recipient in noncompliance. Like all compliance provisions of the rule, this provision is subject to the "court order" exception recently created by statute (see § 26.101(b)).

Section 26.49 How Are Overall Goals Established for Transit Vehicle Manufacturers?

This provision basically continues in effect the existing transit vehicle manufacturer (TVM) provisions of the rule. The SNPRM proposed to change the existing rule in two respects. FHWA or FAA recipients could avail themselves of similar provisions, if they chose. The final rule retains this flexibility. Also, it was proposed that FTA, rather than manufacturers, would set TVM goals. The few comments we received on this section objected to the

latter change. Consequently, we will not adopt the proposed change and will continue to require the TVMs themselves to set their own goals based on the principles outlined in § 26.45 of this rule.

Section 26.51 What Means Do Recipients Use To Meet Overall Goals?

One of the key points of both the SNPRM and this final rule is that, in meeting overall goals, recipients have to give priority to race-neutral means. By race-neutral means (a term which, for purposes of this rule, includes gender neutrality), we mean outreach, technical assistance, procurement process modification, etc.—measures which can be used to increase opportunities for all small businesses, not just DBEs, and do not involve setting specific goals for the use of DBEs on individual contracts. Contract goals, on the other hand, are race-conscious measures.

In the context of these definitions, it is important to note that awards of contracts to DBEs are not necessarily race-conscious actions. Whenever a DBE receives a prime contract because it is the lowest responsible bidder, the resulting DBE participation was achieved through race-neutral means. Similarly, when a DBE receives a subcontract on a project that does not have a contract goal, its participation was also achieved through race-neutral means. Finally, even on projects that do carry contract goals, when a prime awards a particular subcontract to a DBE because it has proven in the past that it does the best or quickest work, or because it submitted the lowest quote, the resulting DBE participation has, in fact, been achieved through race-neutral means. We also note that the use of race-neutral measures (e.g., outreach, technical assistance) specifically to increase the participation of DBEs does not convert these measures into race-conscious measures.

A number of non-DBE contractors commented that race-neutral measures should not only be given priority, but must be tried and fail before any use of contract goals can occur. This, they asserted, is essential for a program to be narrowly tailored. The law on this point is fairly clear, and does not support the commenters' contention. The extent to which race-neutral alternatives were considered and deemed inadequate to remedy the problem is the relevant narrow tailoring question. Both in past legislation and when considering TEA-21, Congress did consider race-neutral alternatives. In fact, as described above, throughout the debate, Member after Member gave examples of how state and local race-neutral programs without

goals fail to overcome the discriminatory barriers that face DBEs. Congress' careful consideration and conclusion that race-neutral means are insufficient, buttressed by this rule's emphasis on achieving as much of the goal as possible through race-neutral means, satisfies this part of the narrow tailoring requirement.

No one opposed the use of race-neutral means, though a number of DBEs and recipients stressed that these means, standing alone, were insufficient to address discrimination and its effects. Most recipients and non-DBE contractors supported the use of race-neutral measures, though some recipients said that increased use of these measures would require additional resources.

The relationship between race-conscious and race-neutral measures in the final rule is very important. The recipient establishes an overall goal. The recipient estimates, in advance, what part of that goal it can meet through the use of race-neutral means. This projection, and the basis for it, would be provided to the concerned operating administration at the same time as the overall goal, and is subject to OA approval.

The requirement of the rule is that the recipient get the maximum feasible DBE participation through race-neutral means. The recipient uses race-conscious measures (e.g., sets contract goals) to get the remainder of the DBE participation it needs to meet the overall goal. If the recipient expects to be able to meet its entire overall goal through race-neutral means, it could, with OA approval, implement its program without any use of contract goals.

For example, suppose Recipient X establishes an 11 percent overall goal for Fiscal Year 2000. This is the amount of DBE participation that X has determined it would have if the playing field were level. Recipient X projects that, using a combination of race-neutral means, it can achieve 5 percent DBE participation. Recipient X then sets contract goals on some of its contracts throughout the year to bring in an additional 6 percent DBE participation. Recipients would keep data separately on the DBE participation obtained through those contracts that either did or did not involve the use of contract goals. Recipients would use this and other data to adjust their use of race-neutral means and contract goals during the remainder of the year and in future years. For example, if Recipient X projected being able to attain 5 percent DBE participation through race-neutral measures, but was only able to obtain 1 percent from the race-neutral measures

it used, Recipient X would increase its future use of contract goals. On the other hand, if Recipient X exceeded its prediction that it would get 5 percent DBE participation from race-neutral measures and actually obtained 10 percent DBE participation from the contracts on which there were no contract goals, it would reduce its future use of contract goals. A recipient that was consistently able to meet its overall goal using only race-neutral measures would never need to use contract goals.

Most recipients and non-DBE contractors agreed with the SNPRM's proposal that (contrary to the part 23 provision on this subject) contract goals not be required on all contracts. This provision is retained in the final rule. We believe that this provision provides recipients the ability to achieve the objective of a narrowly tailored program. The rule also reiterates that the contract goal need not be set at the same level as the overall goal. To express this more clearly, let us return to the above example of Recipient X. Just because Recipient X has an overall goal of 11 percent, it does not have to set a contract goal on each contract. Nor does it have to establish an 11 percent goal on each contract on which it does set a contract goal. Indeed, since X has projected that it can achieve almost half of its overall goal through race-neutral means, it would most likely set contract goals on some contracts but not on others. On contracts with a contract goal, the goal might be 4 percent one time, 18 percent another time, 9 percent another time, depending on the actual work involved in each contract, the location of the work and the subcontracting opportunities available. The idea is for X to set contract goals that, cumulatively over the year, bring in 6 percent DBE participation, which, added to the 5 percent participation X projects achieving from race-neutral measures, ends up meeting the 11 percent overall goal.

The SNPRM asked for comment on evaluation credits as an additional race-conscious measure that recipients could use to meet overall goals. The vast majority of the many comments on this subject opposed the use of evaluation credits, on both legal (e.g., as contrary to narrow tailoring) and policy (e.g., as confusing and subjective) grounds. A smaller number of commenters favored at least giving recipients discretion to use this tool. While the Department does not agree with the contention that evaluation credits are legally suspect, we do agree with much of the sentiment against using them in the DBE program, particularly the practical difficulties they might involve when applied to

subcontracting (which constitutes the main source of DBE participation in the program). As a result, the final rule does not contain an evaluation credits provision.

The SNPRM proposed certain mechanisms for determining when it was appropriate to ratchet back the use of contract goals. Most commenters said they found these particular mechanisms complicated and confusing. The Department believes that, as a matter of narrow tailoring, it is important to have concrete mechanisms in place to ensure that race-conscious measures like contract goals are used only to the extent necessary to ensure a level playing field. The final rule contains examples of four such mechanisms.

The first mechanism applies to a situation in which a recipient estimates that it can meet its overall goal exclusively through the use of race-neutral goals. In this case, the recipient simply does not set contract goals during the year. The second mechanism takes this approach one step further. If the recipient meets its overall goal two years in a row using *only* race-neutral measures, the recipient continues to use only race-neutral measures in future years, without having to project each year how much of its overall goal it anticipates meeting through race-neutral and race-conscious means, respectively. However, if in any year the recipient does not meet its overall goal, the recipient must make the projection for the following year, using race-conscious means as needed to meet the goal.

The third mechanism applies to recipients who exceed their overall goals for two years in a row while using contract goals. In the third year, when setting their overall goal and making their projection of the amount of DBE participation they will achieve through race-neutral means, they would determine the average percentage by which they exceeded their overall goals in the two previous years. They would then use that percentage to reduce their reliance on contract goals in the coming year, as noted in the regulatory text example. The rationale for this reduction is that the recipient's overall goal represents its best estimation of the participation level expected for DBEs in the absence of discrimination. By exceeding that goal consistently, the recipient may be relying too heavily on race-conscious measures. Scaling back the use of contract goals—while keeping careful track of DBE participation rates on projects without contract goals—will ensure that the recipient's DBE program remains narrowly tailored to overcoming the continuing effects of discrimination.

The fourth mechanism operates within a given year. If a recipient determines part way through the year that it will exceed (or fall short of) its overall goal, and it is using contract goals during that year, it would scale back its use of contract goals (or increase its use of race-neutral means and/or contract goals) during the remainder of the year to ensure that it is using an appropriate balance of means to meet its "level playing field" objectives.

There were also a number of comments on how contract goals should be expressed. Most favored continuing the existing practice of adding together the Federal and local shares of a contract and expressing the contract goal as a percentage of the sum because it works well and avoids confusion. A few comments favored expressing contract goals as a percentage of only the Federal share of a contract. Ultimately, we believe that it is not necessary for the Department to dictate which method to use. Recipients may continue to use whichever method they feel works best and allows them to accurately track the participation of DBEs in their program. Recipients need only ensure that they are consistent and clearly express the method they are using, and report to the Department the total federal aid dollars spent and the federal aid dollars spent with DBEs.

As a last note on this topic, FAA recipients are reminded that funds derived from passenger facility charges (PFCs) are not covered by this part and should not be counted as part of the Federal share in any goal calculation. If a recipient chooses to express its contract goals as a percentage of the combined Federal and local share, it may include the PFC funds as part of the local share.

Section 26.53 What Are the Good Faith Efforts Procedures Recipients Follow in Situations Where There Are Contract Goals?

There was little disagreement about the main point of this section. When a recipient sets a contract goal, the basic obligation of bidders is to make good faith efforts (GFE) to meet it. They can demonstrate these efforts in either of two ways, which are equally valid. First, they can meet the goal, by documenting that they have obtained commitments for enough DBE participation to meet the goal. Second, even though they have not met the goal, they can document that they have made good faith efforts to do so. The Department emphasizes strongly that this requirement is an important and serious one. A refusal by a recipient to accept valid showings of

good faith is not acceptable under this rule.

Appendix A discusses in greater detail the kinds of good faith efforts bidders are expected to make. There was a good deal of comment concerning its contents. Non-minority contractors recited that good faith efforts standards should be "objective, measurable, realistically achievable, and standardized." Not one of these comments provided any examples or suggestions of what "objective, measurable, realistically achievable, and standardized" standards would look like, however. Certainly a one-size-fits-all checklist is neither desirable nor possible. What constitutes a showing of adequate good faith efforts in a particular procurement is an intrinsically fact-specific judgment that recipients must make. Circumstances of procurements vary widely, and GFE determinations must fit each individual situation as closely as possible.

The proposed good faith efforts appendix suggested that one of the factors recipients could take into account is the behavior of bidders other than the apparent successful bidder. For example, if the latter failed to meet the contract goal, but other bidders did, that could suggest that the apparent successful bidder had not exerted sufficient efforts to get DBE participation. Recipients who commented on this issue favored the concept; non-DBE contractors opposed it. The final rule's Appendix A makes clear that recipients are not to use a "conclusive presumption" approach, in which the apparent successful bidder is summarily found to have failed to make good faith efforts simply because another bidder was able to meet the goal. However, the track record of other bidders can be a relevant factor in a GFE determination, in more than one way. If other bidders have met the goal, and the apparent successful bidder has not, this at least raises the question of whether the apparent successful bidder's efforts were adequate. It does not, by itself, prove that the apparent successful bidder did not make a good faith effort to get DBE participation, however. On the other hand, if the apparent successful bidder—even if it failed to meet the goal—got as much or more DBE participation than other bidders, then this fact would support the apparent successful bidder's showing of GFE. The revised Appendix makes these points.

The proposed good faith efforts appendix also expanded on language in part 23 concerning price-based decisions by prime contractors. The existing language provides that a

recipient can use, as evidence of a bidder's failure to make good faith efforts, the recipient's rejection of a DBE subcontractor's "reasonable price" offer. The SNPRM added that a recipient could set a price differential from 1–10 percent to evaluate bidders' efforts. If a bidder did not meet the goal and rejected a DBE offer within the range, the recipient could view the bidder as not making good faith efforts. This was an attempt to provide additional, quantified, guidance to recipients on this issue.

Comment was mixed on this issue. Non-DBE prime contractors generally opposed the price differential idea, saying that it encouraged deviations from the traditional low bid system. It should be noted, however, that subcontracts are typically awarded outside any formal low bid system. Some recipients thought that it was a bad idea to designate a range, because it would limit their discretion, while others liked the additional definiteness of the range. Most recipients supported the "reasonable price" concept in general, even if they had their doubts about the value of a range. Some DBE organizations favored the range approach.

Taking all the comments into consideration, the Department has decided to retain language similar to that of part 23, without reference to any specific range. Appendix A now provides that the fact that some additional costs may be involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet a DBE contract goal, as long as such costs are reasonable. Along with this emphasis on the reasonableness of the cost necessarily comes the fact that prime contractors are not expected to bear unreasonable costs. The availability of a good faith efforts waiver of the contract goal helps to ensure that a prime contractor will not be in a position where it has to accept an excessive or unreasonable bid from a DBE subcontractor. At the same time, any burden that a non-DBE subcontractor might face is also limited by the reasonableness of competing bids. This approach retains flexibility for recipients while avoiding the concerns commenters expressed about a particular range.

The SNPRM proposed that recipients would have to provide for an administrative review of decisions that a bidder's GFE showing was inadequate. The purpose of the provision was to ensure that recipients did not arbitrarily dismiss bidders' attempts to show that they made good faith efforts. The provision was meant to emphasize the

seriousness with which the Department takes the GFE requirement and to help respond to allegations that some recipients administered the program in a quota-like fashion. The SNPRM also asked whether such a mechanism should be operated entirely by the recipient or whether a committee including representatives of DBE and non-DBE contractors should be involved.

A number of recipients, and a few contractors, opposed the idea on the basis of concern about administrative burdens on recipients and potential delays in the procurement process. A greater number of commenters, largely non-DBE contractors but also including recipients and DBEs, supported the proposal as ensuring greater fairness in the process. A significant majority of all commenters said that the recipient should operate the system on its own, because a committee would make the process more cumbersome and raise conflict of interest issues.

The Department will adopt this proposal, which should add to the fairness of the system and make allegations of *de facto* quota operations less likely. The Department intends that reconsideration be administered by recipients. The regulation does not call for a committee involving non-recipient personnel. The Department intends that the process be informal and timely. The recipient could ensure that the process be completed within a brief period (e.g., 5–10 days) to minimize any potential delay in procurements. The bidder would have an opportunity to meet with the reconsideration official, but a formal hearing is not required. To ensure fairness, the reconsideration official must be someone who did not participate in the original decision to reject the bidder's showing. The recipient would have to provide a written decision on reconsideration, but there would be no provision for administrative appeals to DOT.

A point raised by several non-DBE commenters was that DBEs should have to make good faith efforts (even when they were not acting as prime contractors). The commenters suggested things like providing capacity statements and documenting that they have bid on contracts. This point is unrelated to the subject of this section, which has to do with what efforts bidders for prime contracts have to make to show that they have made to obtain DBE subcontractors. It is difficult to see what purpose the additional paperwork burdens these commenters' requests would serve.

One of the most hotly debated issues among commenters was whether DBE

firms bidding on prime contracts should have to meet goals and make good faith efforts to employ DBE subcontractors. Under part 23, DBE prime contractors did not have to meet goals or make good faith efforts. The rationale for this position was that, as DBEs, 100 percent of the work of these contractors counted toward recipients' contract goals, which the firms automatically met.

A significant majority of commenters on this issue—particularly non-DBE contractors but also including some recipients and a few DBEs—argued that DBE primes should meet goals and make GFE the same as other contractors. Failing to do so, they said, went beyond providing a level playing field to the point of providing an unfair advantage for DBE bidders for prime contracts. This change would also increase opportunities for DBE subcontractors, they said. One comment suggested requiring DBE prime contractors to meet goals or make GFE, but stressed that work they performed with their own forces as well as work awarded to DBE subcontractors should count toward goals.

Supporters of the current system said that many prime contracts performed by DBEs are too small to permit subcontracting (of course, goals need be set only on contracts with subcontracting possibilities). Moreover, these commenters—mostly DBEs and recipients—said that there was already inequity as between DBEs and non-DBEs, and requiring DBEs to meet the same requirements simply maintained the inequity. There was also some support for a third option the Department included in the SNPRM, in which DBEs would have to meet goals and make GFE to the extent that work they proposed to perform with their own forces was insufficient to meet goals.

The Department believes that, in a rule aimed at providing a level playing field for DBEs, it is appropriate to impose the same requirements on all bidders for prime contracts. Consequently, part 26 will depart from the part 23 approach and require DBE prime contractors to meet goals and make good faith efforts on the same basis as other prime contractors. However, in recognition of the DBE bidders' status as DBEs, we will permit them to count toward goals the work that they commit to performing with their own forces, as well as the work that they commit to be performed by DBE subcontractors. DBE bidders on prime contracts will be expected to make the same outreach efforts as other bidders and to document good faith

efforts in situations where they do not fully meet contract goals.

Under part 23 and the SNPRM, recipients have a choice between handling bidder compliance with contract goals and good faith efforts requirements as a matter of responsiveness or responsibility. Some recipients and other contractors recounted successful experience with one approach or the other, and suggested reasons why everyone should follow each approach (e.g., responsiveness as a deterrent to bid-shopping; responsibility as a more flexible and cost-effective approach). Both approaches have their merits, and the Department believes the best course is to maintain the existing recipient discretion on this issue.

Some recipients use so-called "design-build" or "turnkey" contracts, in which the design and construction of an entire project is contracted out to a master contractor. The master contractor then lets subcontracts, which are often equivalent to the prime contracts that the recipient would let if it were designing and building the project directly. In a sense, the master contractor stands in the shoes of the recipient.

On design-build contracts, the normal process for setting contract goals does not fit the contract award process well. At the time of the award of the master contract, neither the recipient nor the master contractor knows in detail what the project will look like or exactly what contracting opportunities there will be, let alone the identity of DBEs who may subsequently be involved. In these situations, the recipient may alter the normal process, setting a project goal to which the master contractor commits. Later, when the master contractor is letting subcontracts, it will set contract goals as appropriate, standing in the shoes of the recipient. The recipient will exercise oversight of this process.

The final issue in this section has to do with replacement of DBEs that drop out of a contract. What actions, if any, should a prime contractor have to take when a DBE is unable to complete a subcontract, for whatever reason? Should it matter whether or not the DBE's participation is needed to achieve the prime contractor's goal?

Comment on this issue came mostly from recipients, with some non-DBE contractors and a few DBEs providing their views. A majority of the commenters believed that replacement of a fallen-away DBE with another DBE (or making a good faith effort toward that end) should be required only when needed to ensure that the prime contractor continued to meet its contract

goal. Others said that, since using DBEs to which the prime had committed at the time of award was a contractual requirement, replacement or good faith efforts should be required regardless of the prime's ability to meet the goal without the lost DBE's participation.

The Department believes that, in a narrowly tailored rule, it is not appropriate to require DBE participation at a level exceeding that needed to ensure a level playing field. Consequently, we will require a prime contractor to replace a fallen-away DBE (or to demonstrate that it has made good faith efforts toward that end) only to the extent needed to ensure that the prime contractor is able to achieve the contract goal established by the recipient for the procurement. The Department will also retain the SNPRM provision—supported by most commenters who mentioned it—that a prime contractor may not terminate a DBE firm for convenience and then perform the work with its own forces without the recipient's written consent. This provision is intended to prevent abuse of the program by a prime contractor who would commit to using a DBE and then bump the DBE off the project in favor of doing the work itself.

Section 26.55 How Is DBE Participation Counted Toward Goals?

In a narrowly tailored program, it is important that DBE credit be awarded only for work actually being performed by DBEs themselves. The necessary implication of this principle is that when a DBE prime contractor or subcontractor subcontracts work to another firm, the work counts toward DBE goals only if the other firm is itself a DBE. This represents a change from the existing rule and the SNPRM, which said that all the work of a DBE's contract (implicitly including work subcontracted to non-DBEs) counts toward goals. A few comments urged such a change. The new language is also consistent with the way that the final rule treats goals for DBE prime contractors.

The value of work performed by DBEs themselves is deemed to include the cost of materials and supplies purchased, and equipment leased, by the DBE from non-DBE sources. For example, if a DBE steel erection firm buys steel from a non-DBE manufacturer, or leases a crane from a non-DBE construction firm, these costs count toward DBE goals. There is one exception: if a DBE subcontractor buys supplies or leases equipment from the prime contractor on its contract, these costs do not count toward DBE goals. Several comments from prime contractors suggested these costs should

count, but this situation is too problematic, in our view, from an independence and commercially useful function (CUF) point of view to permit DBE credit.

One of the most difficult issues in this section concerns how to count DBE credit for the services of DBE trucking firms. The SNPRM proposed that, to be performing a CUF, a DBE trucking firm had to own 50 percent of the trucks it used in connection with a contract. A number of comments said that this requirement was out of step with industry practice, which commonly involves companies leasing trucks from owner-operators and other sources for purposes of a project. In response to these comments, the Department revisited this issue and reviewed the trucking CUF policies of a number of states. The resulting provision requires DBEs to have overall control of trucking operations and own at least one truck, but permits leasing from a variety of sources under controlled conditions, with varying consequences for DBE credit awarded.

A DBE need not provide all the trucks on a contract to receive credit for transportation services, but it must control the trucking operations for which it seeks credit. It must have at least one truck and driver of its own, but it can lease the trucks of others, both DBEs and non-DBEs, including owner operators. For work done with its own trucks and drivers, and for work with DBE lessees, the firm receives credit for all transportation services provided. For work done with non-DBE lessees, the firm gets credit only for the fees or commissions it receives for arranging the transportation services, since the services themselves are being performed by non-DBEs.

When we say that a DBE firm must own at least one of the trucks it uses on a contract, we intend for recipients to have a certain amount of discretion for handling unexpected circumstances, beyond the control of the firm. For example, suppose firm X starts the contract with one truck it owns. The truck is disabled by an accident or mechanical problem part way through the contract. Recipients need not conclude that the firm has ceased to perform a commercially useful function.

Most commenters who addressed the issue agreed with the SNPRM proposal that a DBE does not perform a CUF unless it performs at least 30 percent of the work of a contract with its own forces (a few commenters suggested 50 percent). This provision has been retained. A commenter suggested that the use of two-party checks by a DBE and another firm should not

automatically preclude there being a CUF. While we do not believe it is necessary to include rule text language on this point, we agree with the commenter. As long as the other party acts solely as a guarantor, and the funds do not come from the other party, we do not object to this practice where it is a commonly-recognized way of doing business. Recipients who accept this practice should monitor its use closely to avoid abuse.

One commenter noted an apparent inconsistency between counting 100 percent of the value of materials and supplies used by a DBE construction contractor (e.g., in the context of a furnish and install contract) and counting only 60 percent of the value of goods obtained by a non-DBE contractor from a DBE regular dealer. The two situations are treated differently, but there is a policy reason for the difference. There is a continuing concern in the program that, if non-DBEs are able to meet DBE goals readily by doing nothing more than obtaining supplies made by non-DBE manufacturers through DBE regular dealers, the non-DBEs will be less likely to hire DBE subcontractors for other purposes. As a policy matter, the Department does not want to reduce incentives to use DBE subcontractors, so we have not permitted 100 percent credit for supplies in this situation. Giving 100 percent credit for materials and supplies when a DBE contractor performs a furnish and install contract does not create the same type of disincentive, so the policy concern does not apply. In our experience, the 60 percent credit has been an effective incentive for the use of DBE regular dealers, so those firms are not unduly burdened.

Section 26.61 How Are Burdens of Proof Allocated in the Certification Process?

This section, which states a "preponderance of evidence" standard for applicants' demonstration to recipients concerning group membership, ownership, control, and business size, received favorable comment from all commenters who addressed it. We are retaining it with only one change, a reference to the fact that, in the final rule, recipients will collect information concerning the economic status of prospective DBE owners.

Section 26.63 What Rules Govern Group Membership Determinations?

There were several comments on details of this provision. One commenter suggested that tribal

registration be used as an identifier for Native Americans. The suggestion is consistent with long-standing DOT guidance; however this section of the regulation is meant to set out general rules applicable to all determinations of group membership, not to enumerate means of making the determination for specific groups. The same commenter suggested that if someone knowingly misrepresents himself as a group member, he should not be given further consideration for eligibility. Misrepresentation of any kind on an application is a serious matter. Indeed, misrepresentation of material facts in an application can be grounds for debarment or even criminal prosecution. While it would certainly be appropriate for recipients to take action against someone who so misrepresented himself, the regulatory text on group membership is not the place to make a general point about the consequences of misrepresentation.

Some commenters wanted further definition of what "a long period of time" means. We believe it would be counterproductive to designate a number of years that would apply in all cases, since circumstances are likely to differ. The point is to avoid "certification conversions" in which an individual suddenly discovers, not long before the application process, ancestry or culture with which he previously has had little involvement.

We are adopting the SNPRM provision without substantive change.

Section 26.65 What Rules Govern Business Size Determinations?

By statute, the Department is mandated to apply SBA small business size standards to determining whether a firm is a small business. The Department is also mandated to apply the statutory size cap (\$16.6 million in the current legislation, which the Department adjusts for inflation from time to time). Consequently, the Department cannot adopt the variety of comments we received to adjust size standards or the gross receipts cap to take differences among industries or regions into account. We are adopting the proposed language, using the new statutory gross receipts cap. As under part 23, a firm must fit under both the relevant SBA size standard and the generally applicable DOT statutory cap to be eligible for certification.

A few commenters asked for additional guidance for situations in which a firm is working in more than one SIC code, and the SBA size standards for the different SIC codes are different. First, size determinations are made for the firm as a whole, not for one

division or another. Second, suppose the size of Firm X (e.g., determined through looking at the firm's gross receipts) is \$5 million, and X is seeking certification as a DBE in SIC code yyyy and zzzz, whose SBA small business size standards are \$3.5 and \$7 million, respectively. Firm X would be a small business that could be certified as a DBE, and that could receive DBE credit toward goals, in SIC code zzzz but not in SIC code yyyy. This approach to the issue of differing standards being involved with the same firm fits in well with the general requirement of part 26 that certification be for work in particular SIC codes.

Section 26.67 What Rules Determine Social and Economic Disadvantage?

The statutes governing the DBE program continue to state that members of certain designated groups are presumed to be both socially and economically disadvantaged. Therefore, the Department is not adopting comments suggesting that one or both of the presumptions be eliminated from the DBE rule. While the rule does specify that applicants who are members of the designated groups do have to submit a signed certification that they are, in fact, socially and economically disadvantaged, this requirement should not be read as making simple "self-certification" sufficient to establish disadvantage. As has been the case since the beginning of the DBE program, the presumptions of social and economic disadvantage are rebuttable.

The Department is making an important change in this provision in response to comments about how to rebut the presumption of economic disadvantage. Recipient comments unanimously said that recipients should collect financial information, such as statements of personal net worth (PNW) and income tax returns, in order to determine whether the presumption of economic disadvantage really applies to individual applicants. Particularly in the context of a narrowly tailored program, in which it is important to ensure that the benefits are focussed on genuinely disadvantaged people (not just anyone who is a member of a designated group), we believe that these comments have merit. While charges by opponents of the program that fabulously wealthy persons could readily participate under part 23 have been exceedingly hyperbolic and inaccurate (e.g., references to the Sultan of Brunei as a potential DBE), it is appropriate to give recipients this tool to make sure that non-disadvantaged persons do not participate.

For this reason, part 26 requires recipients to obtain a signed and notarized statement of personal net worth from all persons who claim to own and control a firm applying for DBE certification *and* whose ownership and control are relied upon for DBE certification. These statements must be accompanied by appropriate supporting documentation (e.g., tax returns, where relevant). The rule does not prescribe the exact supporting documentation that should be provided, and recipients should strive for a good balance between the need for thorough examination of applicants' PNW and the need to limit paperwork burdens on applicants. For reasons of avoiding a retroactive paperwork burden on firms that are now certified, the rule does not require recipients to obtain this information from currently certified firms. These firms would submit the information the next time they apply for renewal or recertification. The final rule's provisions on calculating personal net worth are derived directly from SBA regulations on this subject (see 13 CFR § 124.104(c)(2), as amended on June 30, 1998).

One of the primary concerns of DBE firms commenting about submitting personal financial information is ensuring that the information remains confidential. In response to this concern, the rule explicitly requires that this material be kept confidential. It may be provided to a third party only with the written consent of the individual to whom the information pertains. This provision is specifically intended to preempt any contrary application of state or local law (e.g., a state freedom of information act that might be interpreted to require a state transportation agency to provide to a requesting party the personal income tax return of a DBE applicant who had provided the return as supporting documentation for his PNW statement). There is one exception to this confidentiality requirement. If there is a certification appeal in which the economic disadvantage of an individual is at issue (e.g., the recipient has determined that he or she is not economically disadvantaged and the individual seeks DOT review of the decision), the personal financial information would have to be provided to DOT as part of the administrative record. The Department would treat the information as confidential.

Creating a clear and definitive standard for determining when an individual has overcome the economic disadvantage that the DBE program is meant to remedy has long been a contentious issue. In 1992, the

Department proposed to use a personal net worth standard of \$750,000 to rebut the presumption of disadvantage for members of the designated groups. In 1997, the Department proposed a similar idea, though rather than use the \$750,000 figure, the SNPRM asked the public for input on what the specific amount should be. Finally, as discussed in detail above, the issue of ensuring that wealthy individuals do not participate in the DBE program was a central part of the 1998 Congressional debate.

Public comment on both proposals was sharply divided. Roughly equal numbers of commenters thought \$750,000 was too high as thought it was too low. Commenters proposed figures ranging from \$250,000 to \$2 million. Others supported the \$750,000 level, which is based on the SBA's threshold for participation in the SDB program (it is also the retention level for the 8(a) program). One theme running through a number of comments was that recipients should have discretion to vary the threshold depending on such factors as the local economy or the type of firms involved. Some comments opposed the idea of a PNW threshold altogether or suggested an alternative approach (e.g., based on Census data about the distribution of wealth).

Others commented that rebutting the presumption did not go far enough, pointing out that the only way to ensure that wealthy people did not participate in the program was for the threshold to act as a complete bar on the eligibility of an individual to participate in the program. Congress appears to share this concern. While they differed on the effectiveness of past DOT efforts, both proponents and opponents of the program agreed that preventing the participation of wealthy individuals was central to ensuring the constitutionality of the DBE program.

The Department agrees and, in light of the comments and the intervening TEA-21 debate, is adopting the clearest and most effective standard available: when an individual's personal net worth exceeds the \$750,000 threshold, the presumption of economic disadvantage is conclusively rebutted and the individual is no longer eligible to participate in the DBE program. The Department is using the \$750,000 figure because it is a well established and effective part of the SBA programs and is a reasonable middle ground in view of the wide range of comments calling for higher or lower thresholds. Using a figure any lower, as some commenters noted, could penalize success and make growth for DBEs difficult (since, for example, banks and insurers frequently

look to the personal assets of small business owners in making lending and bonding decisions). Operating the threshold as a cap on eligibility for all applicants also serves to treat men and women, minorities and non-minorities equally.

When a recipient determines, from the PNW statement and supporting information, that an individual's personal net worth exceeds \$750,000, the recipient must deem the individual's presumption of economic disadvantage to have been conclusively rebutted. No hearing or other proceeding is called for in this case. When this happens in the course of an application for DBE eligibility, the certification process for the applicant firm stops, unless other socially and economically disadvantaged owners can account for the required 51 percent ownership and control. A recipient cannot count the participation of the owner whose presumption of economic disadvantage has been conclusively rebutted toward the ownership and control requirements for DBE eligibility.

There may be other situations in which a recipient has a reasonable basis (e.g., from information in its own files, as the result of a complaint from a third party) for believing that an individual who benefits from the statutory presumptions is not really socially and/or economically disadvantaged. In these cases, the recipient may begin a proceeding to rebut the presumptions. For example, if a recipient had reason to believe that the owner of a currently-certified firm had accumulated personal assets well in excess of \$750,000, it might begin such a proceeding. The recipient has the burden of proving, by a preponderance of evidence, that the individual is not disadvantaged. However, the recipient may require the individual to produce relevant information.

It is possible that, at some time in the future, SBA may consider changing the \$750,000 cap amount. The Department anticipates working closely with SBA on any such matter and seeking comment on any potential changes to this rule that would be coordinated with changes SBA proposes for Federal procurement programs in this area.

Under part 23, recipients had to accept 8(a)-certified firms (except for those who exceeded the statutory gross receipts cap). The SNPRM proposed some modifications of this requirement. Recipients were concerned that in some situations information used for 8(a) certification could be inaccurate or out of date. They noted differences between 8(a) and DBE certification standards and procedures. They asked for the ability to

look behind 8(a) certifications and make their own certification decisions.

In response to these comments, the Department is providing greater discretion to recipients. Under part 26, recipients can treat 8(a) certifications as they do certifications made by other DOT recipients. A recipient can accept such a certification in lieu of conducting its own certification process or it can require the firm to go through part or all of its own application process. Because SBA is beginning a certification process for firms participating in the small and disadvantaged business (SDB) program, we will treat certified SDB firms in the same way. If an SDB firm is certified by SBA or an organization recognized by SBA as a certifying authority, a recipient may accept this certification instead of doing its own certification. (This does not apply to firms whose participation in the SDB program is based on a self-certification.) We note that this way of handling SBA program certifications is in the context of the development by DOT recipients of uniform certification programs. If a unified certification program (UCP) accepts a firm's 8(a) or 8(d) certification, then the firm will be certified for all DOT recipients in the state.

People who are not presumed socially and economically disadvantaged can still apply for DBE certification. To do so, they must demonstrate to the recipient that they are disadvantaged as individuals. Using the guidance provided in Appendix E, recipients must make case-by-case decisions concerning such applications. It should be emphasized that the DBE program is a disadvantage-based program, not one limited to members of certain designated groups. For this reason, recipients must take these applications seriously and consider them fairly. The applicant has the burden of proof concerning disadvantage, however.

Section 26.69 What Rules Govern Determinations of Ownership?

Commenters on the ownership provisions of the SNPRM addressed a variety of points. Most commenters agreed that the general burden of proof on applicants should be the preponderance of the evidence. A few commenters thought that this burden should also apply in situations where a firm was formerly owned by a non-disadvantaged individual. For some of these situations, the SNPRM proposed the higher "clear and convincing evidence" standard, because of the heightened opportunities for abuse involved. The Department believes this safeguard is necessary, and we will

retain the higher standard in these situations.

Commenters asked for more guidance in evaluating claims that a contribution of expertise from disadvantaged owners should count toward the required 51 percent ownership. They cited the potential for abuse. The Department believes that there may be circumstances in which expertise can be legitimately counted toward the ownership requirement. For example, suppose someone with a great deal of expertise in a computer-related field, without whom the success of his or her high-tech start-up business would not be feasible, receives substantial capital from a non-disadvantaged source.

We have modified the final rule provision to reflect a number of considerations. Situations in which expertise must be recognized for this purpose are limited. The expertise must be outstanding and in a specialized field: everyday experience in administration, construction, or a professional field is unlikely to meet this test. (This is not a "sweat equity" provision.) We believe that it is fair that the critical expertise of this individual be recognized in terms of the ownership determination. At the same time, the individual must have a significant financial stake in the company. This program focuses on entrepreneurial activity, not simply expertise. While we will not designate a specific percentage of ownership that such an individual must have, entrepreneurship without a reasonable degree of financial risk is inconceivable.

The SNPRM's proposals on how to treat assets obtained through inheritance, divorce, and gifts were somewhat controversial. Most comments agreed with the proposal that assets acquired through death or divorce be counted. One commenter objected to the provision that such assets always be counted, saying that the owner should have to make an additional demonstration that it truly owned the assets before the recipient counted them. We do not see the point of such an additional showing. If a white male business owner dies, and his widow inherits the business, the assets are clearly hers, and the deceased husband will play no further role in operating the firm. Likewise, assets a woman obtains through a divorce settlement are unquestionably hers. Absent a term of a divorce settlement or decree that limits the customary incidents of ownership of the assets or business (a contingency for which the proposed provision provided), there is no problem for which an additional showing of some

sort by the owner would be a useful remedy.

A majority of comments on the issue of gifts opposed the SNPRM proposal, saying that gifts should not be counted toward ownership at all. The main reason was that allowing gifts would make it easier for fronts to infiltrate the program. Some comments also had a flavor of opposition to counting what commenters saw as unearned assets. The Department understands these concerns. If a non-disadvantaged individual who provides a gift is no longer connected with the business, or a disadvantaged individual makes the gift, the issue of the firm being a potential front is much reduced. Where a non-disadvantaged individual makes a gift and remains involved with the business, the concern about potential fronts is greater.

For this reason, the SNPRM erected a presumption that assets acquired by gift in this situation would not count. The applicant could overcome this presumption only by showing, through clear and convincing evidence—a high standard of proof—that the transfer was not for the purpose of gaining DBE certification and that the disadvantaged owner really controls the company. This provides effective safeguards against fraud, without going to the unfair extreme of creating a conclusive presumption that all gifts are illegitimate. Also, for purposes of ownership, all assets are created equal. If the money that one invests in a company is really one's own, it does not matter whether it comes from the sweat of one's brow, a bank loan, a gift or inheritance, or hitting the lottery. As long as there are sufficient safeguards in place to protect against fronts—and we believe the rule provides them—the origin of the assets is unimportant. We are adopting the proposed provisions without change.

Commenters were divided about how to handle marital property, especially in community property states. Some commenters believed that such assets should not be counted at all. This was based, in part, on the concern that allowing such assets to be counted could make it difficult to screen out interspousal gifts designed to set up fronts, even if irrevocable transfers of assets were made. Other commenters said they thought the proposal was appropriate, and some of these thought the requirement for irrevocable transfers was unfair.

The Department is adopting the proposed language. In a community property state, or elsewhere where property is jointly held between spouses, the wife has a legal interest in

a portion of the property. It is really hers. It would be inappropriate to treat this genuine property interest as if it did not exist for purposes of DBE ownership.

To ensure the integrity of the program, it is necessary to put safeguards in place. The regulation does so. First, recipients would not count more assets toward DBE ownership than state law treats as belonging to the wife (the final rule provision adds language to this effect). Second, the irrevocable transfer requirement prevents the husband from being in a position to continue to claim any ownership rights in the assets. If an irrevocable transfer of assets constitutes a gift from a non-disadvantaged spouse who remains involved in the business, then the presumption/clear and convincing evidence mechanism discussed above for gifts would apply to the transaction. If recipients in community property states wanted to establish a mechanism for allocating assets between spouses that was consistent with state law, but did not require court involvement or other more formal procedures, they could propose doing so as part of their DBE programs, subject to operating administration approval.

Most commenters supported the SNPRM's proposal concerning trusts, particularly the distinction drawn between revocable living and irrevocable trusts. One commenter favored counting revocable living trusts when the same disadvantaged individual is both the grantor and beneficiary. The Department believes there is merit in making this exception. If the same disadvantaged individual is grantor, beneficiary, and trustee (i.e., an individual puts his own money in a revocable living trust for tax planning or other legitimate purposes and he alone plays the roles of grantor, beneficiary, and trustee), the situation seems indistinguishable for DBE program purposes from the situation of the same individual controlling his assets without the trust. In all other situations, revocable living trusts would not count.

Some comments asked for clarification of the 51 percent ownership requirement, a subject on which the Department has received a number of questions over the years. The Department has clarified this requirement, with respect to corporations, by stating that socially and economically disadvantaged individuals must own 51 percent of each class of voting stock of a corporation, as well as 51 percent of the aggregate stock. A similar point applies to partnerships and limited liability companies. This latter type of company was not

mentioned in the SNPRM, but a commenter specifically requested clarification concerning it. (We have also noted, in § 26.83, that limited liability companies must report changes in management responsibility to recipients. This is intended to include situations where management responsibility is rotated among members.) These clarifications are consistent with SBA regulations.

There are some ownership issues (e.g., concerning stock options and distribution of dividends) that SBA addresses in some detail in its regulations (see 13 CFR § 124.105 (c), (e), (f)) that were not the subject of comments to the DOT SNPRM. These issues have not been prominent in DOT certification practice, to the best of our knowledge, so we are not adding them to the rule. However, we would use the SBA provisions as guidance in the event such issues arise.

Section 26.71 What Rules Govern Determinations Concerning Control?

Commenters generally agreed with the proposed provisions concerning expertise and delegation of responsibilities, 51 percent control of voting stock, and differences in remuneration. A few commenters expressed concern about having to make judgments concerning expertise. However, this expertise standard, as a matter of interpretation, has been part of the DBE program since the mid-1980s. We do not believe that articulating it in the regulatory text should cause problems, and we believe it is a very reasonable and understandable approach to expertise issues. The provision concerning 51 percent ownership of voting stock, as discussed above, has been relocated in the ownership section of the rule. The Department has added three useful clarifications of the general requirement that disadvantaged owners must control the firm (e.g., by serving as president or CEO, controlling a corporate board). These clarifications are based on SBA's regulations (see 13 CFR § 124.106(a)(2), (b), (d)(1)). The Department intends to use other material in 13 CFR § 124.106 as guidance on control matters, when applicable. Otherwise, the Department is adopting these provisions as proposed.

There was some concern about the proposal concerning licensing. Some recipients thought that it would be better to require a license as proof of control in the case of all licensed occupations. We do not think it is justifiable for the DBE program to require more than state law does. If state law allows someone to run a certain

type of business (e.g., electrical contractors, engineers) without personally having a license in that occupation, then we do not think it is appropriate for the recipient to refuse to consider that someone without a license may be able to control the business. The rule is very explicit in saying that the recipient can consider the presence or absence of a license in determining whether someone really has sufficient ability to control a firm.

Family-owned firms have long been a concern in the program. The SNPRM provided explicitly that if the threads of control in a family-run business cannot be disentangled, such that the recipient can specifically find that a woman or other disadvantaged individual independently controls the business, the recipient may not certify the firm. A business that is controlled by the family as a group, as distinct from controlled individually by disadvantaged individuals, is not eligible.

Notwithstanding this provision, a few recipients commented that certifying any businesses in which non-disadvantaged family members participate would open the program to fronts. We do not agree. Non-disadvantaged individuals can participate in any DBE firm, as long as disadvantaged individuals control the firm. It is not fair and does not achieve any reasonable program objective to say that an unrelated white male may perform functions in a DBE while the owner's brother may never do so.

Commenters generally supported the provision calling for recipients to certify firms only for types of work in which disadvantaged owners had the ability to control the firm's operations. One commenter suggested that recipients, while not requiring recertification of firms seeking to perform additional types of work as DBEs (e.g., work in other than their primary industrial classification), should have to approve a written request from firms in this position. We do believe it is necessary for recipients to verify that disadvantaged owners can control work in an additional area, and we have added language to this effect. Recipients will have discretion about how to administer this verification process.

Commenters asked for additional clarification about the eligibility of people who work only part-time in a firm. We have done so by adding examples of situations that do not lead to eligibility (part-time involvement in a full-time firm and absentee ownership) and a situation that may, depending on circumstances, be compatible with eligibility (running a part-time firm all the time it is operating). It should be

noted that this provision does not preclude someone running a full-time firm from having outside employment. Outside employment is incompatible with eligibility only when it interferes with the individual's ability to control the DBE firm on a full-time basis.

One commenter brought to the Department's attention the situation of DBEs who use "employee leasing companies." According to the commenter, employee leasing companies fill a number of administrative functions for employers, such as payroll, personnel, forwarding of taxes to governmental entities, and drug testing. Typically, the employees of the underlying firm are transferred to the payroll of the employee leasing firm, which in turn leases them back to the underlying employer. The underlying employer continues to hire, fire, train, assign, direct, control etc. the employees with respect to their on-the-job duties. While the employee leasing firm sends payments to the IRS, Social Security, and state tax authorities on behalf of the underlying employer, it is the latter who is remains responsible for paying the taxes.

For practical and legal purposes, the underlying employer retains an employer-employee relationship with the leased employees. The employee leasing company does not get involved in the operations of the underlying employer. In this situation, the use of an employee leasing company by a DBE does not preclude the DBE from meeting the control requirements of this rule. Nor does the employee leasing company become an affiliate of the DBE for business size purposes. Case-by-case judgement, of course, remains necessary. Should an employee leasing company in fact exercise control over the on-the-job activities of employees of the DBE, then the ability of the DBE to meet control requirements would be compromised.

One commenter said, as a general matter, that independence and control should be considered separately. We view independence as an aspect of control: If a firm is not independent of some other business, then the other firm, not the disadvantaged owners, exercise control. While independence is an aspect of control that recipients must review, we do not see any benefit in separating consideration of the two concepts.

A recent court decision (*Jack Wood Construction Co., Inc. v. U.S. Department of Transportation*, 12 F. Supp. 2d 25 (D.D.C., 1998)) overturned a DOT Office of Civil Rights certification appeal decision that upheld a denial of certification based on lack of control.

The court, reading existing part 23 closely, said that a non-disadvantaged individual who was an employee, but not an owner, of a firm could disproportionately control the affairs of a firm without making it ineligible. The court also said that the existing rule language did not make it necessary for a disadvantaged owner to have both technical and managerial competence to control a firm. Part 26 solves both problems that the court found to exist in part 23's control provisions (see § 26.71(e)-(g)).

Section 26.73 What Are Other Rules Affecting Certification?

There were relatively few comments on this section. One commenter disagreed with the proposal to continue the provision that a firm owned by a DBE firm, rather than by socially and economically disadvantaged individuals, was not eligible. The argument against this provision, as we understand it, is that precluding a DBE firm from being owned by, for example, a holding company that is in turn owned by disadvantaged individuals would deny those individuals a financing and tax planning tool available to other businesses.

This argument has merit in some circumstances. The purpose of the DBE program is to help create a level playing field for DBEs. It would be inconsistent with the program's intent to deny DBEs a financial tool that is generally available to other businesses. The Department will allow this exception. Recipients must be careful, however, to ensure that certifying a firm under this exception does not have the effect of allowing the firm, or its parent company, to evade any of the requirements or restrictions of the certification process. The arrangement must be consistent with local business practices and must not have the effect of diluting actual ownership by disadvantaged individuals below the 51 percent requirement. All other certification requirements, including control by disadvantaged individuals and size limits, would continue to apply.

Another commenter suggested a firm should not be certified as a DBE if its owners have interests in non-DBE businesses. We believe that a *per se* rule to this effect would be too draconian. If owners of a DBE—whether disadvantaged individuals or not—also have interests in other businesses, the recipient can look at the relationships among the businesses to determine if the DBE is really independent.

One commenter opposed basing certification on the present status of

firms, seeking discretion to deny certification based on the history of the firm. We believe there is no rational or legal basis for denying certification to a firm on the basis of what it was in the past. Is it a small business presently owned and controlled by socially and economically disadvantaged individuals? If so, it would be contrary to the statute, and to the intent of the program, to deny certification because at some time—perhaps years—in the past, it was not owned and controlled by such individuals. The rule specifies that recipients may consider whether a firm has engaged in a pattern of conduct evincing an intent to evade or subvert the program.

The final provision of this section concerns firms owned by Alaska Native Corporations (ANCs), Indian tribes, and Native Hawaiian Organizations. Like the NPRM, it provides that firms owned by these entities can be eligible DBEs, even though their ownership does not reside, as such, in disadvantaged *individuals*. These firms must meet the size standards applicable to other firms, including affiliation (lest large combinations of tribal or ANC-owned corporations put other DBEs at a strong competitive disadvantage). Also, they must be controlled by socially and economically disadvantaged individuals. For example, if a tribe or ANC owns a company, but its daily business operations are controlled by a non-disadvantaged white male, the firm would not be eligible.

Commenters pointed us to the following provision of the Alaska Native Claims Settlement Act (ANCSA):

(e) Minority and economically disadvantaged status—

(1) For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.

(2) For all purposes of Federal law, direct and indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both—

(A) The total equity of the subsidiary corporation, joint venture, or partnership; and

(B) The total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers. (43 U.S.C. 1626(e)).

The question for the Department is whether, reading this language together with the language of the Department's DBE statutes, DOT must alter these provisions.

The DOT DBE statute (TEA-21 version) provides as follows:

(b) Disadvantaged Business Enterprises.—

(1) General rule.—Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) Definitions.—In this subsection, the following definitions apply:

(A) Small business concern.—The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of \$16,600,000, as adjusted by the Secretary for inflation.

(B) Socially and economically disadvantaged individuals.—The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

* * * * *

(4) Uniform certification.—The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity, and type of work preferred.

While the language § 1626(e) is broad, the terms used in the two statutes are not identical. Section 1626(e) refers to "minority and economically disadvantaged business enterprise[s]", while the Department's statutes refer to "small business concerns owned and controlled by socially and economically disadvantaged individuals." Requirements applicable to the former need not necessarily apply to the latter.

The legislative history of § 1626(e) lends support to distinguishing the two statutes. The following excerpt from House Report 102-673 suggests that the intent of Congress in enacting this provision was to focus on direct Federal procurement programs:

[The statute] amends section [1626(e)] of ANCSA to clarify that Alaska Native Corporations are minority and economically disadvantaged business enterprises for the purposes of implementing the SBA programs * * * This section would further clarify that Alaska Native Corporations and their subsidiary companies are minority and economically disadvantaged business enterprises for purposes of qualifying for participation in federal contracting and subcontracting programs, the largest of which include the SBA 8(a) program and the Department of Defense Small and Disadvantaged Business Program. These programs were established to increase the participation of certain segments of the population that have historically been denied access to Federal procurement activities. While this section eliminates the need for Alaska Native Corporations or their subsidiaries to prove their "economic" disadvantage the corporations would still be required to meet size requirements as small businesses. This will continue to be determined on a case-by-case basis. (Id. at 19.)

This statute, in other words, was meant to apply to direct Federal procurement programs like the 8(a) program or the DOD SBD program, rather than a program involving state and local procurements reimbursed by DOT financial assistance.

The TEA-21 program is a more recent, more specific statute governing DOT recipients' programs. In contrast, the older, more general section 1626(e) evinces no specific intent to govern the DOT DBE program. There is no evidence that Congress, in enacting section 1626(e), had any awareness of or intent to alter the DOT DBE program.

A number of provisions of the TEA-21 statute suggest that Congress intended to impose specific requirements for the DOT program, without regard to other more general statutory references. For example, the \$16.6 million size cap and the uniform certification requirements suggest that Congress wanted the eligibility for the DOT program to be determined in very specific ways, giving no hint that they intended these specific requirements to be overridden in the case of ANCs.

The Department concludes that section 1626(e) is distinguishable from the DOT DBE statutes, and that the latter govern the implementation of the DBE program. The Department is not compelled to alter its approach to certification in the case of ANCs.

Section 26.81 What Are the Requirements for Unified Certification Programs?

As was the case following the 1992 NPRM, a significant majority of the large number of commenters addressing the issue favored implementing the proposed UCP requirement, which the final rule retains largely as proposed. A few commenters suggested that airports be included in UCPs for concession purposes as well as for FAA-assisted contracting, because there are not any significant differences between the certification standards for concessionaires and contractors (the only exception is size standards, which are easy to apply). We agree, and the final rule does not make an exception for concessions (regardless of the CFR part in which the concessions provisions appear). Some commenters wanted either a longer or shorter implementation period than the SNPRM proposed, but we believe the proposal is a good middle ground between the goal of establishing UCPs as soon as possible and the time recipients will need to resolve organizational, operational, and funding issues.

There were a number of comments and questions about details of the UCP provision. One recipient wondered whether a UCP may or must be separate from a recipient and what the legal liability implications of various arrangements might be. As far as the rule is concerned, a UCP can either be situated within a recipient's organization or elsewhere. Recipients can take state law concerning liability into account in determining how best to structure a UCP in their state. Another recipient asked if existing UCPs could be exempted from submitting plans for approval. Rather than being exempted, we believe that it would be appropriate for such UCPs to submit their existing plans. They would have to change them only to the extent needed to conform to the requirements of the rule.

Some commenters asked about the relationship of UCPs to recipients. For example, should a recipient be able to certify a firm that the UCP had not certified (or whose application the UCP had not yet acted on) or refuse to recognize the UCP certification of a firm the recipient did not think should be eligible? In both cases, the answer is no. Allowing this kind of discretion would fatally undermine the "one-stop shopping" rationale of UCPs. However, a recipient could, like any other party, initiate a third-party challenge to a UCP certification action, the result of which could be appealed to DOT.

We would emphasize that the form of the UCP is a matter for negotiation among DOT recipients in a state, and this regulation does not prescribe its organization. A number of models are available, including single state agencies, consortia of recipients that hire a contractor or share the workload among themselves, mandatory reciprocity among recipients, etc. It might be conceivable for a UCP to be a "virtual entity" that is not resident in any particular location. What matters is that the UCP meet the functional requirements of this rule and actually provide one-stop shopping service to applicants. The final rule adds a provision to clarify that UCPs—even when not part of a recipient's own organization—must comply with all provisions of this rule concerning certification and nondiscrimination. Recipients cannot use a UCP that does not do so. For example, if a UCP fails to comply with part 26 certification standards and procedures, or discriminates against certain applicants, the Secretary reserves the right to direct recipients not to use the UCP, effectively "decertifying" the UCP for purposes of DOT-assisted programs. In this case, which we hope will never happen, the Department would work with recipients in the state on interim measures and replacement of the erring UCP.

The SNPRM proposed "pre-certification." That is, the UCP would have to certify a firm before the firm became eligible to participate as a DBE in a contract. The application could not be submitted as a last-minute request in connection with a procurement action, which could lead to hasty and inaccurate certification decisions. Commenters were divided on this issue, with most expressing doubts about the concept. The Department believes that avoiding last-minute (and especially post-bid opening) applications is important to an orderly and accurate certification process, so we are retaining this requirement. However, we are modifying the timing of the requirement, by requiring that certification take place before the bid/offer due date, rather than before the issuance of the solicitation. The certification action must be *completed* by this date in order for the firm's proposed work on the particular contract to be credited toward DBE goals. It is not enough for the application to have been submitted by the deadline.

The SNPRM proposed that, once UCPs were up and running, a UCP in State A would not have to process an application from a firm whose principal

place of business was in State B unless State B had first certified the firm. Most commenters supported this proposal, one noting that it would help eliminate problems of having to make costly out-of-state site visits. It would also potentially reduce confusion caused by multiple, and potentially conflicting, outcomes in certification decisions. One commenter was concerned that this provision would lead to "free-rider" problems among recipients. The Department will be alert to this possibility, but we do not see it as precluding going forward with this provision. We have added a provision making explicit that when State B has certified a firm, it would have an obligation to send copies of the information and documents it had on the firm to State A when the firm applied there.

All save one of the comments on mandatory reciprocity opposed the concept. That is, commenters favored UCPs being able to choose whether or not to accept certification decisions made by other UCPs. The Department urges UCPs to band together in multi-state or regional alliances, but we believe that it is best to leave reciprocity discretionary. Mandatory reciprocity, even among UCPs, could lead to forum shopping problems.

UCPs will have a common directory, which will have to be maintained in electronic form (i.e., on the internet). One commenter suggested that this electronic directory be updated daily. We think this comment has merit, and the final rule will require recipients to keep a running update of the electronic directory, making changes as they occur.

Section 26.83 What Procedures Do Recipients Follow in Making Certification Decisions?

Commenters generally supported this certification process section, and we are adopting it with only minor changes. Commenters suggested that provision for electronic filing of applications be discretionary rather than mandatory. We agree, and the final rule does not mandate development of electronic filing systems. Some commenters remained concerned about site visits and asked for more guidance on the subject. We intend to provide future guidance on this subject.

Most commenters who addressed the subject favored the development of a mandatory, nationwide, standard DOT application form for DBE eligibility. A number of commenters supplied the forms they use as examples. We believe that this is a good idea, which will help avoid confusion among applicants in a nationwide program. However, we have

not yet developed a form for this purpose. The final rule reserves a requirement for recipients to use a uniform form. We intend to work on developing such a form during the next year, in consultation with recipients and applicants. Meanwhile, recipients can continue to use existing forms, modified as necessary to conform to the requirements of this part.

The SNPRM said recipients could charge a reasonable fee to applicants. A majority of commenters, both recipients and DBEs, opposed the idea of a fee or said it should be capped at a low figure. Fees are not mandatory, and they would be limited, under the final rule, to modest application fees (not intended to recover the cost of the certification process). However, if a recipient wants to charge a modest application fee, we do not see that it is inconsistent with the nature of the program to allow it to do so. Fee waivers would be required if necessary (i.e., a firm who showed they could not afford it). All fees would have to be approved by the concerned OA as part of the DBE program approval process, which would preclude excessive fees.

Given that reciprocity is discretionary among recipients, we thought it would be useful to spell out the options a recipient has when presented by an applicant with the information that another recipient has certified the firm. The recipient may accept the other recipient's certification without any additional procedures. The recipient can make an independent decision based, in whole or in part, on the information developed by the first recipient (e.g., application forms, supporting documents, reports of site visits). The recipient may make the applicant start an entire new application process. The choice among these options is up to the recipient. (As noted above, UCPs will have these same options.)

Most commenters on the subject supported the three-year term for certifications. Some wanted a shorter or longer period. We believe the three-year term is appropriate, particularly given the safeguards of annual and update affidavits that the rule provides. In response to a few comments that recipients should have longer than the proposed 21 days after a change in circumstances to submit an update affidavit, we have extended the period to 30 days. If recipients want to have a longer term in their DBE programs than the three years provided in the rule, they can do so, with the Department's approval, as part of their DBE programs.

A few recipients said that the 90-day period for making decisions on

applications (with the possibility of a 60-day extension) was too short. Particularly since this clock does not begin ticking until a *complete* application, including necessary supporting documentation, is received from the applicant, we do not think this time frame is unreasonable. We would urge recipients and applicants to work together to resolve minor errors or data gaps during the assembly of the package, before this time period begins to run.

Section 26.85 What Rules Govern Recipients' Denials of Initial Requests for Certification?

A modest number of commenters addressed this section, most of whom supported it as proposed. One commenter noted that it was appropriate to permit minor errors to be corrected in an application without invoking the 12-month reapplication waiting period. We agree, and we urge recipients to follow such a policy. Most commenters thought 12 months was a good length for a reapplication period. A few opposed the idea of a waiting period or thought a shorter period was appropriate. The rule keeps 12 months, but permits recipients to seek DOT approval, through the DBE program review process, for shorter periods.

Section 26.87 What Procedures Does a Recipient Use To Remove a DBE's Eligibility?

As long ago as 1983, the Department (in the preamble to the first DBE rule) strongly urged recipients to use appropriate due process procedures for decertification actions. Recipient procedures are still inconsistent and, in some cases, inadequate, in this respect. Quite recently, for example, litigation forced one recipient to rescind a decertification of an apparently ineligible firm because it had failed to provide administrative due process. We believe that proper due process procedures are crucial to maintaining the integrity of this program. The majority of commenters agreed, though a number of commenters had concerns about particular provisions of the SNPRM proposal.

Some recipients, for example, thought separation of functions was an unnecessary requirement, or too burdensome, particularly for small recipients. We believe separation of functions is essential: there cannot be a fair proceeding if the same party acts as prosecutor and judge. We believe that the burdens are modest, particularly in the context of state DOTs and statewide UCPs. We acknowledge that for small recipients, like small airports and transit

authorities, small staffs may create problems in establishing separation of functions (e.g., if there is only one person in the organization who is knowledgeable about the DBE program). For this reason, the rule will permit small recipients to comply with this requirement to the extent feasible until UCPs are in operation (at which time the UCPs would have to ensure separation of functions in all such cases). The organizational scheme for providing separation of functions will be part of each recipient's DBE program. In the case of a small recipient, if the DBE program showed that other alternatives (e.g., the airport using the transit authority's DBE officer as the decisionmaker in decertification actions, and vice-versa) were unavailable, the Department could approve something less than ideal separation of functions for the short term before the UCP becomes operational. In reviewing certification appeals from such recipients, the Department would take into account the absence of separation of functions.

It is very important that the decisionmaker be someone who is familiar with the DBE certification requirements of this part. The decisionmaker need not be an administrative law judge or some similar official; a knowledgeable program official is preferable to an ALJ who lacks familiarity with the program.

Another aspect of the due process requirements that commenters addressed was the requirement for a record of the hearing, which some commenters found to be burdensome. We want to emphasize that, while recipients have to keep a hearing record (including a verbatim record of the hearing), they do not need to produce a transcript unless there is an appeal. A hearing record is essential, because DOT appellate review is a review of the administrative record.

Some commenters suggested deleting two provisions. One of these allowed recipients to impose a sort of administrative temporary restraining order on firms pending a final decertification decision. The other allowed the effect of a decertification decision to be retroactive to the date of the complaint. The Department agrees that these two provisions could lead to unfairness, and so we have deleted them.

Section 26.89 What Is the Process for Certification Appeals to the Department of Transportation?

Several commenters addressed this section, supporting it with a few requests for modification. Some

commenters wanted a time limit for DOT consideration of appeals. We have added a provision saying that if DOT takes longer than 180 days from the time we receive a complete package, we will write everyone concerned with an explanation of the delay and a new target date for completion. Some commenters thought a different time limit for appeals to the Department (e.g., 180 days) would be beneficial. We believe that 90 days is enough time for someone to decide whether a decision of a recipient or UCP should be appealed and write a letter to DOT. This time period starts to run from the date of the final recipient decision on the matter. DOT can accept late-filed appeals on the basis of a showing of good cause (e.g., factors beyond the control of the appellant). Some recipients thought that more time might be necessary to compile an administrative record, so we have permitted DOT to grant extensions for good cause. Generally, however, the Department will adhere to the 90-day time period in order to prevent delays in the appeals process. As a clarification, we have added a provision that all recipients involved must provide administrative record material to DOT when there is an appeal. For example, State A has relied on the information gathered by State B to certify Firm X. A competitor files an ineligibility complaint with State A, which decertifies the firm. Firm X appeals to the Department. Both State A and State B must provide their administrative record materials to DOT for purposes of the appeal. (The material would be provided to the Departmental Office of Civil Rights.)

Section 26.91 What Actions Do Recipients Take Following DOT Certification Appeal Decisions?

There were few comments concerning this section. Some comments suggested DOT appeal decisions should have mandatory nationwide effect. That is if DOT upheld the decertification action of Recipient A, Recipients B, C, D, E, etc. should automatically decertify the firm. This approach is inconsistent with the administrative review of the record approach this rule takes for appeals to DOT.

A DOT decision that A's decertification was supported by substantial evidence is not a DOT decision that the firm is ineligible. It is only a finding that A had enough evidence to decertify the firm. Other results might also be supported by substantial evidence. Nevertheless, when the Department takes action on an appeal, other recipients would be well

advised to review their own decisions to see if any new proceedings are appropriate. One comment suggested the Department should explain a refusal to accept a complaint. This is already the Department's practice.

The SNPRM included a proposal to permit direct third-party complaints to the Department. There were few comments on this proposal, which would have continued an existing DOT practice. Some of these comments suggested dropping this provision, saying it made more sense to have all certification matters handled at the recipient level in the first instance. Others raised procedural issues (e.g., the possibility of the Department holding *de novo* hearings). The Department has reconsidered this proposal, and we have decided to delete it. We believe it will avoid administrative confusion and simplify procedures for everyone if all certification actions begin at the recipient level, with DOT appellate review on the administrative record.

Subpart F—Compliance and Enforcement

There were very few comments concerning this subpart, which we are adopting as proposed. One section has been added to reflect language in TEA-21 that prohibits sanctions against recipients for noncompliance in situations where compliance is precluded by a final Federal court order finding the program unconstitutional.

DBE Participation in Airport Concessions

The Department proposed a number of changes to its airport concessions DBE program rule in the 1997 SNPRM. We received a substantial number of comments on these proposals. The Department is continuing to work on its responses to these comments, as well as on refinements of the rule to ensure that it is narrowly tailored. This work is not complete. Rather than postpone issuance of the rest of the rule pending completion of this work, we are not issuing final concessions provisions at this time. The existing concessions provisions of 49 CFR part 23 will remain in place pending completion of the revised rule.

Regulatory Analyses and Notices

Executive Order 12866

This rule is a significant rule under Executive Order 12866, because of the substantial public interest concerning and policy importance of programs to ensure nondiscrimination in Federally-assisted contracting. It also affects a wide variety of parties, including

recipients in three important DOT financial assistance programs and the DBE and non-DBE contractors that work for them. It has been reviewed by the Office of Management and Budget. It is also a significant rule for purposes of the Department's Regulatory Policies and Procedures.

We do not believe that the rule will have significant economic impacts, however. In evaluating the potential economic impact of this rule, we begin by noting that it does not create a new program. It simply revises the rule governing an existing program. The economic impacts of the DBE program are created by the existing regulation and the statutes that mandate it, not by these revisions. The changes that we propose in this program are likely to have some positive economic impacts. For example, "one-stop shopping" and clearer standards in certification are likely to reduce costs for small businesses applying for DBE certification, as well as reducing administrative burdens on recipients.

The rule's "narrow tailoring" changes are likely to be neutral in terms of their overall economic impact. These could have some distributive impacts (e.g., if the proposed goal-setting mechanism results in changes in DBE goals, a different mix of firms may work on recipients' contracts), but there would probably not be net gains or losses to the economy. There could be some short-term costs to recipients owing to changes in program administration resulting from "narrow tailoring," however.

In any event, the economic impacts are quite speculative and appear nearly impossible to quantify. Comments did not provide, and the Department does not have, any significant information that would allow the Department to estimate any such impacts.

Regulatory Flexibility Act Analysis

The DBE program is aimed at improving contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals. Virtually all the businesses it affects are small entities. There is no doubt that a DBE rule always affects a substantial number of small entities.

This rule, while improving program administration and facilitating DBE participation (e.g., by making the certification process clearer) and responding to legal developments, appears essentially cost-neutral with respect to small entities in general (as noted above, the one-stop shopping feature is intended to benefit small entities seeking to participate). It does

not impose new burdens or costs on small entities, compared to the existing rule. It does not affect the total funds or business opportunities available to small businesses that seek to work in DOT financial assistance programs. To the extent that the proposals in this rule (e.g., with respect to changes in the methods used to set overall goals) lead to different goals than the existing rule, some small firms may gain, and others lose, business.

There is no data of which the Department is aware that would permit us, at this time, to measure the distributive effects of the revisions on various types of small entities. It is likely that any attempt to gauge these effects would be highly speculative. For this reason, we are not able to make a quantitative, or even a precise qualitative, estimate of these effects.

Paperwork Reduction Act

A number of provisions of this rule involve information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). One of these provisions, concerning a report of DBE achievements that recipients make to the Department, is the subject of an existing OMB approval under the PRA.

With one exception, the other information collection requirements of the rule continue existing part 23 requirements, major elements of the DBE program that recipients and contractors have been implementing since 1980 or 1983. While the final rule modifies these requirements in some ways, the Department believes the overall burden of these requirements will remain the same or shrink. These requirements are the following:

- Firms applying for DBE certification must provide information to recipients to allow them to make eligibility decisions. Currently certified firms must provide information to recipients to allow them to review the firms' continuing eligibility. (After the UCP requirements of the rule are implemented, the burdens of the certification provisions should be substantially reduced.)

- When contractors bid on prime contracts that have contract goals, they must document their DBE participation and/or the good faith efforts they have made to meet the contract goals. (Given the final rule's emphasis on race-neutral measures, it is likely the burden in this area will be reduced.)

- Recipients must maintain a directory of certified DBE firms. (Once UCPs are implemented, there will be 52 consolidated directories rather than the hundreds now required, reducing burdens substantially.)

- Recipients must calculate overall goals and transmit them to the Department for approval. (The process of setting overall goals is more flexible, but may also be more complex, than under part 23. As they make their transition to the final rule's goal-setting process during the first years of implementation, recipients may temporarily expend more hours than in the past on information-related tasks.)

- Recipients must have a DBE program approved by the Department. (The final rule includes a one-time requirement to submit a revised program document making changes to conform to the new regulation.)

The Department estimates that these program elements will result in a total of approximately 1.58 million burden hours to recipients and contractors combined during the first year of implementation and approximately 1.47 million annual burden hours thereafter.

The final rule also includes one new information collection element. It calls for recipients to collect and maintain data concerning both DBE and non-DBE bidders on DOT-assisted contracts. This information is intended to assist recipients in making more precise determinations of the availability of DBEs and the shape of the "level playing field" the maintenance of which is a major objective of the rule. The Department estimates that this requirement will add 254,595 burden hours in the first year of implementation. This figure is projected to decline to 193,261 hours in the second year and to 161,218 hours in the third and subsequent years.

Both as the result of comments and what the Department learns as it implements the DBE program under part 26, it is possible for the Department's information needs and the way we meet them to change. Sometimes the way we collect information can be changed informally (e.g., by guidance telling recipients they need not repeat information that does not change significantly from year to year). In other circumstances, a technical amendment to the regulation may be needed. In any case, the Department will remain sensitive to situations in which modifying information collection requirements becomes appropriate.

As required by the PRA, the Department has submitted an information collection approval request to OMB. Organizations and individuals desiring to submit comments on information collection requirements should direct them to the Department's docket for this rulemaking. You may also submit copies of your comments to

the Office of Information and Regulatory Affairs (OIRA), OMB, Room 10235, New Executive Office Building, Washington, DC, 20503; Attention: Desk Officer for U.S. Department of Transportation.

The Department considers comments by the public on information collections for several purposes:

- Evaluating the necessity of information collections for the proper performance of the Department's functions, including whether the information has practical utility.

- Evaluating the accuracy of the Department's estimate of the burden of the information collections, including the validity of the methods and assumptions used.

- Enhancing the quality, usefulness, and clarity of the information to be collected.

- Minimizing the burden of the collection of information on respondents, including through the use of electronic and other methods.

The Department points out that, with the exception of the bid data collection, all the information collection elements discussed in this section of the preamble have not only been part of the Department's DBE program for many years, but have also been the subject of extensive public comment following the 1992 NPRM and 1997 SNPRM. Among the over 900 comments received in response to these notices were a number addressing administrative burden issues surrounding these program elements. In this final rule, the Department has responded to these comments.

OMB is required to make a decision concerning information collections within 30-60 days of the publication of this notice. Therefore, for best effect, comments should be received by DOT/OMB within 30 days of publication. Following receipt of OMB approval, the Department will publish a **Federal Register** notice containing the applicable OMB approval numbers.

Federalism

The rule does not have sufficient Federalism impacts to warrant the preparation of a Federalism assessment. While the rule concerns the activities of state and local governments in DOT financial assistance programs, the rule does not significantly alter the role of state and local governments vis-a-vis DOT from the present part 23. The availability of program waivers could allow greater flexibility for state and local participants, however.

List of Subjects

49 CFR Part 23

Administrative practice and procedure, Airports, Civil rights,

Concessions, Government contracts, Grant programs—transportation, Minority businesses, Reporting and recordkeeping requirements.

49 CFR Part 26

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant programs—transportation, Highways and roads, Mass transportation, Minority businesses, Reporting and recordkeeping requirements.

Issued this 8th day of January, 1999, at Washington, DC.

Rodney E. Slater,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department amends 49 CFR subtitle A as follows:

PART 23—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

1. Revise the heading of 49 CFR part 23 as set forth above.

2. Revise the authority citation for 49 CFR part 23 to read as follows:

Authority: 42 U.S.C. 200d *et seq.*; 49 U.S.C. 47107 and 47123; Executive Order 12138, 3 CFR, 1979 Comp., p. 393.

Subparts A, C, D, and E—[Removed and Reserved]

3. Remove and reserve subparts A, C, D, and E of part 23.

§ 23.89 [Amended]

4. Amend § 23.89 as follows:

a. In the definition of “disadvantaged business,” remove the words “§ 23.61 of subpart D of this part” and add the words “49 CFR part 26”; and remove the words “§ 23.61” in the last line of the definition and add the words “49 CFR part 26”.

b. In the definition of “small business concern,” paragraph (b), remove the words “§ 23.43(d)” and add the words “§ 23.43(d) in effect prior to March 4, 1999 (See 49 CFR Parts 1 to 99 revised as of October 1, 1998.)”.

c. In the definition of “socially and economically disadvantaged individuals,” remove the words “§ 23.61 of subpart D of this part” and add “49 CFR part 26”.

§ 23.93 [Amended]

5. Amend § 23.93(a) introductory text by removing the words “§ 23.7” and adding the words “§ 26.7”.

§ 23.95 [Amended]

6. Amend § 23.95(a)(1) by removing the words “based on the factors listed in § 23.45(g)(5)” and adding the words

“consistent with the process for setting overall goals set forth in 49 CFR 26.45”.

7. In addition, amend § 23.95 as follows:

a. In paragraph (f)(1), remove the words “§ 23.51” and add the words “49 CFR part 26, subpart E”;

b. In paragraph (f)(2), remove the words “Except as provided in § 23.51(c), each” and add “Each”;

c. Remove paragraph (f)(5);

d. In paragraph (g)(1), remove the words “§ 23.53” and add the words “49 CFR part 26, subpart D”.

§ 23.97 [Amended]

8. Amend § 23.97 by removing the words “§ 23.55” and adding the words “49 CFR 26.89”.

§ 23.11 [Removed]

9. Remove § 23.111.

10. Add a new 49 CFR part 26, to read as follows:

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

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Sec.

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Appendix B to part 26—Forms [Reserved]

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Development Program Guidelines

Appendix D to part 26—Mentor-Protégé

Program Guidelines

Appendix E to part 26—Individual

Determinations of Social and Economic

Disadvantage

Authority: 23 U.S.C. 324; 42 U.S.C. 2000d *et seq.*; 49 U.S.C 1615, 47107, 47113, 47123;

Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107, 113.

Subpart A—General

§ 26.1 What are the objectives of this part?

This part seeks to achieve several objectives:

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

§ 26.3 To whom does this part apply?

(a) If you are a recipient of any of the following types of funds, this part applies to you:

- (1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107.
- (2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178.
- (3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

26.5 What do the terms used in this part mean?

Affiliation has the same meaning the term has in the Small Business

Administration (SBA) regulations, 13 CFR part 121.

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

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

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

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

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

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

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. The SIC Manual and the NAICS Manual are available through the National Technical Information Service (NTIS) of the U.S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site (www.ntis.gov/naics).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

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

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

(vi) Women;

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

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

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

§ 26.7 What discriminatory actions are forbidden?

(a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

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

(a) This part applies instead of subparts A and C through E of 49 CFR part 23 in effect prior to March 4, 1999. (See 49 CFR Parts 1 to 99, revised as of October 1, 1998.) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999 have definitive, binding effect in implementing the provisions of this part and constitute the official position of the Department of Transportation.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid and binding, and constitute the official position of the Department of Transportation, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

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

§ 26.11 What records do recipients keep and report?

(a) [Reserved]

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

(c) You must create and maintain a bidders list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects. For every firm, the following information must be included:

- (1) Firm name;
- (2) Firm address;
- (3) Firm's status as a DBE or non-DBE;
- (4) The age of the firm; and
- (5) The annual gross receipts of the firm.

§ Section 26.13 What assurances must recipients and contractors make?

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

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

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

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

§ 26.15 How can recipients apply for exemptions or waivers?

(a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that—

- (i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;

- (ii) Conditions in your jurisdiction are appropriate for implementing the proposal;

- (iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and

- (iv) Your proposal is consistent with applicable law and program requirements of the concerned operating

administration's financial assistance program.

(3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

- (i) DBE eligibility is determined as provided in subparts D and E of this part, and DBE participation is counted as provided in § 26.49;

- (ii) Your level of DBE participation continues to be consistent with the objectives of this part;

- (iii) There is a reasonable limitation on the duration of your modified program; and

- (iv) Any other conditions the Secretary makes on the grant of the waiver.

(4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

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

§ 26.21 Who must have a DBE program?

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

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

- (2) FTA recipients that receive \$250,000 or more in FTA planning, capital, and/or operating assistance in a Federal fiscal year;

- (3) FAA recipients that receive a grant of \$250,000 or more for airport planning or development.

(b)(1) You must submit a DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed and approved by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has

approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

§ 26.23 What is the requirement for a policy statement?

You must issue a signed and dated policy statement that expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation. You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

§ 26.25 What is the requirement for a liaison officer?

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part.

26.27 What efforts must recipients make concerning DBE financial institutions?

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

§ 26.29 What prompt payment mechanisms must recipients have?

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than a specific number of days from receipt of each payment you make to the prime contractor. This clause must also require the prompt return of retainage payments from the prime contractor to the subcontractor within a specific number of days after the subcontractor's work is satisfactorily completed.

(1) This clause may provide for appropriate penalties for failure to comply, the terms and conditions of which you set.

(2) This clause may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(b) You may also establish, as part of your DBE program, any of the following

additional mechanisms to ensure prompt payment:

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

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

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

§ 26.31 What requirements pertain to the DBE directory?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Your DBE program must also include a monitoring and enforcement mechanism to verify that the work committed to DBEs at contract award is

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

Subpart C—Goals, Good Faith Efforts, and Counting

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

(a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.

(c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

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

(a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.

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

§ 26.45 How do recipients set overall goals?

(a) You must set an overall goal for DBE participation in your DOT-assisted contracts.

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

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

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

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number for all businesses to derive a base figure for the relative availability of DBEs in your market.

(3) *Use data from a disparity study.* Use a percentage figure derived from data in a valid, applicable disparity study.

(4) *Use the goal of another DOT recipient.* If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) *Alternative methods.* Subject to the approval of the DOT operating administration, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your

jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

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

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

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

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

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

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

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

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

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

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

(2) If you are an FTA or FAA recipient, as a percentage of all FTA or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the forthcoming fiscal year. In appropriate cases, the FTA or FAA Administrator may permit you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects.

(f)(1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration for review on August 1 of each year, unless the Administrator of the concerned operating administration establishes a different submission date.

(2) If you are an FTA or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FTA or FAA Administrator.

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

(4) You are not required to obtain prior operating administration concurrence with the your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific

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

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

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

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

(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not

project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

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

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

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

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

Example to Paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the

amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to Paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

Example to Paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (i.e., from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two consecutive years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

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

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

offeror does either of the following things:

(1) Documents that it has obtained enough DBE participation to meet the goal; or

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

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

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;

(v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part); and

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

(i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.

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

(d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a)

of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

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

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

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

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

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

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

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

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

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

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

§ 26.55 How is DBE participation counted toward goals?

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

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

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

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

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

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

(1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities

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

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

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

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

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

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

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

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

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

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

(5) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.

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

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

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

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

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

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

(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the

purchase and sale or lease of the products in question.

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

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

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

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

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

(h) Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or your overall goal until the amount being counted toward the goal has been paid to the DBE.

Subpart D—Certification Standards

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

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

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

(c) You must rebuttably presume that members of the designated groups

identified in § 26.67(a) are socially and economically disadvantaged. This means that they do not have the burden of proving to you that they are socially and economically disadvantaged. However, applicants have the obligation to provide you information concerning their economic disadvantage (see § 26.67).

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

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

§ 26.63 What rules govern group membership determinations?

(a) If you have reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, you must require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group.

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

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

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

§ 26.65 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. You must apply current SBA

business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

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

§ 26.67 What rules determine social and economic disadvantage?

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

(2)(i) You must require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.

(ii) In determining net worth, you must exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

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

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

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

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

(c) *8(a) and SDB Firms.* If a firm applying for certification has a current, valid certification from or recognized by the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB certification based on the firm's self-certification as an SDB), you may accept the firm's 8(a) or SDB certification in lieu of conducting your own certification proceeding, just as you may accept the certification of another DOT recipient for this purpose. You are not required to do so, however.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE

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

§ 26.69 What rules govern determinations of ownership?

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

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

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

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

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

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

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are

considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if—

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

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

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

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

(1) The owner's expertise must be—

(i) In a specialized field;

(ii) Of outstanding quality;

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

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

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

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

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

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

(1) As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce

decree is inconsistent with this section; or

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

(h)(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is—

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that—

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

(j) You may consider the following factors in determining the ownership of a firm. However, you must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because—

(1) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (h) of this section;

(2) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or

(3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, you must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

§ 26.71 What rules govern determinations concerning control?

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

(b) Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

(3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

(4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential

DBE and non-DBE firms with normal industry practice.

(c) A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in § 26.69(j)(2).

(d) The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in

the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

(h) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

(i)(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that

owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

(j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(k)(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

(l) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual

now owning the firm must demonstrate to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

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

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

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on

the sale or transfer of the franchise interest or license.

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

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

§ 26.73 What are other rules affecting certification?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) A firm that is owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of § 26.65. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in § 26.71.

Subpart E—Certification Procedures

§ 26.81 What are the requirements for Unified Certification Programs?

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

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

(2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring

that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their résumés and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification;

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

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

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

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

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

(7) Require potential DBEs to complete and submit an appropriate application form.

(i) *Uniform form.* [Reserved]

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

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

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

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

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

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

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

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

(g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may

reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.

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

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

(1) Changes in management responsibility among members of a limited liability company are covered by this requirement.

(2) You must attach supporting documentation describing in detail the nature of such changes.

(3) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under § 26.109(c).

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you fail to provide this affidavit in a timely manner, you will be

deemed to have failed to cooperate under § 26.109(c).

(k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. You may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under § 26.89.

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

(a) When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

(b) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your DBE program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm.

(c) When you make an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under § 26.89.

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

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not

continue to be certified. Confidentiality of complainants' identities must be protected as provided in § 26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must

give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under § 26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (i.e., an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

(4) A change in the certification standards or requirements of the Department since you certified the firm; or

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

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

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

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

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

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

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

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

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

(a)(1) If you are a firm which is denied certification or whose eligibility is removed by a recipient, you may make an administrative appeal to the Department.

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

(3) Send appeals to the following address: Department of Transportation, Office of Civil Rights, 400 7th Street, SW, Room 2401, Washington, DC 20590.

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

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

(1) If you are an appellant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before

which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(2) If you are an appellant other than one described in paragraph (c)(1) of this section, the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in paragraph (c)(1) of this section. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a recipient's showing of good cause. To facilitate the Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

(f) As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by

substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.

(2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (see paragraph (d) of this section). The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

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

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

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

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

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

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

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

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

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

Subpart F—Compliance and Enforcement

§ 26.101 What compliance procedures apply to recipients?

(a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action

under § 26.103 or § 26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.

(b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

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

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

(a) *Noncompliance complaints.* Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in § 26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.

(b) *Compliance reviews.* The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.

(c) *Reasonable cause notice.* If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, return receipt requested, a written notice advising you that there is reasonable cause to find you in

noncompliance. The notice states the reasons for this finding and directs you to reply within 30 days concerning whether you wish to begin conciliation.

(d) *Conciliation.* (1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

(2) If you and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as being in compliance. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.

(3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.

(4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.

(e) *Enforcement actions.* (1) Enforcement actions are taken as provided in this subpart.

(2) Applicable findings in enforcement proceedings are binding on all DOT offices.

§ 26.105 What enforcement actions apply in FAA Programs?

(a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

(b) The provisions of § 26.103(b) and this section apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

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

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations

or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

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

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

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

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

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

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

(2) If you are a recipient, you shall safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.

(b) *Confidentiality of information 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.

Appendix A to Part 26—Guidance Concerning Good Faith Efforts

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took

all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere *pro forma* efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring *bona fide* good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the

available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

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

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

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

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

Appendix B to Part 26—Forms [Reserved]

Appendix C to Part 26—DBE Business Development Program Guidelines

The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from the recipient.

(A) Each firm that participates in a recipient's business development program (BDP) program is subject to a program term determined by the recipient. The term should consist of two stages; a developmental stage and a transitional stage.

(B) In order for a firm to remain eligible for program participation, it must continue to meet all eligibility criteria contained in part 26.

(C) By no later than 6 months of program entry, the participant should develop and submit to the recipient a comprehensive business plan setting forth the participant's business targets, objectives and goals. The participant will not be eligible for program benefits until such business plan is submitted and approved by the recipient. The approved business plan will constitute the participant's short and long term goals and the strategy for developmental growth to the point of economic viability in non-traditional areas of work and/or work outside the DBE program.

(D) The business plan should contain at least the following:

(1) An analysis of market potential, competitive environment and other business analyses estimating the program participant's prospects for profitable operation during the term of program participation and after graduation from the program.

(2) An analysis of the firm's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts other than those in traditional areas of DBE participation.

(3) Specific targets, objectives, and goals for the business development of the participant during the next two years, utilizing the results of the analysis conducted pursuant to paragraphs (C) and (D)(1) of this appendix;

(4) Estimates of contract awards from the DBE program and from other sources which are needed to meet the objectives and goals for the years covered by the business plan; and

(5) Such other information as the recipient may require.

(E) Each participant should annually review its currently approved business plan with the recipient and modify the plan as may be appropriate to account for any changes in the firm's structure and redefined needs. The currently approved plan should be considered the applicable plan for all program purposes until the recipient approves in writing a modified plan. The recipient should establish an anniversary date for review of the participant's business plan and contract forecasts.

(F) Each participant should annually forecast in writing its need for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (E) of this appendix. Such forecast should be included in the participant's business plan. The forecast should include:

(1) The aggregate dollar value of contracts to be sought under the DBE program, reflecting compliance with the business plan;

(2) The aggregate dollar value of contracts to be sought in areas other than traditional areas of DBE participation;

(3) The types of contract opportunities being sought, based on the firm's primary line of business; and

(4) Such other information as may be requested by the recipient to aid in providing effective business development assistance to the participant.

(G) Program participation is divided into two stages: (1) a developmental stage and (2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.

(H) The length of service in the program term should not be a pre-set time frame for either the developmental or transitional stages but should be figured on the number of years considered necessary in normal progression of achieving the firm's established goals and objectives. The setting of such time could be factored on such items as, but not limited to, the number of contracts, aggregate amount of the contract received, years in business, growth potential, etc.

(I) Beginning in the first year of the transitional stage of program participation, each participant should annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations in areas other than traditional areas of DBE participation after graduation from the program. The transition management plan should be submitted to the recipient at the same time other modifications are submitted pursuant to the annual review under paragraph (E) of this section. The plan should set forth the same information as required under paragraph (F) of steps the participant will take to continue its business development after the expiration of its program term.

(J) When a participant is recognized as successfully completing the program by substantially achieving the targets, objectives and goals set forth in its program term, and has demonstrated the ability to compete in the marketplace, its further participation within the program may be determined by the recipient.

(K) In determining whether a concern has substantially achieved the goals and

objectives of its business plan, the following factors, among others, should be considered by the recipient:

(1) Profitability;

(2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;

(3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;

(4) Ability to obtain bonding;

(5) A positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category; and

(6) Good management capacity and capability.

(L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient should notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification should set forth findings, based on the facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification should also provide the participant 45 days from the date of service of the letter to submit in writing information that would explain why the proposed basis of graduation is not warranted.

(M) Participation of a DBE firm in the program may be discontinued by the recipient prior to expiration of the firm's program term for good cause due to the failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance. Also, the recipient can discontinue the participation of a firm that does not actively pursue and bid on contracts, and a firm that, without justification, regularly fails to respond to solicitations in the type of work it is qualified for and in the geographical areas where it has indicated availability under its approved business plan. The recipient should take such action if over a 2-year period a DBE firm exhibits such a pattern.

Appendix D to Part 26—Mentor-Protégé Program Guidelines

(A) The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from other firms. To operate a mentor-protégé program, a recipient must obtain the approval of the concerned operating administration.

(B)(1) Any mentor-protégé relationship shall be based on a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by

the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.

(2) To be eligible for reimbursement, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts. The recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement.

(C) DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified *before* it begins participation in a mentor-protégé arrangement. If the recipient chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/ subcontractor mentor-protégé agreement.

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

The following guidance is adapted, with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR 124.103(c) and 124.104).

Social Disadvantage

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(1) *Education.* Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) *Employment.* Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

(3) *Business history.* The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

II. With respect to paragraph I.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities—especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments)—may be socially and economically disadvantaged.

III. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, recipients must also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

Economic Disadvantage

(A) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(B) *Submission of narrative and financial information.*

(1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

(2) When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(C) *Factors to be considered.* In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash),

personal net worth, and the fair market value of all assets, whether encumbered or not. Recipients will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

(D) *Transfers within two years.*

(1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

[FR Doc. 99-1083 Filed 1-29-99; 11:00 am]

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DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Part 26**

[Docket OST-2000-7640]

RIN 2105-AC89

Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs; Threshold Requirements and Other Technical Revisions**AGENCY:** Office of the Secretary, DOT.**ACTION:** Interim final rule; request for comments.

SUMMARY: This interim final rule revises the Department's regulations for its Disadvantaged Business Enterprise (DBE) program. This document changes threshold requirements for Federal Transit Administration recipients and Federal Aviation Administration recipients to establish DBE programs and submit overall goals. In addition, this document corrects and clarifies misleading language in the DBE final rule. This correction document adds examples of ways to collect information required for bidders lists. This document adds language clarifying that in order to verify whether a DBE firm actually performed the work they were committed, both commitments and attainments must be tracked and reported. Finally, this document corrects potentially misleading language regarding evidence that must be considered when setting overall goals.

EFFECTIVE DATE: This interim final rule is effective November 15, 2000.

Comments concerning this document are due no later than January 2, 2001.

ADDRESSES: Interested persons should send comments to Docket Clerk, Docket No. OST-2000-7640, Department of Transportation, 400 7th Street, SW, Room PL-401, Washington, DC 20590. We request that, in order to minimize burdens on the docket clerk's staff, commenters send three copies of their comments to the docket. Commenters wishing to have their submissions acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the commenter. Comments will be available for inspection at the above address from 10 a.m. to 5 p.m., Monday through Friday. Comments also may be sent electronically to the Dockets Management System (DMS) at the following Internet address: <http://dms.dot.gov/> at any time. Commenters who wish to file comments

electronically should follow the instructions on the DMS web site.

FOR FURTHER INFORMATION CONTACT: Laura Aguilar, Attorney, Office of General Counsel for Environmental, Civil Rights, and General Law, Department of Transportation, 400 Seventh Street, SW, Room 10102, Washington, DC 20590; Telephone: (202) 366-0365.

SUPPLEMENTARY INFORMATION:**1. Substantive Changes***DBE Programs*

In Section 26.21(a)(2) of the rule, the Department states that Federal Transit Administration (FTA) recipients who receive \$250,000 in a fiscal year in various forms of FTA assistance must have a DBE program. Similarly, subsection (a)(3) requires Federal Aviation Administration (FAA) recipients who receive grants of \$250,000 or more in a fiscal year for airport planning and development to have a DBE program. The Department is changing the threshold to \$250,000 in contracting opportunities. The change requires FTA recipients who project awarding more than \$250,000 in prime contracts in a Federal fiscal year from FTA assistance to have a DBE program. Similarly, FAA recipients who project awarding more than \$250,000 in prime contracts in a fiscal year from grants for airport planning and development are required to submit a plan. Prime contracts include goods as well as contracts for services.

The Department is making these changes to decrease the administrative burden on small airport and transit authorities. Many of these transit authorities and small airports receive more than \$250,000 in FTA or FAA funds but only have a small amount of funding for actual contracting opportunities. For example, FAA grants funds for land acquisition projects. While many of these grants exceed \$250,000, the value of contracting opportunities covered by the DBE program (e.g., real estate appraisal and survey) is frequently well below \$250,000. The major portion of the grant funds is generally for the land purchase itself, which is not a "DOT-assisted contract" under the definition of section 26.5.

Therefore, FTA and FAA recipients who reasonably anticipate awarding \$250,000 or less in prime contracts in a fiscal year are not required to submit a DBE plan. This change affects new recipients or recipients who do not have a DBE program. The rule would also reduce burdens on recipients who already have DBE programs. If such a

recipient anticipates awarding \$250,000 or less in prime contracts it would not have to submit a DBE overall goal for that year.

Goal Setting

Section 26.45 requires recipients to submit new goals on August 1 of each year. Section 26.45 is being revised to exempt FTA or FAA recipients with existing DBE programs from setting updated overall goals when they do not project awarding prime contracts exceeding \$250,000 (excluding vehicle transit purchases).

If a recipient is administering a DBE program, but is a FAA or FTA recipient who anticipates awarding \$250,000 or less in prime contracts in a Federal fiscal year, the recipient is not required to develop overall goals for that fiscal year. However, the recipient's existing DBE program must remain in effect. For example, the recipient would still perform certification functions such as processing applications and obtaining no-change affidavits. If the recipient expects to award prime contracts exceeding \$250,000 in the following fiscal year, it would be required to timely publish the proposed goal and submit the goal to the applicable DOT Operating Administration by August 1. Although not required, a FAA or FTA recipient who anticipates awarding \$250,000 or less in prime contracts may submit a goal for that fiscal year. However, if a recipient chooses to submit a goal, it must meet all the requirements set forth in § 26.45. Of course, recipients must still seek to meet the objectives of § 26.1 of this part.

Many recipients may have already submitted their fiscal year 2001 goal to the applicable Operating Administration. If you are a recipient who submitted your goal, but under the revisions to this part are not required to submit a goal, your Operating Administration will contact you to ask whether you wish to have your goal in effect.

2. Technical Changes*Clarification Concerning Bidders Lists*

Section 26.11(c) requires recipients to create and maintain a bidders list containing information about DBE and non-DBE contractors and subcontractors who seek work on a recipient's Federally-assisted contracts. The Department has received a number of questions regarding the appropriate method to collect the required information. Recipients have also expressed concern with collecting the annual gross receipts of firms, saying

that firms have sometimes been reluctant to share this information.

In discussing this requirement in the DBE final rule, the Department recognized the difficulty in identifying subcontractors, particularly non-DBEs and all subcontractors that were unsuccessful in their attempts to obtain contracts. Consequently, the Department did not impose any procedural requirements for how the data is collected. The Department still believes that a recipient's data collection process should remain flexible. However, we are amending § 26.11(c) to emphasize the purpose of the bidders list and by providing examples of ways in which recipients may choose to collect the required data.

The Department is amending § 26.11(c)(1) to state that the purpose of maintaining a bidders list is to provide the most accurate data possible about the universe of DBE and non-DBE contractors and subcontractors who seek to perform work under a recipient's Federally-assisted contracts, for use in setting overall goals. We are also adding language stating that a recipient may collect the required data from all bidders, before or after the bid due date. They may also choose to conduct a survey that will result in a statistically sound estimate of the universe of DBE contractors and non-DBE contractors and subcontractors who seek to perform work under the recipient's Federally-assisted contracts. Additionally, we are clarifying that the data need not come from the same source. For example, a recipient may collect name and address information from all bidders, while conducting a survey with respect to age and gross receipts information. The Department believes that the approach should remain flexible so that recipients can choose the least burdensome and intrusive method.

With regard to a firm's annual gross receipts, we are amending the language in § 26.11(c) to clarify that recipients are not required to collect the exact dollar figure from the bidders. Recipients may ask a 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 firms. We note that this information on the size of a firm, as well as information collected about the firm's age, should be helpful to recipients in formulating narrowly tailored overall goals.

Clarification Concerning Monitoring and Counting DBE Participation

Section 26.37(b) requires recipients to have a mechanism to verify that the work committed to DBEs at contract

award is actually performed by the DBEs. The language in the final rule states that recipients must provide for a running tally of actual DBE attainments. The preamble to the rule states, "Under the final rule, recipients would keep a running tally of the extent to which, on each contract, performance had matched promises." Verifying whether a DBE actually performed the work to which they were committed, necessarily requires the recipient to track both commitments and attainments.

We are rewording the language in § 26.37(b) to state that a recipient's DBE program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs. In addition, we are adding a new paragraph (c) to clarify that a recipient's mechanism for providing a running tally of actual DBE attainments must include a means of comparing the attainments to commitments. We are also clarifying that both awards or commitments and attainments must be contained in a recipient's reports of DBE participation to the Department. In the forthcoming DOT uniform reporting form, we will provide a format for these reports.

Section 26.37(b) requires the mechanism providing for a running tally of actual DBE attainments to include a provision ensuring that the DBE participation is credited toward overall or contract goals only when payments are actually made to DBE firms. Since this requirement is already stated in § 26.55(h), we are removing it from § 26.37(b). Furthermore, we believe the wording of § 26.55(h) is confusing and we are, therefore, revising it. The point of the revised language is to emphasize that actual payment of committed funds to DBEs is a key element in determining whether a prime contractor has met its contract obligations.

Clarification Concerning Goal Setting

In setting overall goals, step 2 requires that recipients examine all evidence available in the jurisdiction to determine what adjustment, if any, is needed to the base figure. Sec. 26.45(d)(1) specifies information that must be considered when adjusting the base figure. Sec. 26.45(d)(2) lists additional information to be considered, but uses the language "you may also consider." The permissive language may be misleading. A narrowly tailored program requires that all relevant information be considered. We are merely clarifying that if the information is available, then it must be considered. Therefore, to avoid misleading language, we are changing the wording in § 26.45(d)(2) to say, "if available, you

must consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete."

3. Interim Final Rule

This rule is being published as an interim final rule, without prior notice and opportunity to comment. The Department believes there is good cause for finding that providing prior notice and comment in connection with this rulemaking action is impracticable, unnecessary and contrary to the public interest since it concerns actions required to be taken on or around August 1, 2000. See 5 U.S.C. 553(b)(B).

The Department believes it is important to expedite these revisions in order to benefit DOT recipients this year. Under the DBE regulations, recipients who set their goals on a fiscal year basis are required to submit their goals on or around August 1 each year. In order to reduce administrative burdens on FTA and FAA entities receiving \$250,000 or less in contracting opportunities, the rule must be effective as soon as possible, since August 1 has passed and recipients are still in the process of formulating goals and programs. Therefore, the Department finds good cause that compliance with notice and comment procedures in adoption of this interim final rule would be impractical, unnecessary and contrary to the public interest. See 5 U.S.C. 553(b)(B). For the same reasons, pursuant to 5 U.S.C. 553(d), it is determined that there is good cause for the interim final rule to become effective immediately upon publication. In addition, this interim final rule relieves a restriction.

All comments received will be filed in the docket. The docket is available for public inspection before and after the comment closing date. All comments received on or before the comment closing date will be considered before taking final action on this rulemaking. Comments filed late will be considered as far as possible without incurring expense or delay. The provisions of this interim final rule may be changed in light of comments received.

Regulatory Analyses and Notices

These revisions to part 26 are not a significant rule under Executive Order 12866 or the Department's regulatory policies and procedures. While the Regulatory Flexibility Act does not, as such, apply to rules that do not involve a notice of proposed rulemaking, the Department has determined that the revisions will not have significant economic impacts on a substantial number of small entities. In fact, these revisions decrease costs to some small

entities. Further, these revisions do not have Federalism impacts sufficient to warrant the preparation of a Federalism impact statement.

List of Subjects in 49 CFR Part 26

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant—programs—transportation, Mass transportation, and Minority businesses.

Issued this 6th Day of November, 2000, at Washington, DC.

Rodney E. Slater,
Secretary of Transportation.

For the reasons set forth in the preamble, the Department amends 49 CFR part 26 as follows:

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

1. The authority citation for 49 CFR part 26 continues to read as follows:

Authority: 23 U.S.C. 324; 41 U.S.C. 2000d, *et seq.*; 49 U.S.C. 1615, 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105–178, 112 Stat. 107, 113.

2. In § 26.11, revise paragraph (c) to read as follows:

§ 26.11 What records do recipients keep and report?

* * * * *

(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).

3. In § 26.21, revise paragraphs (a)(2) and (a)(3) to read as follows:

§ 26.21 Who must have a DBE program?

(a) * * *
(2) FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) exceeding \$250,000 in FTA funds in a Federal fiscal year;

(3) FAA recipients receiving grants for airport planning or development who will award prime contracts exceeding \$250,000 in FAA funds in a Federal fiscal year.

* * * * *

4. In § 26.37, revise paragraph (b), and add paragraph (c) to read as follows:

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

* * * * *

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs.

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

5. Amend § 26.45 as follows:
a. Revise paragraph (a); and
b. In paragraph (d) (2) at the beginning of the sentence, remove “You may also consider available” and substitute “If available, you must consider” in its place. The revised text reads as follows:

§ 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.

* * * * *

6. In § 26.55, revise paragraph (h) to read as follows:

§ 26.55 How is DBE participation counted toward goals?

* * * * *

(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.

§ 26.89 [Amended]

7. In § 26.89(a)(3), remove “Room 2401” and add “Room 5414” in its place.

[FR Doc. 00–29100 Filed 11–14–00; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 991008273–0070–02; I.D. 110900A]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Trip Limit Reduction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Trip limit reduction.

SUMMARY: NMFS reduces the commercial trip limit in the fishery for king mackerel in the northern Florida west coast subzone to 500 lb (227 kg) of king mackerel per day in or from the exclusive economic zone (EEZ). This trip limit reduction is necessary to protect the overfished Gulf king mackerel resource.

DATES: This rule is effective 12:01 a.m., local time, November 12, 2000, through June 30, 2001, unless changed by further notification in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mark Godcharles, telephone 727–570–5305, fax 727–570–5583, e-mail: Mark.Godcharles@noaa.gov.

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic fish

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compliance with the Commission's minimum distance separation requirements with a site restriction of 11.4 kilometers (7.1 miles) west of Leakey, Texas. The reference coordinates for Channel 257A at Leakey are 29-44-41 North Latitude and 99-52-40 West Longitude. Although concurrence has been requested for Channel 257A at Leakey, notification has not been received. If a construction permit is granted prior to the receipt of formal concurrence in the allotment by the Mexican Government, the construction permit will include the following condition: "Operation with the facilities specified for Leakey herein is subject to modification, suspension or, termination without right to hearing, if found by the Commission to be necessary in order to conform to the 1992 USA-Mexico FM Broadcast Agreement."

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Accordingly, for the reasons set out in the preamble, 47 CFR Part 73 is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 261C at Dalhart; by adding Channel 229A at Kermit; and by adding Channel 257A at Leakey.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 03-15068 Filed 6-13-03; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03-1843; MB Docket No. 03-21, RM-10632, RM-10696]

Radio Broadcasting Services; Eastpoint and Port St. Joe, FL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Moira L. Ritch, allots Channel 270C3 to Port St. Joe, FL, as the community's second local FM

transmission service. See 68 FR 7964, February 19, 2003. Channel 270C3 can be allotted to Port St. Joe in compliance with the Commission's minimum distance separation requirements with a site restriction 2.2 kilometers (1.4 miles) south to avoid short-spacing to the application site of Station WWAV, Channel 271C2, Santa Rosa, Florida and the license site of Station WBGE, Channel 270A, Bainbridge, Georgia. The reference coordinates for Channel 270C3 at Port St. Joe are 29-47-45 North Latitude and 85-17-27 West Longitude. In response to a counterproposal filed by Richard L. Plessinger, Sr., the Audio Division allots Channel 283A to Eastpoint, FL, as that community's first local aural transmission service. Channel 283A can be allotted to Eastpoint in compliance with the Commission's minimum distance separation requirements at city reference coordinates. The reference coordinates for Channel 283A at Eastpoint are 29-44-11 North Latitude and 84-52-42 West Longitude. Filing windows for Channel 270C3 at Port St. Joe, FL and Channel 283A at Eastpoint, FL, will not be opened at this time. Instead, the issue of opening a filing window for these channels will be addressed by the Commission in a subsequent order.

DATES: Effective July 14, 2003.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC. 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 03-21, adopted May 28, 2003, and released May 30, 2003. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY-A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Accordingly, for the reasons set out in the preamble, 47 CFR Part 73 is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Florida, is amended by adding Eastpoint, Channel 283A and by adding Channel 270C3 at Port St. Joe.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 03-15067 iled 6-13-03; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 26

[Docket OST-2000-7639 & OST-2000-7640]

RIN 2105-AC89

Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: This final rule revises the Department of Transportation's (DOT or Department) regulations for its Disadvantaged Business Enterprise (DBE) program. It makes several changes to the DBE program, concerning such subjects as uniform application and reporting forms; implementing a memorandum of understanding (MOU) with the Small Business Administration (SBA); substantive amendments to provisions concerning personal net worth, retainage, size standard, proof of ethnicity, confidentiality, proof of economic disadvantage, DBE credit for trucking firms, and eligibility of firms owned by Alaska Native Corporations (ANCs); and clarifications concerning multi-year project goals and the use of the new North American Industrial Classification System ("NAICS"). In addition, this document addresses comments received in response to both an interim final rule (IFR) issued in November 2000 and a notice of proposed rulemaking (NPRM) issued in May 2001 (RIN 2105-AC88).

DATES: This final rule is effective July 16, 2003.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant

General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590, phone numbers (202) 366-9310 (voice), (202) 366-9313 (fax), (202) 755-7687 (TDD), bob.ashby@ost.dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

Electronic Access: An electronic copy of this document may be downloaded by using a computer, modem, and suitable communications software from the Government Printing Office's Electronic Bulletin Group Service at (202) 512-1661. Internet users may reach the Office of the Federal Register's home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's database at: <http://www.access.gpo.gov/nara>. You can also view and download this document by going to the web page of the Department's Docket Management System at: <http://dms.dot.gov/>. On that page, click on "search." On the next page, type in the four-digit docket number shown on the first page of this document. Then click on "search."

Background

On February 2, 1999, the Department published a final rule revising its Disadvantaged Business Enterprise (DBE) program. The new regulations (49 CFR part 26) replaced 49 CFR part 23, except for the airport concessions regulations. Airport concessions are being discussed in a separate rule. The NPRM on airport concessions was issued December 12, 2002 (67 FR 76327). Its final rule is pending. In drafting the 1999 final rule, the Department considered many sources, including the results of a government-wide review of affirmative action programs, requirements set forth in the Supreme Court's decision in *Adarand v. Peña* (515 U.S. 200 (1995)), extensive Congressional debate during the reauthorization of the DBE program, and over 900 comments. Because of the enormity of the 1999 revisions, there were several requirements, such as the establishment of a uniform certification form, that were reserved for a later date. Additionally, after administering the program since 1999 it is evident that clarification of some provisions and revisions to other provisions would be useful.

I. Interim Final Rule Regarding Threshold Requirements and Other Changes

The Department published an IFR in the **Federal Register** on November 15, 2000 (65 FR 68949). The IFR addressed threshold requirements for Federal Transit Administration recipients and

Federal Aviation Administration recipients to establish DBE programs and submit overall goals. In addition, the IFR corrected and clarified misleading language in 49 CFR part 26. The IFR also provided examples of ways to collect information required for bidders lists, and clarified that in order to verify whether a DBE firm actually performed the work they were committed to, both commitments and attainments must be tracked and reported. Finally, the IFR corrected potentially misleading language regarding evidence that must be considered when setting overall goals. The Department received only four comments on this IFR that are addressed below.

A. Substantive Changes

DBE Programs

Section 26.21(a)(2) of the rule states that Federal Transit Administration (FTA) recipients who receive \$250,000 or more in a fiscal year in various forms of FTA assistance must have a DBE program. Similarly, subsection (a)(3) requires Federal Aviation Administration (FAA) recipients who receive grants of \$250,000 or more in a fiscal year for airport planning and development to have a DBE program. The IFR changed the threshold to \$250,000 in contracting opportunities. The change requires FTA recipients who project awarding more than \$250,000 in prime contracts in a Federal fiscal year from FTA assistance to have a DBE program. Similarly, FAA recipients who project awarding more than \$250,000 in prime contracts in a fiscal year from grants for airport planning and development are required to submit a plan. Prime contracts include contracts for goods as well as contracts for services.

The Department made these changes to decrease the administrative burden on transit authorities and small airports. Many of these transit authorities and small airports receive more than \$250,000 in FTA or FAA funds, but have only a small amount of funding available for actual contracting opportunities. For example, FAA grants funding for land acquisition projects. While many of these grants exceed \$250,000, the value of contracting opportunities covered by the DBE program (e.g., real estate appraisal and survey) frequently is well below \$250,000. The major portion of grant funds is generally for the land purchase itself, which is not a "DOT-assisted contract" under the definition of § 26.5.

We only received two comments on this provision, both supporting the

change. It was suggested, however, that DOT monitor the number of recipients and Federal contracts affected by this change to ensure that the purpose of the DBE program is not compromised. We believe that this change will only affect a small number of our recipients and monitoring the way in which recipients carry out provisions of the rule is a normal function of FTA and FAA.

One commenter requested that we extend the \$250,000 threshold to transit vehicle manufacturers (TVMs). We do not believe that any TVMs would benefit from the \$250,000 threshold. The cost of just one vehicle would exceed \$250,000; therefore, any change would be meaningless.

Therefore, we are adopting the provisions of the IFR without change. FTA and FAA recipients who reasonably anticipate awarding \$250,000 or less in prime contracts in a fiscal year are not required to submit a DBE plan. This change affects new recipients or recipients who do not have a DBE program. The rule also reduces burdens on recipients who already have DBE programs. If such a recipient anticipates awarding \$250,000 or less in prime contracts it does not have to submit a DBE overall goal for that year.

Goal Setting

Section 26.45 requires recipients to submit new goals on August 1 of each year. The IFR revised this section to exempt FTA or FAA recipients with existing DBE programs from setting updated overall goals when they do not project awarding prime contracts exceeding \$250,000 (excluding vehicle transit purchases) in the year in which the updated goal would apply.

Under this provision, if a recipient is administering a DBE program, but is an FAA or FTA recipient who anticipates awarding \$250,000 or less in prime contracts in a Federal fiscal year, the recipient is not required to develop overall goals for that fiscal year. The recipient's existing DBE program must remain in effect, however, even though they are not required to develop goals. For example, the recipient is still required to perform certification functions such as processing applications and obtaining no-change affidavits. If the recipient expects to award prime contracts exceeding \$250,000 in the following fiscal year, it must timely publish the proposed goal and submit the goal to the applicable DOT Operating Administration by August 1. Although not required, a FAA or FTA recipient who anticipates awarding \$250,000 or less in prime contracts may submit a goal for that fiscal year. If a recipient chooses to

submit a goal, however, it must meet all the requirements set forth in § 26.45. Of course, all recipients must still seek to meet the objectives of § 26.1 of this part.

There were no substantive comments on this section; therefore, we are not making any changes to this provision.

B. Technical Changes

Clarification Concerning Bidders Lists

Section 26.11(c) requires recipients to create and maintain a bidders list containing information about DBE and non-DBE contractors and subcontractors who seek work on a recipient's Federally-assisted contracts. The Department had received a number of questions regarding the appropriate method to collect the required information. Recipients had also expressed concern with collecting the annual gross receipts of firms, saying that firms sometimes have been reluctant to share this information.

In discussing this requirement in the DBE final rule, the Department recognized the difficulty in identifying subcontractors, particularly non-DBEs and all subcontractors that were unsuccessful in their attempts to obtain contracts. Consequently, the Department did not impose any procedural requirements for how the data are collected. The Department still believes that a recipient's data collection process should remain flexible. The IFR amended § 26.11(c) to emphasize the purpose of the bidders list and provide examples of ways in which recipients may choose to collect the required data.

The IFR amended § 26.11(c)(1) to state that the purpose of maintaining a bidders list is to provide the most accurate data possible about the universe of DBE and non-DBE contractors and subcontractors who seek to perform work under a recipient's Federally-assisted contracts for use in setting overall goals. The IFR also added language stating that a recipient may collect the required data from all bidders, before or after the bid due date. They may also choose to conduct a survey that will result in a statistically sound estimate of the universe comprised of DBE and non-DBE contractors and subcontractors who seek to perform work under the recipient's Federally-assisted contracts. Additionally, we clarified that the data need not come from the same source. For example, a recipient may collect name and address information from all bidders while conducting a survey with respect to age and gross receipts information. The Department continues to believe that the approach should remain flexible so that recipients can

choose the least burdensome and intrusive method.

With regard to a firm's annual gross receipts, the IFR amended the language in § 26.11(c) to clarify that recipients are not required to collect exact dollar figures from the bidders. Recipients may ask a 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 firms. We note that this information on the financial size of a firm, as well as information collected about the firm's age, should be helpful to recipients in formulating narrowly tailored overall goals.

A few commenters stated that they do not use a firm's gross receipts or a firm's age in calculating their goals and therefore collecting this information should be optional. We believe that this information is a valuable way to measure the relative availability of ready, willing, and able DBEs, and we encourage recipients to utilize this in setting their goals. Use of this information will help recipients to ensure that their goal setting process is narrowly tailored. However, although this information is not required in setting goals, it is information that the Department is asked to provide periodically to Congress. Consequently, we will continue to require recipients to collect a firm's gross receipts and age for DBE and non-DBE contractors and subcontractors who seek to work on Federally-assisted contracts. This portion of the IFR is also being retained without change.

Clarification Concerning Monitoring and Counting DBE Participation

Section 26.37(b) requires recipients to have a mechanism to verify that the work committed to DBEs at contract award is actually performed by the DBEs. The language in the final rule states that recipients must provide for a running tally of actual DBE attainments. The preamble to the rule states, "Under the final rule, recipients would keep a running tally of the extent to which, on each contract, performance had matched promises." Verifying whether a DBE actually performed the work they were committed to necessarily requires the recipient to track both commitments and attainments.

The IFR reworded the language in § 26.37(b) to state that a recipient's DBE program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs. In addition, it added a new paragraph (c) to clarify that a recipient's mechanism

for providing a running tally of actual DBE attainments must include a means of comparing the attainments to commitments. It also clarified that both awards or commitments and attainments must be contained in a recipient's reports of DBE participation to the Department.

The few comments we received on this section questioned whether commitments and attainments could be reported together in a meaningful way without being misleading. We recognize that in many instances the awards and commitments reported will not correspond to the attainments reported on the same form. For example, if a contract is awarded to a DBE in August 2001, the award would be reflected in the report for that period, but the contract likely would not be completed for many years. Therefore, the actual achievements section in that report could not reflect the achievements on that contract. The Uniform Reporting Form in Section II of this document contains two separate sections in the form. The first section reflects contracts awarded or committed during the reporting period. The second section reflects actual payments on contracts completed during the reporting period. It is essentially a "snap-shot" of a recipient's progress towards the participation of DBEs in its DBE program, and is not a determinative factor as to whether or not DBE goals are being met.

One commenter requested that we provide guidance on how to track actual participation. The Department believes that a recipient's data collection process should remain flexible, and as such we are reluctant to tell recipients how to collect the information. As an example, many recipients track actual participation by obtaining certified statements from the prime contractor and then verifying the information with the DBEs.

The IFR also deleted and revised repetitive and misleading language. Section 26.37(b) requires the mechanism providing for a running tally of actual DBE attainments to include a provision ensuring that the DBE participation is credited toward overall or contract goals only when payments actually are made to DBE firms. Because this requirement was already stated in § 26.55(h), we have removed it from § 26.37(b). Furthermore, we believe that the wording of § 26.55(h) was confusing; therefore, we revised it. The point of the revised language is to emphasize that actual payment of committed funds to DBEs is a key element in determining whether a prime contractor has met its contract obligations.

Clarification Concerning Goal Setting

In setting overall goals, step two requires that recipients examine all evidence available in the jurisdiction to determine what adjustment, if any, is needed to the base figure. Section 26.45(d)(1) specifies information that must be considered when adjusting the base figure. Section 26.45(d)(2) lists additional information to consider, but uses the language "you may also consider." This permissive language may be misleading. A narrowly tailored program requires that all relevant information be considered. The IFR clarified that if the information is available, then it must be considered. Therefore, to avoid misleading language, we changed the wording in § 26.45(d)(2) to read, "If available, you must consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete." There were no comments on this provision; therefore, we are not making any changes to this provision.

II. Notice of Proposed Rulemaking Regarding Memorandum of Understanding With the Small Business Administration, Uniform Forms, and Other Provisions

There are three different matters addressed in this section. Part A addresses uniform forms. In the 1999 final rule, the Department stated that it would develop a uniform reporting form and a standard DOT application form for DBE eligibility. The Department did not want to delay the issuance of the 1999 final rule, so it reserved the date on which the uniform form requirements would go into effect. This document addresses both of these forms. Part B addresses the implementation of a Memorandum of Understanding (MOU) between the DOT and the Small Business Administration (SBA). The MOU streamlines certification procedures for participation in SBA's 8(a) Business Development (8(a) BD) and Small Disadvantaged Business (SDB) programs and DOT's DBE program. Part C addresses substantive changes to several provisions of part 26, including personal net worth, retainage, proof of ethnicity, confidentiality, proof of economic disadvantage, and DBE credit for trucking firms.

A. Forms

Uniform Reporting Form

In the February 1999 rule, the Department adopted the suggestion of having a single, uniform, nationwide form that all recipients must use to report to the DOT its awards or commitments and payments. We published a proposed format in the

NPRM. We received over eighty comments concerning the format and content of the proposed uniform reporting form, all of which were considered and addressed in drafting the final form. Several versions of the form were generated to account for the various comments and suggestions provided, and the Department believes that the final form compiles the necessary information needed by the Department to safeguard the program's integrity and ensure the goals of the program are met. The Final Form and its instructions are in Appendix B of this document.

Many commenters made suggestions about the format and style of the reporting form. The basic formatting remains the same as in the NPRM because of its brevity and its capacity to capture the required information sought by the Department in a single page. One particular goal was to minimize the burden on recipients in compiling the information, as well as reducing the amount of paperwork required. Some terms and phrasing used in the form were changed to be consistent with that used in the current final rule.

The Instructions Sheet that accompanies the reporting form explains more fully what is required in each field on the form, and instructs recipients on how to derive specific numbers and percentages that are required to be provided. It is essential that recipients completing this form consult the Instructions Sheet.

One commenter questioned the distinction between race conscious and race neutral goals. These concepts are explained in some detail in part 26, and this rulemaking does not change any of the concepts in the 1999 final rule that established part 26. Another commenter requested clarification as to the category of "Other" in the ethnicity breakdown portion of the form. Firms may qualify as DBEs on a case-by-case, individual basis, even though their owners are not members of a group presumed to be disadvantaged (*e.g.*, a firm owned by a white male who makes an individual showing of disadvantage). The "Other" category would be used to report this type of scenario. We also added new category for "Non-Minority Women" to the final form to account for women-owned DBEs participating in the program, and to guard against the potential for double counting women-owned DBEs where the female owner is also a minority. As a result, the category "Caucasian" was removed from the final form.

Many commenters were concerned that the "Awards or Commitments this Reporting Period" section did not match

up with the later section on "Actual Payments on Contracts Completed This Reporting Period." All dollar amounts are to reflect only the Federal share of such contracts. The Department realizes that many awards or commitments last over an extended period of time, and therefore will be likely to extend over multiple reporting periods. The Departments intends that these sections would not match up and that the respective numbers would most likely be different.

The purpose of the Actual Payments section is to capture a "snap shot" of the present reporting period as concerns monies actually paid to DBEs, as opposed to monies that are only committed or awarded to DBEs but have not necessarily been paid yet. This data will provide a more accurate picture of the level of DBE participation that is completed at any given time. The new categories added to these sections will depict more fully the level of DBE participation. More importantly, it should be stressed that while several commenters noted that the tracking of such information is not currently done, it is crucial that recipients maintain records of committed DBE goals and actual payments by contract because this data allows recipients (and the Department) to determine the recipient's actual success in meeting contract and overall DBE goals. Failure to track such data would defeat the purpose of goal-setting and undermine the integrity of the program.

We received twenty-eight comments regarding the reporting frequency. The Department currently has authority to require quarterly reporting. While the FHWA and the FTA do require quarterly reporting, the FAA requires only annual reporting. Not surprisingly, most of the comments objecting to semi-annual reporting came from airport authorities, while many State DOTs favored semi-annual reporting. Although our goal is uniformity we also want to decrease our recipients' burdens. Therefore, all recipients are required to use the standard reporting form. Recipients of funds from the FHWA and FTA will be required to report semi-annually, but FAA recipients will continue to report annually.

Reports are due to a recipient's operating administration (OA) on June 1 and December 1 each year. The June 1 report should include information from October 1 through March 31. The December 1 report should include information from April 1 through September 30. We believe that these dates will assist recipients in setting goals, which are due by August 1 each year. A couple of commenters requested

alternative reporting deadlines for recipients that use local fiscal years or calendar years. This will be permitted on a case-by-case basis if approved by the concerned OA.

The form will be made available electronically in PDF format, but at this time recipients cannot submit the forms electronically. The reporting form must be submitted to the OA from which the recipient received Federal funds. For example, a recipient of Federal Highway funds must submit a report to the FHWA. If a recipient received funds from more than one OA, it must submit a report to each OA. TVMs will continue to report to the recipient and not DOT directly.

Finally, recipients are required to retain information relating to basic program data for three years.

Uniform Certification Application Form

In the February 1999 final rule the Department said that it planned to create a single, uniform, nationwide form that all recipients must use without modification for DBE eligibility. We published a proposed format in the NPRM. We received over eighty-eight comments concerning the format and content of the proposed uniform application, all of which were considered and addressed in drafting the final form. Several changes were made to the proposed form that the Department believes makes the form more streamlined and user-friendly, yet comprehensive enough to supply recipients with the necessary information to make determinations as to applicants' qualifications for the DBE program. The Final Form is in Appendix F of this document.

Many commenters made suggestions about the format and style of the application. These suggestions were considered and incorporated into the final form to the extent possible. Much of the basic formatting remains the same because the goal was to keep the form manageable, easy to read, and easy to follow for applicants who must fill out the form, while simultaneously being accessible and practical for the multitude of recipients required to accept the form. Our major concern was keeping the application within a reasonable limit, regarding both length and content, in order to prevent the form from becoming too unwieldy and burdensome.

Other commenters posed questions or sought clarification of certain terms used in the application or of the applicability of certain sections of the application to specific groups or types of contractors and businesses. These questions and queries are addressed in

both the form and in its accompanying Instructions Sheet. The form itself uses simplified language and the Instructions Sheet explains more fully the type of information or documents sought in each section of the application.

Although recipients must use the uniform application form without modification, we recognize that some recipients have additional statutory and/or regulatory requirements. Therefore, recipients, with the written consent of the cognizant OA, may (1) supplement the uniform application form with a one to two page attachment containing the additional information collection requirements, and (2) require applicants to submit additional supporting documents not already listed in or required by the uniform application. Additionally, with written consent of the OA, a recipient may translate the forms into a second language (e.g., Spanish or Chinese) to assist their applicants. We reiterate that the form should be streamlined, however, and that additional information should be sought during the on-site review process rather than during the application process.

B. Memorandum of Understanding

There has been some confusion as to the scope of the Memorandum of Understanding (MOU) between the Small Business Administration (SBA) and the DOT. While the intent of the MOU is to streamline the certification process for firms who apply for the SBA's 8(a) BD or SDB programs and the DOT's DBE program, absolute reciprocity is impossible. The programs share many common requirements, but there are some significant differences. Therefore, we are clarifying that the MOU does not alter any program requirements; applicant firms must meet the program requirements for which they are applying. For example, an SBA-certified firm applying for DBE certification must meet the DOT statutory gross receipts cap, currently set at \$17,420,000 (65 FR 52470 (August 29, 2000)). An SBA-certified firm must also undergo an on-site review before receiving DBE certification.

Because the SBA is not required to issue regulations prior to implementing the MOU, it has already established procedures to implement the agreement. If a DBE firm contacts the SBA requesting to be certified for SBA's Small and Disadvantaged Business program, the SBA would follow procedures similar to those set forth in this document.

Some commenters supported the MOU and the proposed regulations without change. Others did not object to

the MOU in its entirety, but rather focused on a few main issues. One of the primary issues was the degree of reciprocity. Under this rule, recipients must accept a firm's application package submitted to the SBA in lieu of requiring the applicant firm to fill out the recipient's own application. The certifying agency may ask the applicant firm for additional information and an on-site review will be required. If the SBA conducted an on-site review, the DOT recipient may rely on SBA's report in lieu of conducting its own on-site review. Several commenters mentioned the importance of conducting their own on-site review because the certifying agency can actually see the firm and can ask additional questions. We agree that the on-site review is important, and that is why the recipient may accept the SBA's report of the on-site review, but is not required to do so.

Under the 1999 final rule, a recipient receiving an application from an SBA-certified firm had three choices. It could (1) accept the SBA certification decision, subject to the recipient's own on-site review; (2) use the firm's SBA application package in lieu of requiring completion of the recipient's own application form (the recipient would still have to complete an on-site review), but make its own decision; or (3) disregard the SBA materials and require the recipient to undergo the recipient's full application process from scratch. The MOU, as implemented by this rule, removes the third option. Under today's final rule, recipients will have to choose one of the first two options when an SBA-certified firm files an application.

If the recipient chooses the second option, it should be aware of one important constraint on its discretion. If the SBA has looked at an application package and determined that a firm is a small business owned and controlled by socially and economically disadvantaged persons, it would not be appropriate for the DOT recipient to disagree with the SBA's conclusion in the absence of additional information that leads to a different conclusion. That is, the recipient could not make a different decision based solely on a judgment of the same exact information on which SBA based its decision. Doing so would be contrary to the language and intent of the MOU. However, if the DOT recipient (typically in the course of the on-site review) discovers additional information from which it could reasonably conclude that the SBA-certified firm is not an eligible DBE, it could decline to certify the firm.

In any case, § 26.83(k) requires a recipient to make a decision within ninety days of receiving all the required

information, including any additional information requested, whether it is from the applicant or the SBA.

This issue that appears to have caused the most concern is the requirement that recipients copy and transmit to the SBA a copy of the applicant firm's application package when a DOT-certified firm applies to the SBA for certification. A majority of the commenters argued that the copy requirement would place an administrative and financial burden on recipients. That is why we are allowing recipients to charge a reasonable fee (e.g., comparable to what would be charged for a Freedom of Information Act or open records law request) for the photocopying to defray some of the costs. A few commenters suggested that it would be more of a burden to collect the fees. Therefore, whether to impose copying and transmittal fees will be left entirely up to the recipient. We do not believe that there will be a large demand from DBE-certified firms requesting SBA certification, so we do not believe that this provision will have a significant economic effect. The Department will monitor the situation and will make future alterations as needed.

A few commenters questioned the definition of "application package." Two commenters stated that it would be easier to copy and transmit the entire file rather than the actual application. That way there would be no need for the SBA to request additional information from the recipient. We agree. By "application package" we mean the application and any information relied upon in making the certification decision.

Several commenters also addressed the time limits prescribed in the NPRM. Some claimed that the time limits were too short, while others said that they are too long. We believe that while an expedited process would be desirable, lack of resources will make shorter deadlines unworkable. We believe that the time frames set forth in the NPRM are reasonable. Therefore, recipients are required to forward the application package to the SBA within thirty days after the firm's request. If additional information is requested, it must be transmitted within forty-five days after receipt of the request. In implementing this provision, we intend to provide some flexibility during the first several months as recipients adjust to the requirement. Again, the Department will monitor the situation and make changes if warranted. There is some concern that some application packages are outdated and unreliable. We agree that transmitting irrelevant and outdated information would be wasteful;

however, if an applicant firm has a current, valid certification, and then all of the information relied upon for that certification may be relevant.

There were several comments regarding the notification requirement. If a recipient denies certification to a firm certified by the SBA, or if it decertifies a firm it knows to be certified by the SBA, it is required to notify the SBA in writing. The notification must include the reason for denial. Two commenters believe that the denial/decertification letter is sufficient notification to the SBA, and we agree. A recipient may simply send a copy of the denial or decertification letter to the SBA. One commenter asked how it would know whether the firm is SBA certified. Typically, an applicant will submit this information in an application package or decertification proceeding. A recipient could also query an on-line database of firms the SBA has certified at <http://pro-net.sba.gov>.

C. Additional Changes

Personal Net Worth

Section 26.67 requires each individual whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth (PNW) with appropriate supporting documentation. The Department received a number of questions about what documentation is appropriate for recipients to require in ascertaining the PNW of owners of DBE firms. In the preamble to the final rule correction (64 FR 34569 (June 28, 1999)), the Department recommended using the SBA's form as a model. The SBA requires completion of a two-page form, supported by two years of personal and business tax returns. The Department wanted to remain flexible while encouraging recipients to use forms that are not unduly lengthy, burdensome, or intrusive. The Department did not require recipients to use the SBA form verbatim but encouraged them to use a form of similar length and content, including collecting and retaining two years of an individuals' personal and business tax returns. The Department has not found anything more appropriate than the SBA form, however. In the interest of uniformity, this final rule will mandate use of the SBA PNW form in conjunction with the new uniform application form. A copy is included in Appendix F.

The final rule explicitly requires that personal financial information be kept confidential. Nevertheless, the

Department has continued to receive comments concerning the intrusiveness of collecting personal tax returns. In the 2001 NPRM, the Department proposed an alternative option with regard to the necessary supporting documentation to prove PNW in order to address these concerns. The proposal still called for recipients to require individuals whose ownership and control are relied upon for DBE certification to certify that he or she has a PNW not exceeding \$750,000 by allowing applicants to submit a signed, notarized statement of PNW with appropriate documentation. In the alternative, the proposed option was to allow the applicant to submit a signed, notarized statement from a certified public accountant (CPA) attesting that the CPA had examined his or her PNW pursuant to § 26.67(a)(2)(iii) and determined that his or her PNW does not exceed \$750,000. This option was intended to eliminate the need for the applicant to provide personal income tax information to the DOT recipient as supporting documentation for purposes of proving PNW.

The Department received numerous comments concerning the proposed alternative documentation for establishing an applicant's PNW. Many commenters supported the proposed option of allowing applicants to submit a CPA's affidavit as to PNW instead of filing personal income tax information. A majority of the commenters in favor of the proposal highlighted the fact that such an option would be less intrusive and would protect the privacy and confidentiality interests of applicants in their personal economic and financial information. Furthermore, some commenters noted that this option would alleviate the burden of the application process on applicants and would reduce the amount of paperwork associated with the DBE program, thereby facilitating the entire process. One commenter also felt that CPAs are better situated to evaluate financial statements because of their academic and professional training.

A roughly equal number of commenters felt quite differently about the issue. An overwhelming majority of recipients opposed the proposal to allow the submission of a CPA's affidavit in lieu of an individual applicant's personal income tax return or other such documentation in order to prove PNW. Many commenters felt that it was very important for the recipients themselves to verify the PNW of each applicant, and that to allow a simple affidavit of a CPA would unduly inhibit their ability to do so, and would prevent the recipients from closely tracking the eligibility of applicants through their

own independent assessment. Moreover, a number of commenters strongly maintained that by requiring applicants to submit personal income tax information, rather than merely a CPA's affidavit, recipients could better safeguard the integrity of the DBE program because they would be able to certify applicants' eligibility to the Department with unqualified certainty, having done the eligibility determination as to PNW themselves. Of particular concern to those commenters opposed to the CPA affidavit was the fact that it could not be guaranteed that the various CPAs utilized by applicants would be familiar with the technical aspects of the DBE program, and that such CPAs would only, and could only, certify the PNW of applicants based on the information provided to them, which would not be available to the recipients if an affidavit were allowed to supplant the current requirement of actual documentation. This, they speculated, could lead to potential misinformation and, as a consequence, various forms of disclaimers and waivers by the CPAs in order to shield them from liability based on an applicant's supply of faulty or incomplete information. Accordingly, a majority of commenters opposed were concerned that this proposed alternative, while appearing more efficient, would open the door to, and increase the potential for, fraud and abuse by reducing the level of scrutiny with which a recipient could exercise over the applications submitted and in making the ultimate eligibility determinations.

The Department is clearly concerned with maintaining the integrity of the program. Central to the narrow tailoring of the DBE program is the PNW requirement, and as such there is a great need to ensure that every measure is taken to qualify applicants who are truly socially and economically disadvantaged within the meaning of the statutes governing the DBE program and as intended by Congress. Thus, a thorough eligibility determination process that is not overly burdensome is required. Having been persuaded by the recipients' comments opposing the CPA option on grounds of maintaining program integrity, the Department has decided not to adopt this proposal. Therefore, individual applicants are required to submit their personal income tax information to DOT recipients so that the recipients themselves can make unqualified and accurate determinations of applicants' eligibility under the DBE program.

It should be emphasized that the privacy and confidentiality concerns

raised by many of the commenters does not go unheeded. The final rule, as it has existed since 1999, explicitly requires that the personal financial information of applicants be kept strictly confidential. This confidentiality requirement is not taken lightly, and cannot and will not be compromised. We note that the regulation has been amended previously to prohibit the release by recipients of applicants' PNW-related personal financial information, even in the face of State freedom of information or open records laws.

We understand the justifiable privacy concerns associated with collecting personal tax returns; nevertheless, it is incumbent upon the Department to safeguard the integrity of the program. Providing the recipients with the necessary means and information to determine the eligibility of applicants to participate in the DBE program is critical to accomplishing this end, and such determinations must be unqualified and verified. This, we believe, is necessary to ensure that the DBE program is indeed narrowly tailored, so as to comply with *Adarand* and its progeny.

The 2001 NPRM went further in its proposed changes to § 26.67 as to the calculation of an applicant's PNW. The proposed change addressed vested pension plans, Individual Retirement Accounts, 401(k) accounts, and 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. We proposed two options: (1) That PNW should 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; and/or (2) to exclude such assets altogether from the PNW calculation.

As with the PNW proposal, the public comments received regarding retirement assets were sharply divided. Some commenters suggested that either method would be acceptable. One commenter offered a variation on these two proposed methods of calculating PNW—having applicants list their accounts and like assets, but not actually including them in the PNW calculation unless they are accessed. Another commenter suggested only counting such assets at the point they become vested.

A substantial number of other commenters opposed the inclusion of pension plans and other retirement assets in the PNW calculation, arguing that only liquid assets should be included, and because such assets are

not available without penalty they should not be counted. These commenters also voiced the concern that calculating the penalty (*i.e.*, present value minus taxes and interest penalties if withdrawn) would be too problematic and burdensome on small business owners and recipients. It would also be difficult to verify. Others suggested that retirement assets have no bearing on whether a particular DBE has the present ability to do the required work within the program, and therefore should be excluded from any PNW calculation. To include such assets in the PNW calculation, some commenters contended, would be to penalize DBEs for investing wisely.

A similarly substantial number of commenters, mostly recipients, strongly urged the inclusion of pension plans and other retirement assets in the PNW calculation. Many supporters of the inclusion of such assets stressed that to exclude them would go against generally accepted accounting practices. One commenter stated that the proposal of counting the assets and then taking into account the consequent liability is fairer than simply counting the asset in whole. Other commenters suggested that it is important to include these assets in the PNW calculation because it would prevent applicants from diverting funds to such accounts in order to meet the PNW requirement, and thereby preclude any possibility of fraud or abuse. One commenter stated that retirement assets are plainly assets, and therefore should be included in any accounting of PNW, taking appropriate account of penalties and present value.

Although retirement assets may not be readily available as sources of financing for business operations, they are part of a person's overall wealth. While we understand that it may be difficult to calculate the assets, we must maintain the integrity of the program and ensure that the calculation reflects the individual's true wealth. To exclude these assets would be misleading and could compromise the integrity of the program. Therefore, we are continuing to require that the present value of assets be counted. Recipients should count only the present value of the retirement savings or investment device toward the personal net worth calculation. That is, the recipient needs to determine how much the asset is actually worth today, not what its face value is or what the individual's return on it may be at some point in the future. In making this determination, the recipient would subtract the interest or tax penalties the individual would incur if he or she withdrew the assets today.

Retainage

As the Department noted in the preamble to the February 1999 final rule, delays in payment have long been one of the most significant barriers to the competitiveness, and in some cases the viability, of small subcontractors. One of the delays in payment which subcontractors have been most concerned about is the payment of retainage. Subcontractors have told us they often finish their work on a contract months or years before the end of the project on which the prime contractor is working, but the prime contractor does not pay them fully until after the recipient has paid retainage to the prime contractor at the end of the entire project. To help surmount this barrier, the 1999 final rule requires prime contractors to pay retainage to subcontractors promptly after the subcontractors satisfactorily complete their work.

Many states and other recipients have responded creatively to this provision, taking such measures as making incremental payments to prime contractors or eliminating retainage altogether. Where recipients have not taken such measures, however, prime contractors have complained that the requirement to pay subcontractors fully before the recipient pays retainage to the prime contractor is a financial hardship on prime contractors.

In order to address the prime contractors' concerns without diminishing the benefit of the existing provision to subcontractors, the Department proposed three approaches: (1) A recipient could eliminate retainage entirely, neither retaining funds from prime contractors nor permitting prime contractors to hold retainage from subcontractors; (2) a recipient could decide not to retain funds from prime contractors, but give prime contractors discretion to hold retainage from subcontractors (the recipient would require prime contractors to pay subcontractors in full after satisfactory completion of the subcontractor's work); or (3) the recipient could hold retainage from prime contractors but make incremental inspections and approvals of the prime contractor's work at various stages of the project (the recipient would pay the prime contractor the portion of the retainage based on these approvals), and the prime contractor, in turn, would be required to promptly pay all retainage owed to the subcontractor for satisfactory completion of the approved work.

We received eighty-four comments on the issue of retainage. Several commenters favored the proposed

changes, with most agreeing that options (1) and (3) are best, so long as they would not conflict with state law. A majority of commenters favored the proposed changes with modifications. Several commenters noted the difficulty on prime contracts in implementing the three options when it may be difficult to evaluate the quality of each subcontractor's work in situations where the result of the subcontractor's work may not be known until other work is performed on top of it. In twenty-two letters submitted, option (3) was pointed out as the best because commenters said, of the need for prime contractors to have the flexibility to hold retainage until the state accepts the portion of the work performed by the subcontractor. Another commenter recommended a fourth option: all retainage amounts must be returned within fifteen business days of satisfactory completion of the work, regardless of whether the prime contractor was paid.

Several commenters requested a definition of "satisfactory completion." For purposes of this provision, we have defined satisfactory completion of a subcontractor's work as 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 considered satisfactorily completed.

Twenty-three commenters disagreed entirely with the proposed changes, including eleven State DOTs. Many of these commenters were concerned that one or more of the options could conflict with state laws, or force recipients into a "cookie cutter" solution. Others found option (3) unworkable, costly, or in need of a phase-in period for implementation. A few commenters recommended the complete elimination of retainage. They pointed to the root causes of difficulty in recouping retainage—such as inspector delays and inefficiency—that lead to the contractors being unduly penalized.

The Department wants recipients to have flexibility in their implementation of retainage. The Department believes that it is best to implement solutions that minimize difficulties for both subcontractors and prime contractors. Current § 26.29 addresses the difficulties caused by retainage for subcontractors, but does so in a way that prime contractors were concerned shifted too much of the burden to them. The purpose of the amendments to § 26.29 is to mitigate the problems

raised by prime contractors while retaining the benefits of the section to subcontractors. The Department also believes that recipients should have flexibility in their implementation of this section. For these reasons, we are adopting the proposed amendments and permitting recipients to choose which of the three options to use. Whichever option the recipient chooses, it must apply it uniformly to all contracts. We are defining "prompt" as no later than thirty days. Based on our experience in program review thirty days was the most common length of time suggested by recipients. The Department believes that this is a sensible amount of time for payment of retainage.

Size Standard

One of the purposes of the DBE rule is to make it possible for small firms to grow. This includes the opportunity for subcontractors to become able to compete as prime contractors. To be able to perform prime contracts, companies often need to be larger and have more resources than they had as subcontractors. Frequently, firms attempting to grow will perform both prime contracts and subcontracts. This may create a dilemma for DBE firms in some instances. In order to work as prime contractors, firms may need to grow beyond the limits of the SBA size standards applicable to their subcontracting field. If they do, then recipients may decertify the companies because they no longer qualify as small businesses. A number of firms have expressed concern that this situation penalizes success and impedes achievement—an important objective of the DBE program.

We have issued guidance stating that recipients should not totally decertify a firm because it exceeds the size standard for one or more of its activities. Under § 26.65(a), if a firm meets the size standard for one type of work (e.g., as a general contractor), it should continue to be certified and receive DBE credit for that type of work, even if it has exceeded the size standard for another type of work (e.g., as a specialty subcontractor). When its specific section exceeds particular size standards, the firm will not remain eligible and receive DBE credit for this type of activity, but will retain its certification for its other areas that remain DBE eligible. It is important for recipients to make these distinctions, as it is not appropriate for a recipient to decline to certify a firm for all purposes when the firm meets SBA size standards with respect to some of its activities. However, recipients must be careful to award DBE credit to a firm

only in those areas in which it does meet size standards.

The Department sought comment on whether any modifications of the rule to address further the situations of firms that work as both prime contractors and subcontractors. There was no proposed language offered, but instead used recently issued guidance to shape the issue. Ten commenters favored changes with some modification or variation. One comment noted that the proposal raises concerns that DBEs who graduate from one type of work area are devising creative approaches to restructure their companies so they can remain in the DBE program. Another commenter favored change, but wanted to increase the certification gross receipts cap to \$25,000,000. The gross receipts cap is statutory, and the Department's discretion to raise it is limited to making adjustments for inflation.

Some commenters may have believed that the guidance language was a proposed change, but it was not. The major objections from those commenters opposed are that the change would be confusing and create tracking problems for the recipients. Several commenters noted questions that would be raised by the changes, including how often size standards should be checked, how it should be measured, and by whom. We recommend that size determinations be reviewed by the unified certification agency that conducted the most recent certification, and that the certifications be reviewed every three years. As such, we are not making any changes to the provision.

Evidence of Group Membership

Section 26.67 requires that recipients rebuttably presume that members of groups specified in the regulation are disadvantaged. Recipients are further required to obtain a signed, notarized statement of disadvantage from all persons whose membership in a disadvantaged group is relied upon for DBE certification. The current regulation also allows recipients to request additional proof of ethnicity. Several commenters indicated that a signed, notarized statement of ethnicity is sufficient. Other commenters felt that additional proof is necessary, however, and that they should be permitted to request additional proof rather than relying on a checked box on a form. We agree that recipients should continue to have the flexibility to require proof of ethnicity. We caution recipients, however, to apply these standards uniformly.

In particular, recipients should avoid making members of a particular ethnic group routinely meet a higher level of

proof than members of other groups. For example, many recipients accept a driver's license or a birth certificate as adequate proof of group membership. These forms of identification always indicate gender and sometimes may indicate the race of the holder. They often do not designate, however, whether an individual is Hispanic or Native American. In some instances, members of these groups have been required to provide several additional types of proof of ethnicity simply because their driver's license did not indicate their particular group membership.

The Department does not object to recipients' requirements that applicants document group membership. If a recipient chooses to require proof then it should do so uniformly, by requiring at least one piece of evidence from each applicant. A driver's license or a birth certificate may be adequate forms of proof of group membership. In cases where the required proof does not indicate specific races, however, such as Hispanic or Native American, the applicant only should be required to provide the same level of proof as members of other groups. For example, if a birth certificate is adequate for one group, then a single piece of evidence (but not multiple pieces of evidence) may be required from members of other groups. Such single pieces of evidence might include naturalization papers; Indian tribal roll cards; tribal voter registration certificate; a letter from a community group, educational institution, religious leader, or government agency stating that the individual is a member of the claimed group; or, a letter from the individual setting forth specific reasons for believing himself/herself to be a member of the designated group. If a recipient has a reasonable basis for doubting the validity of the asserted group membership of an applicant, then it is appropriate for the recipient to collect additional information. In such a case, the recipient must inform the applicant, in writing, of the reasons for seeking additional documentary evidence. It is our expectation that requiring a written record justifying the need for additional information will help to reduce the number of unnecessary requests.

Confidentiality

In the NPRM we proposed amending the confidentiality section of the regulation to parallel the existing, tighter confidentiality provision of § 26.67 concerning personal net worth information. We received twenty-three comments on this section, all of which

at least in part supported the proposed change. Therefore, recipients may not release confidential business information under any circumstance without the submitter's written consent. This proposal has the effect of extending the protection previously given to PNW-related personal financial information.

Two commenters asked about UCPs and the issue of several people having access to the applicant's confidential information. Section 26.101 requires that all recipients be bound by the regulations in part 26. So while it may be necessary for confidential information to be shared among several UCP participants in the certification process, no one may release the confidential information to an outside party without the submitter's consent. Part 26 specifically intends to preempt disclosure under state or local law, so a recipient may not release this information even under local and State FOIA laws. For information that is not considered or deemed confidential business information, the recipient must comply with State freedom of information or open records laws.

Recipients may continue to report data in formats that do not reveal the submitter's name. For example, § 26.11 requires that recipients keep and maintain information on DBE and non-DBE contractors' and subcontractors' annual gross receipts of the firm. There are a variety of methods by which recipients can keep and maintain confidential information private. For example, each applicant could be assigned a case number, and all confidential matters that might be needed by different resources could refer to the case number, with only a specific entity in possession of the master list for certification purposes.

Economic Disadvantage

The majority of commenters on this section supported removing paragraph (B)(2) under "Economic Disadvantage" in Appendix E to part 26, "Individual Determinations of Social and Economic Disadvantage." This paragraph requires that in the case of applications by individuals to be considered socially and economically disadvantaged on an individual basis, the applicant submit personal financial information about his or her spouse. Because it is inconsistent with the way the Department's personal net worth provisions under § 26.67 work in the case of applicants who are members of a group presumed to be economically and socially disadvantaged, we are deleting it.

The primary result of this change is that the Department no longer requires

spouses to complete PNW forms in addition to the applicant, even in cases of individual requests to be considered as disadvantaged (the Department never has permitted the routine collection of spousal information in other contexts). We are preserving, however, the ability for recipients to request relevant information from spouses on a case-by-case basis when the recipient has a specific reason to look into the spouse's finances. For example, when there has been a transfer of assets to the spouse within the previous two years, it is appropriate to collect certain information about the spouse, because assets transferred to the spouse are attributed to the applicant for purposes of calculating PNW. We also recognize that the recipients will want to be able to investigate a spouse's finances in situations where the recipient suspects the applicant is fraudulently transferring assets over to his/her spouse in order to qualify as a disadvantaged individual or when there is an affiliation relationship between the applicant's business and a spouse's business.

Credit for Trucking Firms

The issue of how to count DBE credit for trucking operations, which was debated vigorously among commenters to the 1999 final rule, has continued to be controversial. The SNPRM that led to the 1999 final rule proposed that to be performing a commercially useful function (CUF), a DBE trucking firm had to own fifty percent of the trucks it used in connection with a contract. A number of comments said that this requirement was out of step with industry practice, which commonly involves companies leasing trucks from owner-operators and other sources for purposes of a project. The final rule provided that a DBE need not provide all the trucks on a contract to receive credit for transportation services, but it must control the trucking operations for which it seeks credit. It must have at least one truck and driver of its own, but it can lease trucks owned by others, both DBEs and non-DBEs, including owner-operators. For work done with its own trucks and drivers, and for work done with DBE lessees, the firm receives credit for all transportation services provided. For work done with non-DBE lessees, the firm gets credit only for the fees or commissions it receives for arranging the transportation services, because the services themselves are being performed by non-DBEs.

In the years since the publication of the final rule, the Department has received communications from a number of state DOTs, trucking

companies, and other parties saying that the portion of the rule limiting credit for trucks leased from non-DBE firms reduced opportunities for DBE trucking companies and did not take into account sufficiently the important role of leasing in the trucking industry. In response, the Department asked in the preamble to the May 2001 NPRM whether the rule should expand the credit available for DBE truck leasing (e.g., by counting credit for twice the number of trucks a DBE owned, so that a DBE that owned one truck used on a contract and leased another from a non-DBE firm would get credit for two trucks).

Commenters to the NPRM were divided on the issue. Eleven commenters preferred to leave the current rule in place, citing administrative simplicity and prevention of abuse as their major reasons. Five commenters endorsed the example suggested in the NPRM preamble of permitting credit for twice the number of trucks a DBE owns, and six others suggested variations on that example (e.g., authorizing credit for three times the number of trucks owned by the DBE). Some commenters emphasized the need for safeguards to ward off potential abuse of the provision. Twenty-three commenters favored permitting credit for all leased trucks used by a DBE on a contract, subject to certain safeguards (e.g., for trucks on long-term leases, the DBE firm is responsible for supervision and control of all trucks on the contract).

The principle that DBE participation should be counted only for work performed with a DBE firm's own forces is an important one that the Department's DBE program follows consistently. For example, when a DBE firm subcontracts part of its work to a non-DBE firm, the subcontracted portion does not count toward DBE goals, as per § 26.55(a)(3). The Department's existing counting provision for trucking services was explicitly designed to be consistent with this principle (64 FR 5116 (Feb. 2, 1999)). Allowing credit for unlimited use of non-DBE leased trucks could also lead to program abuses and reduce DBE contracting opportunities for DBEs in other types of work.

At the same time, the Department is aware that flexibility in administering the DBE program is important to recipients and contractors, and we are sensitive to the concerns of trucking companies that opportunities may have been reduced under the 1999 final rule. In light of these factors, the Department has granted program waivers to two states, Indiana and Wisconsin,

permitting credit for leased trucks for twice the number of trucks owned by DBE trucking firms on a contract. The Department believes that this approach reasonably accommodates many of the concerns commenters expressed with respect to reduced DBE trucking participation while not departing from the Department's principle of counting DBE credit only for work performed by DBE firms themselves.

Consequently, the Department, in this final rule, will adopt the following approach. Recipients may count for DBE credit the dollar volume attributable to no more than twice the number of trucks on a contract owned by a DBE firm or leased from another DBE firm, but is not required to do so. For example, if DBE Firm X owned two trucks, leased two others from another DBE firm, and leased six others from a non-DBE firm, the DBE credit authorized for Firm X's participation would be equivalent to the dollar volume of work attributable to eight trucks (four trucks owned by or leased from DBEs, multiplied by two). DBE credit for the remaining two non-DBE trucks leased for the contract would be limited to the fees or commissions received by the DBE firm pertaining to those two trucks.

The final rule permits, but does not require, recipients to count credit in this manner. That is, a recipient could choose to continue the counting provisions its DBE program adopted to comply with the 1999 final rule. If a recipient chooses to modify its counting provisions to count the additional credit for non-DBE lessees permitted by today's amendment, it must do so via a change to its DBE program approved by the cognizant FHWA, FTA, or FAA office. The OA approval is necessary to ensure the appropriate safeguards are taken by the recipients to prevent fraud.

III. Alaska Native Corporations

In § 26.73(h) of the current DBE rule, the Department codified its interpretation of former 49 CFR part 23 that ANC-owned firms, as well as firms owned by Indian tribes and Native Hawaiian Organizations, must meet the DBE rule's eligibility standards concerning size and control. In the preamble to the February 1999 final rule (64 FR 5121 (Feb. 2, 1999)), the Department explained why it did not believe that 43 U.S.C. 1626(e), a provision of the Alaska Native Claims Settlement Act (ANCSA), mandated different treatment for ANC-owned firms in the DOT DBE program. The Department continues to believe that the legal and policy reasoning behind this provision was sound. However, an

amendment to Public Law 107–117 “making appropriations for the Department of Defense for the fiscal year ending September 30, 2002, and for other purposes,” has superceded the application of § 26.73(h) to ANC-owned firms.

Section 702 of Public Law 107–117 amended 43 U.S.C. 1626(e), a provision of the Alaska Native Claims Settlement Act, to say that:

Any entity (*i.e.*, a subsidiary, partnership, or joint venture of an ANC) that satisfies subsection (e)(2) of this section (which establishes ownership and control criteria for ANC-related entities) that has been certified under section 8 of Public Law 85–536 (*i.e.*, is certified by the Small Business Administration under the 8(a) or small disadvantaged business programs) is a Disadvantaged Business Enterprise for the purposes of Public Law 105–178 (*i.e.*, TEA–21).

Based on the above language, an entity meeting criteria to be an ANC-owned firm must be certified as a DBE, even if it does not meet size, ownership, and control criteria otherwise applicable to DBEs. For example, an ANC-related entity could exceed SBA small business size standards or have its daily business operations controlled by a non-disadvantaged individual and still be certified if it met the section 702 criteria.

Consequently, the Department is deleting references to ANC-related entities from § 26.73(h) and creating a new § 26.73(i). The new paragraph sets forth certification criteria for ANC-related entities consistent with 43 U.S.C. 1626(e). Because these certification criteria differ from those applicable to all other DBE applicants, recipients would not use the new DOT Uniform Application Form for ANC-related entities. Recipients instead would collect (and applicants would have to provide) sufficient documentation that an ANC-related entity meets the new criteria including information sufficient to allow the recipients to administer their DBE programs with respect to ANC-related entities. If an ANC-related entity did not meet all the requirements (*e.g.*, it had not been certified by SBA), then its certification would continue to be processed under § 26.73(h), in the same manner as Indian Tribal firms.

The statutory requirement to treat ANC-owned entities differently from all other applicants for certification in the DBE program, because of the reference in section 702 to TEA–21, on its face applies only to firms seeking work on FTA- and FHWA-assisted contracts. The statute does not apply to firms seeking work on FAA-assisted contracts. To

avoid confusion and unnecessary administrative complexity, however, in this rule the Department is applying the altered certification requirements for ANC-related entities to all parts of the DBE program, including FAA-assisted contracts and concessions.

IV. Clarification Regarding Multi-Year Projects and Other Revisions

Multi-Year Projects

A recipient of DOT funds—FAA, FTA, or FHWA—may set an overall project goal for a particular project. Typically, such a goal would be used for a large multi-year project. The recipient’s overall project goal for the project would be separate from the recipient’s annual overall goal for the rest of its DOT-assisted contracting activities. The recipient’s submission of the overall project goal would have to meet the same requirements as for any other overall goal (§ 26.45(f)(3)), specifically including a breakout of the participation anticipated through race neutral and race conscious means. DOT would review the goal submission just as it does in other cases. This change to the regulation would apply to all such projects the option for a project goal currently available to design-build contracts.

With respect to its other DOT-assisted contracting activities, the recipient would also submit its regular annual overall goal for review. In doing so the recipient, in calculating the annual overall goal for a given fiscal year, would not consider funds or contracting opportunities attributable to the project covered by the separate project goal. For example, suppose a recipient will expend \$150 million on Project X in Years 1–3. The recipient will also expend \$40 million on other projects in each year during the same period. The recipient could submit a single project overall goal for Project X, based on the \$150 million to be expended over the life of the project. The recipient would also submit an overall goal each year for its other DOT-assisted contracting activities in Year 1, Year 2, and Year 3, based on the \$40 million the recipient was expending in each of those years.

An overall project goal can be used for a multi-modal project. For example, suppose FHWA Recipient W and FTA Recipient Z are cooperating on a project, which involves the total expenditure of \$500 million. Recipients W and Z can submit jointly a single overall project goal for the project. W and Z would also each submit regular annual overall goals for their other activities during the time that the project was under way.

Many large projects with which it could be useful to establish an overall project goal include design-build contracts. In such a case, the overall project goal would serve as the goal for the master contractor. The master contractor would then proceed to establish contract goals for the subcontracts it is letting at a level appropriate to meet the race conscious portion of the project overall goal.

Currently, part 26 explicitly authorizes the use of project goals in FAA and FTA projects. While nothing in the rule precludes the use of project goals in FHWA projects, the rule does not explicitly mention FHWA projects in this context. It is the Department’s view, however, that recipients of funds from all three operating administrations can make use of project goals.

Clarification Concerning Primary Industry Classification

Section 26.5 of the DBE final rule defined primary industrial classification as the four-digit Standard Industrial Classification (SIC) code designation defined in 13 CFR part 121 by the Small Business Administration. In the final rule we further stated that as the North American Industrial Classification System (NAICS) replaces the SIC system, reference to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. We would like to take this opportunity to remind recipients that effective October 1, 2000, the Small Business Administration is no longer using the SIC system for its small business standards. The SBA published a final rule on May 15, 2000, adopting small business size standards based on the NAICS (65 FR 30840). The new table of small business size standards that accompanied the rule contained errors, so the SBA published a replacement table in the **Federal Register** on September 5, 2001 (65 Fed. Reg. 53533). Therefore, the term “Standard Industrial Classification” and the acronym “SIC” will be replaced with “North American Industrial Classification System” and the acronym “NAICS” throughout the text of the regulation. Although this change was not included in the Interim Final Rule, the change is editorial in nature and does not require notice and comment.

The SBA rule on NAICS standards can be obtained through the Internet at: <http://www.sba.gov/size/>. Further information about NAICS, including a table matching SIC codes to NAICS codes, is available on the U.S. Bureau of Census’ Web page at: <http://census.gov/epcd/www/naics.html>. The *North American Industry Classification*

Manual—United States, 1997 is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA, 22161; by calling 1 (800) 553-6847; or via the Internet at: <http://www.ntis.gov/product/naics.htm>.

Regulatory Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Provisions

This rule is not a significant regulation under either Executive Order 12866 or DOT Regulatory Policies and Provisions. The rule will not impose any new costs on recipients or contractors. It simply would make administrative adjustments concerning existing provisions and assist contractors by implementing the SBA-DOT MOU. It would also reduce burdens on contractors and recipients through the use of new uniform forms.

Regulatory Flexibility Act Analysis

The Department certifies that this rule will not have significant economic effects on a substantial number of small entities. While the rule affects small entities, it does not have a significant economic impact on anyone.

Paperwork Reduction Act

This rule contains information collection requirements. As required by the Paperwork Reduction Act of 1995 (the PRA, 44 U.S.C. 3507(d)), the Department will submit these requirements to the Office of Information And Regulatory Affairs of the Office of Management and Budget for review.

As noted elsewhere in this preamble, the Department adopted the suggestion of having one standard reporting form in the February 2, 1999, DBE final rule. The Uniform Semi-Annual Report of DBE Awards or Commitments and Achievements form is contained in Appendix B. At the present time, the Department has an information collection item approved under the Paperwork Reduction Act. This is for a quarterly DBE data report from recipients to DOT (OMB No. 2105-0510). This approval expired July 31, 2001. Because the reporting requirement has been reduced to semi-annually, the burden has been reduced.

Firms applying for DBE certification must provide information to recipients to allow them to review the firm's continuing eligibility. The 1999 DBE final rule also called for a single, uniform, nationwide certification application form. Part 26 requires firms applying for DBE certification to provide information to recipients to allow them to make eligibility decisions.

Currently, an applicant firm may be required to fill out different applications for FAA, FHWA and FTA recipients. The Department believes that requiring one uniform application will reduce the paperwork burden. The Uniform Certification Application form is contained in Appendix F.

This rule provides forms for the Unified Certification Program for recipients. UCP certifying agencies are responsible for maintaining a directory of certified DBE firms. Instead of the hundreds that used to be required, now only 52 consolidated directories will exist. Additionally, recipients must submit DBE programs to be approved by the Department, including calculations of overall goals. As they complete this requirement, recipients may temporarily expend more hours than in the past on information-related tasks.

Federalism

The Department has determined that this final rule will not have Federalism impacts sufficient to warrant preparation of a Federalism assessment.

List of Subjects in 49 CFR Part 26

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant-programs—transportation, Mass transportation, Minority businesses, Reporting and recordkeeping requirements.

Issued this 4th day of June, 2003, at Washington, DC.

Norman Y. Mineta,

Secretary of Transportation.

■ For the reasons set forth in the preamble, the Department amends 49 CFR part 26 as follows:

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

■ 1. The authority citation for 49 CFR part 26 continues to read as follows:

Authority: 23 U.S.C. 324; 41 U.S.C. 2000d, *et seq.*; 49 U.S.C. 1615, 47107, 47113, 47123; Pub. L. 105-178, Sec. 1101(b), 112 Stat. 107, 113.

■ 2. In 49 CFR part 26, the term “Standard Industrial Classification” is revised to read “North American Industrial Classification System” wherever it occurs. The acronym “SIC” is revised to read “NAICS” wherever it occurs.

■ 3. Amend § 26.5 by adding, in alphabetical order among the existing definitions, a definition of “DOT/SBA MOU Memorandum of Understanding or MOU” after “DOT-assisted contract and

a definition of “SBA certified firm” after “Small Business Administration”, and by revising the definition of “Primary industry classification”, to read as follows:

§ 26.5 What do the terms in this part mean?

* * * * *

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

* * * * *

Primary industry classification means the North American Industrial Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the *North American Industry Classification Manual—United States, 1997* which is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA, 22161; by calling 1 (800) 553-6847; or via the Internet at: <http://www.ntis.gov/product/naics.htm>.

* * * * *

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.

* * * * *

■ 4. Revise § 26.29 to read as follows:

§ 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.

■ 5. In § 26.37, revise paragraph (b) to read as follows:

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

* * * * *

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs.

* * * * *

■ 6-7. In § 26.55, revise paragraphs (d)(5) and (h) to read as follows:

§ 26.55 How is DBE participation counted toward goals?

* * * * *

(d) * * *

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

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

* * * * *

(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.

■ 8. Revise § 26.61(c) to read as follows:

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

* * * * *

(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).

* * * * *

■ 9. Revise § 26.63(a) to read as follows:

§ 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.

* * * * *

■ 10-11. Revise § 26.67(a)(2) and remove and reserve paragraph (c) as follows:

§ 26.67 What rules determine social and economic disadvantage?

(a) * * *

(1) * * *

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

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

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

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

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

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

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

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

* * * * *

■ 12. Amend § 26.73 by revising paragraph (h), and adding a new paragraph (i), to read as follows:

§ 26.73 What are other rules affecting 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 § 26.35. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in § 26.71.

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

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

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

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

electing directors, the general partner, or principal officers; and

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

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

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

■ 13. Amend § 26.83 by revising paragraphs (c)(7) introductory text and (c)(7)(i) to read as follows:

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

* * * * *

(c) * * *

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

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

* * * * *

■ 14. Add a new § 26.84, to read as follows:

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

(a) When an SBA-certified firm applies for certification pursuant to the DOT/SBA MOU, you must accept the certification applications, forms and packages submitted by a firm to the SBA for either the 8(a) BD or SDB programs, in lieu of requiring the applicant firm to complete your own application forms and packages. The applicant may submit the package directly, or may request that the SBA forward the package to you. Pursuant to the MOU,

the SBA will forward the package within thirty days.

(b) If necessary, you may request additional relevant information from the SBA. The SBA will provide this additional material within forty-five days of your written request.

(c) Before certifying a firm based on its 8(a) BD or SDB certification, you must conduct an on-site review of the firm (*see* § 26.83(c)(1)). If the SBA conducted an on-site review, you may rely on the SBA's report of the on-site review. In connection with this review, you may also request additional relevant information from the firm.

(d) Unless you determine, based on the on-site review and information obtained in connection with it, that the firm does not meet the eligibility requirements of Subpart D of this part, you must certify the firm.

(e) You are not required to process an application for certification from an SBA-certified firm having its principal place of business outside the state(s) in which you operate unless there is a report of a "home state" on-site review on which you may rely.

(f) You are not required to process an application for certification from an SBA-certified firm if the firm does not provide products or services that you use in your DOT-assisted programs or airport concessions.

■ 15. Redesignate § 26.85 as § 26.86. Within the redesignated § 26.86, redesignate paragraphs (b) and (c) as paragraphs (c) and (d) and add a new paragraph (b) to read as follows:

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

* * * * *

(b) When you deny DBE certification to a firm certified by the SBA, you must notify the SBA in writing. The notification must include the reason for denial.

* * * * *

■ 16. Add a new § 26.85, to read as follows:

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

(a) Upon receipt of a signed, written request from a DBE-certified firm, you must transfer to the SBA a copy of the firm's application package. You must transfer this information within thirty days of receipt of the request.

(b) If necessary, the SBA may make a written request to the recipient for additional materials (*e.g.*, the report of the on-site review). You must provide a copy of this material to the SBA within forty-five days of the additional request.

(c) You must provide appropriate assistance to SBA-certified firms, including providing information pertaining to the DBE application process, filing locations, required documentation and status of applications.

■ 17. Amend § 26.87 by redesignating paragraphs (h) through (j) as paragraphs (i) through (k) and by adding a new paragraph (h) to read as follows:

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

* * * * *

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

* * * * *

■ 18. Amend § 26.89 by revising paragraphs (a)(1) and (f)(7) to read as follows:

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

(a)(1) If you are a firm that is denied certification or whose eligibility is

removed by a recipient, including SBA-certified firms applying pursuant to the DOT/SBA MOU, you may make an administrative appeal to the Department.

* * * * *

(f) * * *

(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.

* * * * *

■ 19. In § 26.109, revise paragraph (a)(2) to read as follows:

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

(a) * * *

(1) * * *

(2) Notwithstanding any provision of Federal or state law, you must not release information that may be reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 in which the disadvantaged status of the individual is in question.

■ 20. In Appendix B, revise the heading and add a form reading as follows:

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

BILLING CODE 4910-62-P

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

1. Indicate the DOT Operating Administration (OA) that provides your Federal financial assistance. If assistance comes from more than one OA, use separate reporting forms for each OA. If you are an FTA recipient, indicate your Vendor Number in the space provided.
2. If you are an FAA recipient, indicate the relevant AIP Numbers covered by this report. If more than six, attach a separate sheet.
3. Specify the Federal fiscal year (i.e., October 1 – September 30) in which the covered reporting period falls.
4. State the date of submission of this report.
5. Check the appropriate box that indicates the reporting period that the data provided in this report covers. If this report is due June 1, data should cover October 1 – March 31. If this report is due December 1, data should cover April 1 – September 30. If this report is due to the FAA, data should cover the entire year.
6. Name of the recipient.
7. State your annual DBE goal(s) established for the Federal fiscal year of this report to be submitted to and approved by the relevant OA. Your Overall Goal is to be reported as well as the breakdown for specific Race Conscious and Race Neutral Goals (both of which include gender-conscious/neutral goals). The Race Conscious Goal portion should be based on programs that focus on and provide benefits only for DBEs. The use of contract goals is a primary example of a Race Conscious measure. The Race Neutral Goal portion should include programs that, while benefiting DBEs, are not solely focused on DBE firms. For example, a small business outreach program, technical assistance, and prompt payment clauses can assist a wide variety of businesses in addition to helping DBE firms.
- 8-9. The amounts in items 8(A)-9(I) should include all types of prime contracts awarded and all types of subcontracts awarded or committed, including: professional or consultant services, construction, purchase of materials or supplies, lease or purchase of equipment and any other types of services. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.
- 8(A). Provide the total dollar amount for all prime contracts assisted with DOT funds that were awarded during this reporting period.
- 8(B). Provide the total number of all prime contracts assisted with DOT funds that were awarded during this reporting period.
- 8(C). From the total dollar amount awarded in item 8(A), provide the dollar amount awarded to certified DBEs during this reporting period.
- 8(D). From the total number of prime contracts awarded in item 8(B), specify the number awarded to certified DBEs during this reporting period.
- 8(E). From the total dollars awarded in 8(C), provide the dollar amount awarded to DBEs through the use of Race Conscious methods. See the definition of Race Conscious Goal in item 7 and the explanation of project types in item 8 to include in your calculation.
- 8(F). From the total number of prime contracts awarded in 8(D), specify the number awarded to DBEs through Race Conscious methods.
- 8(G). From the total dollar amount awarded in item 8(C), provide the dollar amount awarded to certified DBEs through the use of Race Neutral methods. See the definition of Race Neutral Goal in item 7 and the explanation of project types in item 8 to include.
- 8(H). From the total number of prime contracts awarded in 8(D), specify the number awarded to DBEs through Race Neutral methods.
- 8(I). Of all prime contracts awarded this reporting period, calculate the percentage going to DBEs. Divide the dollar amount in item 8(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.
- 9(A)-9(I). Items 9(A)-9(I) are derived in the same way as items 8(A)-8(I), except that these calculations should be based on subcontracts rather than prime contracts. Unlike prime contracts, which may only be awarded, subcontracts may be either awarded or committed.
- 10(A)-11(I). For all DBEs awarded prime contracts and awarded or committed subcontracts as indicated in 8(C)-(D) and 9(C)-(D), break the data down further by total dollar amount as well as the number of all contracts going to each ethnic group as well as to non-minority women. The "Other" category includes those DBEs who are not members of the presumptively disadvantaged groups already listed, but who are determined eligible for the DBE program on an individual basis (e.g. a Caucasian male with a disability). The TOTALS value in 10(H) should equal the sum of 8(C) plus 9(C), and similarly, the TOTALS value in 11(H) should equal the sum of 8(D) plus 9(D). Column I should only be filled out if this report is due on December 1, as indicated in item 5. The values for this column are derived by adding the values reported in column H in your first report with the values reported in this second report.
- 12(A). Provide the total number of prime contracts completed during this reporting period that had Race Conscious goals. Race Conscious contracts are those with contract goals or another Race Conscious measure.
- 12(B). Provide the total dollar value of prime contracts completed this reporting period that had Race Conscious goals.
- 12(C). Provide the total dollar amount of DBE participation on all Race Conscious prime contracts completed this reporting period that was necessary to meet the contract goals on them. This applies only to Race Conscious prime contracts.
- 12(D). Provide the actual total DBE participation in dollars on the race conscious prime contracts completed this reporting period.
- 12(E). Of all the prime contracts completed this reporting period, calculate the percentage of DBE participation. Divide the actual total dollar amount in 12(D) by the total dollar value provided in 12(B) to derive this percentage. Round to the nearest tenth.
- 13(A)-13(E). Items 13(A)-13(E) are derived in the same manner as items 12(A)-12(E), except these figures should be based on Race Neutral prime contracts (i.e. those with no race conscious measures).
- 14(A)-14(E). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above.
15. Name of the Authorized Representative preparing this form.
16. Signature of the Authorized Representative.
17. Phone number of the Authorized Representative.
18. Fax number of the Authorized Representative.

****Submit your completed report to your Regional or Division Office.**

UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS

Please refer to the Instructions sheet for directions on filling out this form

1. Submitted to (check only one): FHWA FAA FTA--Vendor Number _____

2. AIP Numbers (FAA Recipients Only): _____

3. Federal fiscal year in which reporting period falls: FY _____ 4. Date This Report Submitted: _____

5. Reporting Period Report due June 1 (for period Oct. 1-Mar. 31) Report due Dec. 1 (for period April 1-Sept. 30)

FAA Annual Report

6. Name of Recipient: _____

7. Annual DBE Goal(s): _____ Race Conscious Goal _____ % Race Neutral Goal _____ % OVERALL Goal _____ %

	Race Conscious Goal			Race Neutral Goal			OVERALL Goal		
	A	B	C	D	E	F	G	H	I
AWARDS/COMMITMENTS MADE DURING THIS REPORTING PERIOD (total contracts and subcontracts awarded or 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									
TOTAL									

	Race Conscious Goal			Race Neutral Goal			OVERALL Goal		
	A	B	C	D	E	F	G	H	I
DBE AWARDS/COMMITMENTS THIS REPORTING PERIOD-BREAKDOWN BY ETHNICITY & GENDER	Black American	Hispanic American	Native American	Subcont. Asian American	Asian-Pacific American	Non-Minority Women	Other (i.e., not of any other group listed here)	TOTALS (for this reporting period only)	Year-End TOTALS
10. Total Number of Contracts (Prime and Sub)									
11. Total Dollar Value									

	Race Conscious Goal			Race Neutral Goal			OVERALL Goal		
	A	B	C	D	E	F	G	H	I
ACTUAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD	Number of Prime Contracts Completed	Total Dollar Value of Prime Contracts Completed	DBE Participation Needed to Meet Goal (Dollars)	Total DBE Participation (Dollars)	Percentage of Total DBE Participation				
12. Race Conscious									
13. Race Neutral									
14. Totals									

15. Submitted by (Print Name of Authorized Representative) _____

16. Signature of Authorized Representative _____

17. Phone Number: _____

18. Fax Number: _____

■ 21. In Appendix E, under Economic Disadvantage, remove and reserve section (B)(2).

■ 22. Add a new Appendix F to read as follows:

Appendix F to Part 26—Uniform Certification Application Form

**INSTRUCTIONS FOR COMPLETING THE DISADVANTAGED BUSINESS ENTERPRISE (DBE)
PROGRAM UNIFORM CERTIFICATION APPLICATION**

NOTE: If you require additional space for any question in this application, please attach additional sheets or copies as needed, taking care to indicate on each attached sheet/copy the section and number of this application to which it refers.

Section 1: CERTIFICATION INFORMATION

A. Prior/Other Certifications

Check the appropriate box indicating for which program your firm is currently certified. If you are already certified as a DBE, indicate in the appropriate box the name of the certifying agency that has previously certified your firm, and also indicate whether your firm has undergone an onsite visit. If your firm has already undergone an onsite visit/review, indicate the most recent date of that review and the state UCP that conducted the review.

NOTE: If your firm is currently certified under the SBA's 8(a) and/or SDB programs, you may not have to complete this application. You should contact your state UCP to find out about a streamlined application process for firms that are already certified under the 8(a) and SDB programs.

B. Prior/Other Applications and Privileges

Indicate whether your firm or any of the persons listed has ever withdrawn an application for a DBE program or an SBA 8(a) or SDB program, or whether any have ever been denied certification, decertified, debarred, suspended, or had bidding privileges denied or restricted by any state or local agency or Federal entity. If your answer is yes, indicate the date of such action, identify the name of the agency, and explain fully the nature of the action in the space provided.

Section 2: GENERAL INFORMATION

A. Contact Information

- (1) State the name and title of the person who will serve as your firm's primary contact under this application.
- (2) State the legal name of your firm, as indicated in your firm's Articles of Incorporation or charter.
- (3) State the primary phone number of your firm.
- (4) State a secondary phone number, if any.
- (5) State your firm's fax number, if any.
- (6) State your firm's or your contact person's email address.
- (7) State your firm's website address, if any.
- (8) State the street address of your firm (i.e., the physical location of its offices -- not a post office box address).
- (9) State the mailing address of your firm, if it is different from your firm's street address.

B. Business Profile

- (1) In the box provided, briefly describe the primary business and professional activities in which your firm engages.
- (2) State the Federal Tax ID number of your firm as provided on your firm's filed tax returns, if you have one. This could also be the Social Security number of the owner of your firm.
- (3) State the date on which your firm was officially established, as stated in your firm's Articles of Incorporation or charter.

- (4) State the date on which you and/or each other owner took ownership of the firm.

- (5) Check the appropriate box that describes the manner in which you and each other owner acquired ownership of your firm. If you checked "Other," explain in the space provided.

- (6) Check the appropriate box that indicates whether your firm is "for profit."

NOTE: If you checked "No," then you do NOT qualify for the DBE program and therefore do not need to complete the rest of this application. The DBE program requires all participating firms be for-profit enterprises.

- (7) Check the appropriate box that describes the legal form of ownership of your firm, as indicated in your firm's Articles of Incorporation or charter. If you checked "Other," briefly explain in the space provided.

- (8) Check the appropriate box that indicates whether your firm has ever existed under different ownership, a different type of ownership, or a different name. If you checked "Yes," specify which and briefly explain the circumstances in the space provided.

- (9) Indicate in the spaces provided how many employees your firm has, specifying the number of employees who work on a full-time and part-time basis.

- (10) Specify the total gross receipts of your firm for each of the past three years, as declared in your firm's filed tax returns.

C. Relationships with Other Businesses

- (1) Check the appropriate box that indicates whether your firm is co-located at any of its business locations, or whether your firm shares a telephone number(s), a post office box, any office space, a yard, warehouse, other facilities, any equipment, or any office staff with any other business, organization, or entity of any kind. If you answered "Yes," then specify the name of the other firm(s) and briefly explain the nature of the shared facilities or other items in the space provided.

- (2) Check the appropriate box that indicates whether at present, or at any time in the past:

(a) Your firm has been a subsidiary of any other firm;

(b) Your firm consisted of a partnership in which one or more of the partners are other firms;

(c) Your firm has owned any percentage of any other firm; and

(d) Your firm has had any subsidiaries of its own.

- (3) Check the appropriate box that indicates whether any other firm has ever had an ownership interest in your firm.

- (4) If you answered "Yes" to any of the questions in (2)(a)-(d) or (3), identify the name, address and type of business for each.

D. Immediate Family Member Businesses

Check the appropriate box that indicates whether any of your immediate family members own or manage another company. An "immediate family member" is any person who is your father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law. If you answered "Yes," provide the name of each relative, your relationship to them, the name of the company they own or manage, the type of business, and whether they own or manage the company.

Section 3: OWNERSHIP

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

A. Background Information

- (1) Give the name of the owner.
- (2) State his/her title or position within your firm.
- (3) Give his/her home phone number.
- (4) State his/her home (street) address.
- (5) Check the appropriate box that indicates this owner's gender.
- (6) Check the appropriate box that indicates this owner's ethnicity (check all that apply). If you checked "Other," specify this owner's ethnic group/identity not otherwise listed.
- (7) Check the appropriate box to indicate whether this owner is a U.S. citizen.
- (8) If this owner is not a U.S. citizen, check the appropriate box that indicates whether this owner is a lawfully admitted permanent resident. If this owner is neither a U.S. citizen nor a lawfully admitted permanent resident of the U.S., then this owner is NOT eligible for certification as a DBE owner. This, however, does not necessarily disqualify your firm altogether from the DBE program if another owner is a U.S. citizen or lawfully admitted permanent resident and meets the program's other qualifying requirements.

B. Ownership Interest

- (1) State the number of years during which this owner has been an owner of your firm.
- (2) Indicate the dollar value of this owner's initial investment to acquire an ownership interest in your firm, broken down by cash, real estate, equipment, and/or other investment.
- (3) State the percentage of total ownership control of your firm that this owner possesses.
- (4) State the familial relationship of this owner to each other owner of your firm.
- (5) Indicate the number, percentage of the total, class, date acquired, and method by which this owner acquired his/her shares of stock in your firm.

- (6) Check the appropriate box that indicates whether this owner performs a management or supervisory function for any other business. If you checked "Yes," state the name of the other business and this owner's function or title held in that business.

- (7) Check the appropriate box that indicates whether this owner owns or works for any other firm(s) that has any relationship with your firm. If you checked "Yes," identify the name of the other business and this owner's function or title held in that business. Briefly describe the nature of the business relationship in the space provided.

C. Disadvantaged Status

NOTE: You only need to complete this section for each owner that is applying for DBE qualification (i.e., for each owner who is claiming to be "socially and economically disadvantaged" and whose ownership interest is to be counted toward the control and 51% ownership requirements of the DBE program)

- (1) Indicate in the space provided the total Personal Net Worth (PNW) of each owner who is applying for DBE qualification. Use the PNW calculator form at the end of this application to compute each owner's PNW.
- (2) Check the appropriate box that indicates whether any trust has ever been created for the benefit of this disadvantaged owner. If you answered "Yes," briefly explain the nature, history, purpose, and current value of the trust(s).

Section 4: CONTROL

A. Identify your firm's Officers and Board of Directors:

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

B. Identify your firm's management personnel (by name, title, ethnicity, and gender) who control your firm in the following areas:

- (1) Making financial decisions on your firm's behalf, including the acquisition of lines of credit, surety bonds, supplies, etc.;
 - (2) Estimating and bidding, including calculation of cost estimates, bid preparation and submission;
 - (3) Negotiating and contract execution, including participation in any of your firm's negotiations and executing contracts on your firm's behalf;
 - (4) Hiring and/or firing of management personnel, including interviewing and conducting performance evaluations;
 - (5) Field/Production operations supervision, including site supervision, scheduling, project management services, etc.;
 - (6) Office management;
 - (7) Marketing and sales;
 - (8) Purchasing of major equipment;
 - (9) Signing company checks (for any purpose); and
 - (10) Conducting any other financial transactions on your firm's behalf not otherwise listed.
 - (11) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above perform a management or supervisory function for any other business. If you answered "Yes," identify each person by name, his/her title, the name of the other business in which s/he is involved, and his/her function performed in that other business.
 - (12) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above own or work for any other firm(s) that has a relationship with your firm. If you answered "Yes," identify the name of the firm, the name of the person, and the nature of his/her business relationship with that other firm.
- C. Indicate your firm's inventory in the following categories:**
- (1) **Equipment**
State the type, make and model, and current dollar value of each piece of equipment held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm.
 - (2) **Vehicles**
State the type, make and model, and current dollar value of each motor vehicle held and/or used by your firm. Indicate whether each vehicle is either owned or leased by your firm.
 - (3) **Office Space**
State the street address of each office space held and/or used by your firm. Indicate whether your firm owns or leases the office space and the current dollar value of that property or its lease.
 - (4) **Storage Space**
State the street address of each storage space held and/or used by your firm. Indicate whether your firm owns or leases the storage space and the current dollar value of that property or its lease.
- D. Does your firm rely on any other firm for management functions or employee payroll?**
Check the appropriate box that indicates whether your firm relies on any other firm for management functions or for employee payroll. If you answered "Yes," briefly explain the nature of that reliance and the extent to which the other firm carries out such functions.
- E. Financial Information**
- (1) Banking Information
 - (a) State the name of your firm's bank.
 - (b) State the main phone number of your firm's bank branch.
 - (c) State the address of your firm's bank branch.
 - (2) Bonding Information
 - (a) State your firm's Binder Number.
 - (b) State the name of your firm's bond agent and/or broker.
 - (c) State your agent's/broker's phone number.
 - (d) State your agent's/broker's address.
 - (e) State your firm's bonding limits (in dollars), specifying both the Aggregate and Project Limits.
- F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of persons or firms securing the loan, if other than the listed owner:**
State the name and address of each source, the name of the person securing the loan, the original dollar amount and the current balance of each loan, and the purpose for which each loan was made to your firm.
- G. List all contributions or transfers of assets to/from your firm and to/from any of its owners over the past two years:**
Indicate in the spaces provided, the type of contribution or asset that was transferred, its current dollar value, the person or firm from whom it was transferred, the person or firm to whom it was transferred, the relationship between the two persons and/or firms, and the date of the transfer.
- H. List current licenses/permits held by any owner or employee of your firm.**
List the name of each person in your firm who holds a professional license or permit, the type of license or permit, the expiration date of the permit or license, and the license/permit number and issuing State of the license or permit.
- I. List the three largest contracts completed by your firm in the past three years, if any.**
List the name of each owner or contractor for each contract, the name and location of the projects under each contract, the type of work performed on each contract, and the dollar value of each contract.
- J. List the three largest active jobs on which your firm is currently working.**
For each active job listed, state the name of the prime contractor and the project number, the location, the type of work performed, the project start date, the anticipated completion date, and the dollar value of the contract.
- AFFIDAVIT & SIGNATURE**
Carefully read the attached affidavit in its entirety. Fill in the required information for each blank space, and sign and date the affidavit in the presence of a Notary Public, who must then notarize the form.

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM
49 C.F.R. PART 26

UNIFORM CERTIFICATION APPLICATION

ROADMAP FOR APPLICANTS

① **Should I apply?**

- Is your firm at least 51%-owned by a socially and economically disadvantaged individual(s) who also controls the firm?
- Is the disadvantaged owner a U.S. citizen or lawfully admitted permanent resident of the U.S.?
- Is your firm a small business that meets the Small Business Administration's (SBA's) size standard and does not exceed \$17.42 million in gross annual receipts?
- Is your firm organized as a for-profit business?

⇒ If you answered "Yes" to all of the questions above, you may be eligible to participate in the U.S. DOT DBE program.

② **Is there an easier way to apply?**

If you are currently certified by the SBA as an 8(a) and/or SDB firm, you may be eligible for a streamlined certification application process. Under this process, the certifying agency to which you are applying will accept your current SBA application package in lieu of requiring you to fill out and submit this form.

NOTE: You must still meet the requirements for the DBE program, including undergoing an on-site review.

③ **Be sure to attach all of the required documents listed in the Documents Check List at the end of this form with your completed application.**

④ **Where can I find more information?**

- U.S. DOT – <http://osdbuweb.dot.gov/business/dbe/index.html> (this site provides useful links to the rules and regulations governing the DBE program, questions and answers, and other pertinent information)
- SBA – <http://www.ntis.gov/naics> (provides a listing of NAICS codes) and <http://www.sba.gov/size/indextableofsize.html> (provides a listing of NAICS codes)
- 49 CFR Part 26 (the rules and regulations governing the DBE program)

Under Sec. 26.107 of 49 CFR Part 26, dated February 2, 1999, if at any time, the Department or a recipient has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, the Department may initiate suspension or debarment proceedings against the person or firm under 49 CFR Part 29, Governmentwide Debarment and Suspension (nonprocurement) and Governmentwide Requirements for Drug-free Workplace (grants), take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, and/or refer the matter to the Department of Justice for criminal prosecution under 18 U.S.C. 1001, which prohibits false statements in Federal programs.

Section 1: CERTIFICATION INFORMATION

A. Prior/Other Certifications

Is your firm currently certified for any of the following programs? <i>(If Yes, check appropriate box(es))</i>	<input type="checkbox"/> DBE	Name of certifying agency:
		Has your firm's state UCP conducted an on-site visit?
		<input type="checkbox"/> Yes, on ___ / ___ / ___ State: _____ <input type="checkbox"/> No
	<input type="checkbox"/> 8(a)	⊗ STOP! If you checked either the 8(a) or SDB box, you <u>may not</u> have to complete this application. Ask your state UCP about the streamlined application process under the SBA-DOT MOU.
<input type="checkbox"/> SDB		

B. Prior/Other Applications and Privileges

Has your firm (under any name) or any of its owners, Board of Directors, officers or management personnel, ever withdrawn an application for any of the programs listed above, or ever been denied certification, decertified, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or Federal entity?

Yes, on ___ / ___ / ___ No

If Yes, identify State and name of state, local, or Federal agency and explain the nature of the action:

Section 2: GENERAL INFORMATION

A. Contact Information

(1) Contact person and Title:		(2) Legal name of firm:			
(3) Phone #:	(4) Other Phone #:	(5) Fax #:			
(6) E-mail:		(7) Website <i>(if have one)</i> :			
(8) Street address of firm <i>(No P.O. Box)</i> :	City:	County/Parish:	State:	Zip:	
(9) Mailing address of firm <i>(if different)</i> :	City:	County/Parish:	State:	Zip:	

B. Business Profile

(1) Describe the primary activities of your firm:		(2) Federal Tax ID <i>(if any)</i> :
(3) This firm was established on ___ / ___ / ___		(4) I/We have owned this firm since: ___ / ___ / ___
(5) Method of acquisition <i>(check all that apply)</i> : <input type="checkbox"/> Started new business <input type="checkbox"/> Bought existing business <input type="checkbox"/> Inherited business <input type="checkbox"/> Secured concession <input type="checkbox"/> Merger or consolidation <input type="checkbox"/> Other <i>(explain)</i>		
(6) Is your firm "for profit"? <input type="checkbox"/> Yes <input type="checkbox"/> No		⊗ STOP! If your firm is NOT for-profit, then you do NOT qualify for this program and do NOT need to fill out this application.

(7) Type of firm (check all that apply):

- Sole Proprietorship
- Partnership
- Corporation
- Limited Liability Partnership
- Limited Liability Corporation
- Joint Venture
- Other, Describe: _____

(8) Has your firm ever existed under different ownership, a different type of ownership, or a different name?
 Yes No
 If Yes, explain: _____

(9) Number of employees: Full-time	Part-time	Total
(10) Specify the gross receipts of the firm for the last 3 years: Year _____	Total receipts \$ _____	
Year _____	Total receipts \$ _____	
Year _____	Total receipts \$ _____	

C. Relationships with Other Businesses

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

If Yes, identify: Other Firm's name: _____
 Explain nature of shared facilities: _____

(2) At present, or at any time in the past, has your firm:	(a) been a subsidiary of any other firm?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(b) consisted of a partnership in which one or more of the partners are other firms?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(c) owned any percentage of any other firm?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(d) had any subsidiaries?	<input type="checkbox"/> Yes <input type="checkbox"/> No

(3) Has any other firm had an ownership interest in your firm at present or at any time in the past? Yes No

(4) If you answered "Yes" to any of the questions in (2)(a)-(d) and/or (3), identify the following for each (attach extra sheets, if needed):

	<u>Name</u>	<u>Address</u>	<u>Type of Business</u>
1.			
2.			
3.			

D. Immediate Family Member Businesses

Do any of your immediate family members own or manage another company? Yes No
 If Yes, then list (attach extra sheets, if needed):

	<u>Name</u>	<u>Relationship</u>	<u>Company</u>	<u>Type of Business</u>	<u>Own or Manage?</u>
1.					
2.					

Section 3: OWNERSHIP

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below *(If more than one owner, attach separate sheets for each additional owner):*

A. Background Information

(1) Name:	(2) Title:	(3) Home Phone #:
(4) Home Address (street and number):		City: State: Zip:
(5) Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female	(6) Ethnic group membership (Check all that apply):	
(7) U.S. Citizen: <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Black	<input type="checkbox"/> Hispanic <input type="checkbox"/> Native American
(8) Lawfully Admitted Permanent Resident: <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Asian Pacific	<input type="checkbox"/> Subcontinent Asian
	<input type="checkbox"/> Other (specify) _____	

B. Ownership Interest

(1) Number of years as owner:	(2) Initial investment to acquire ownership interest in firm:	Type	Dollar Value		
(3) Percentage owned:		Cash	\$		
(4) Familial relationship to other owners:		Real Estate	\$		
		Equipment	\$		
		Other	\$		
(5) Shares of Stock:	<u>Number</u>	<u>Percentage</u>	<u>Class</u>	<u>Date acquired</u>	<u>Method Acquired</u>
(6) Does this owner perform a management or supervisory function for any other business? <input type="checkbox"/> Yes <input type="checkbox"/> No					
If Yes, identify: Name of Business: _____ Function/Title: _____					
(7) Does this owner own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)? <input type="checkbox"/> Yes <input type="checkbox"/> No					
If Yes, identify: Name of Business: _____ Function/Title: _____					
Nature of Business Relationship: _____					

C. Disadvantaged Status – NOTE: Complete this section only for each owner applying for DBE qualification (i.e., for each owner claiming to be socially and economically disadvantaged)

(1) What is the Personal Net Worth (PNW) of the owner(s) applying for DBE qualification? <i>(Use and attach the Personal Net Worth calculator form at the end of this application; attach additional sheets if more than one owner is applying)</i>
(2) Has any trust been created for the benefit of this disadvantaged owner(s)? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, explain <i>(attach additional sheets if needed)</i> :

Section 4: CONTROL

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

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

(3) Do any of the persons listed in (1) and/or (2) above perform a management or supervisory function for any other business? Yes No

If Yes, identify for each: Person: _____ Title: _____
 Business: _____ Function: _____

(4) Do any of the persons listed (1) and/or (2) above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)? Yes No

If Yes, identify for each: Firm Name: _____ Person: _____
 Nature of Business Relationship: _____

B. Identify your firm's management personnel who control your firm in the following areas (If more than two persons, attach a separate sheet):

	Name	Title	Ethnicity	Gender
(1) Financial Decisions <i>(responsibility for acquisition of lines of credit, surety bonding, supplies, etc.)</i>	a.			
	b.			
(2) Estimating and bidding	a.			
	b.			
(3) Negotiating and Contract Execution	a.			
	b.			
(4) Hiring/firing of management personnel	a.			
	b.			
(5) Field/Production Operations Supervisor	a.			
	b.			
(6) Office management	a.			
	b.			
(7) Marketing/Sales	a.			
	b.			
(8) Purchasing of major equipment	a.			
	b.			
(9) Authorized to Sign Company Checks (for any purpose)	a.			
	b.			
(10) Authorized to make Financial Transactions	a.			
	b.			

(11) Do any of the persons listed in (1) through (10) above perform a management or supervisory function for any other business? Yes No
 If Yes, identify for each: Person: _____ Title: _____
 Business: _____ Function: _____

(12) Do any of the persons listed in (1) through (10) above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)?
 Yes No

If Yes, identify for each: Firm Name: _____ Person: _____
 Nature of Business Relationship: _____

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

(1) Equipment

Type of Equipment	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

(2) Vehicles

Type of Vehicle	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

(3) Office Space

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

(4) Storage Space

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

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

If Yes, explain:

E. Financial Information

(1) Banking Information:
 (a) Name of bank: _____ (b) Phone No: () _____
 (c) Address of bank: _____ City: _____ State: _____ Zip: _____

(2) **Bonding Information:** If you have bonding capacity, identify: (a) Binder No: _____
 (b) Name of agent/broker _____ (c) Phone No: () _____
 (d) Address of agent/broker: _____ City: _____ State: _____ Zip: _____
 (e) Bonding limit: Aggregate limit \$ _____ Project limit \$ _____

F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of any persons or firms securing the loan, if other than the listed owner:

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

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

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

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

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

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

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

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

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

DBE UNIFORM CERTIFICATION APPLICATION SUPPORTING DOCUMENTS CHECKLIST

In order to complete your application for DBE certification, you must attach copies of all of the following documents as they apply to you and your firm.

All Applicants

- Work experience resumes (include places of ownership/employment with corresponding dates), for all owners and officers of your firm
- Personal Financial Statement (form available with this application)
- Personal tax returns for the past three years, if applicable, for each owner claiming disadvantaged status
- Your firm's tax returns (gross receipts) and all related schedules for the past three years
- Documented proof of contributions used to acquire ownership for each owner (*e.g., both sides of cancelled checks*)
- Your firm's signed loan agreements, security agreements, and bonding forms
- Descriptions of all real estate (including office/storage space, etc.) owned/leased by your firm and documented proof of ownership/signed leases
- List of equipment leased and signed lease agreements
- List of construction equipment and/or vehicles owned and titles/proof of ownership
- Documented proof of any transfers of assets to/from your firm and/or to/from any of its owners over the past two years
- Year-end balance sheets and income statements for the past three years (*or life of firm, if less than three years*); a new business must provide a current balance sheet
- All relevant licenses, license renewal forms, permits, and haul authority forms
- DBE and SBA 8(a) or SDB certifications, denials, and/or decertifications, if applicable
- Bank authorization and signatory cards
- Schedule of salaries (or other compensation or remuneration) paid to all officers, managers, owners, and/or directors of the firm
- Trust agreements held by any owner claiming disadvantaged status, if any

Partnership or Joint Venture

- Original and any amended Partnership or Joint Venture Agreements

Corporation or LLC

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

Trucking Company

- Documented proof of ownership of the company
- Insurance agreements for each truck owned or operated by your firm
- Title(s) and registration certificate(s) for each truck owned or operated by your firm
- List of U.S. DOT numbers for each truck owned or operated by your firm

Regular Dealer

- Proof of warehouse ownership or lease
- List of product lines carried
- List of distribution equipment owned and/or leased

NOTE: The specific state UCP to which you are applying may have additional required documents that you must also supply with your application. Contact the appropriate certifying agency to which you are applying to find out if more is required.

AFFIDAVIT OF CERTIFICATION

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

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

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

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

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

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

I agree to provide written notice to the recipient agency or Unified Certification Program (UCP) of any material change in the information contained in the original application within 30 calendar days of such change (e.g., ownership, address, telephone number, etc.).

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

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

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

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

I further certify that my personal net worth does not exceed \$750,000, and that I am economically disadvantaged because my ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

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

Executed on _____ (Date)

Signature _____
(DBE Applicant)

NOTARY CERTIFICATE

[FR Doc. 03-14989 Filed 6-13-03; 8:45 am]

BILLING CODE 4910-62-C

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 192 and 195

Pipeline Safety: Alternative Mitigation Measures for Required Repairs Delayed by a Need To Obtain Permits

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Interpretation.

SUMMARY: Congress directed the Research and Special Programs Administration's (RSPA) Office of Pipeline Safety (OPS) to revise its pipeline safety regulations, if necessary, to allow operators to take alternative mitigation measures while they seek governmental permits required for repairs. As RSPA/OPS interprets the pipeline safety regulations, they already allow such measures. Revising the regulations is not necessary.

DATES: Effective June 16, 2003.

FOR FURTHER INFORMATION CONTACT:

Mike Israni by phone at (202) 366-4571, by fax at (202) 366-4566, or by e-mail at mike.israni@rspa.dot.gov

SUPPLEMENTARY INFORMATION: The Pipeline Safety Improvement Act of 2002 amended the Federal pipeline safety laws to require that the Secretary of Transportation revise pipeline safety regulations, as needed, to allow operators to implement alternative mitigation measures if repairs to pipelines cannot be completed within specified time frames. Specifically, 49 U.S.C. section 60133 provides, in part:

(d) INTERIM OPERATIONAL ALTERNATIVES.

(1) IN GENERAL * * * subject to the limitations in paragraph (2), the Secretary of Transportation shall revise the regulations of the Department, to the extent necessary, to permit a pipeline operator subject to time periods for repair specified by rule by the Secretary to implement alternative mitigation measures until all applicable permits have been granted.

(2) LIMITATIONS. "The regulations issued by the Secretary pursuant to this subsection shall not allow an operator to implement alternative mitigation measures pursuant to paragraph (1) unless—

(A) Allowing the operator to implement such measures would be consistent with the protection of human health, public safety, and the environment;

(B) The operator, with respect to a particular repair project, has applied for and is pursuing diligently and in good faith all required Federal, State, and local permits to carry out the project; and

(C) The proposed alternative mitigation measures are not incompatible with pipeline safety.

RSPA/OPS has reviewed the existing pipeline safety regulations and determined that no changes to these regulations are necessary to implement this provision. As explained below, RSPA/OPS interprets existing pipeline repair requirements to allow for alternative mitigative measures while an operator has applied for and is waiting for a permit in order to effectuate a repair.

General pipeline facility repair requirements in 49 CFR 192.703 (for natural gas pipelines) and 49 CFR 195.401 (for hazardous liquid pipelines) require repair of conditions that are "unsafe" or "could adversely affect the safe operation of [the] pipeline system," but do not specify a time period in which the required repairs must be made. These provisions, instead, require an operator to take actions necessary to assure the pipeline is safe and to take these actions "within a reasonable time." Thus, for the non immediate hazard conditions, a reasonable repair time allows for an operator to obtain the Federal, state or local permits necessary to make a repair. RSPA/OPS expects an operator to exercise diligence in obtaining the necessary permits by being able to demonstrate that it has applied for the applicable permit and is taking all necessary steps for the permit to be processed and granted. In this interim period until the permit is granted, an operator is allowed to take alternative actions to mitigate the condition, as long as the actions are compatible with pipeline safety.

The reasonable time provision does not apply to an immediate hazard condition. If circumstances associated with a particular pipeline problem are such that safety is immediately in jeopardy, then immediate action is appropriate and delay would be inconsistent with the protection of human health, public safety, and the environment.

The only current regulation that specifies time periods for pipeline repairs is the recently promulgated integrity management rule for hazardous liquid pipelines, 49 CFR 195.452. The remediation requirements of this regulation require an operator to remediate defects meeting certain criteria immediately or within 60 or 180 days, depending on the defect's severity. This regulation further provides for an operator to take alternative mitigation measures if it cannot make the repair within the specified period for any reason, including being unable to obtain

required permits. Specifically, 49 CFR 195.452 (h)(3) provides in part:

(3) *Schedule for evaluation and remediation.* An operator must complete remediation of a condition according to a schedule that prioritizes the conditions for evaluation and remediation. If an operator cannot meet the schedule for any condition, the operator must justify the reasons why it cannot meet the schedule and that the changed schedule will not jeopardize public safety or environmental protection. An operator must notify OPS if the operator cannot meet the schedule and cannot provide safety through a temporary reduction in operating pressure.

Thus, if an operator must obtain a permit to carry out a repair for the operator's integrity management program, and cannot obtain the permit and make the repair within the 60- or 180-day period, an operator may either reduce operating pressure as an interim mitigative measure or, if it determines that pressure reduction is impracticable, submit a notification to RSPA/OPS explaining how it will ensure safety in the interim period, and then continue operation until the permit is granted and the repair made. An operator must complete the repairs in a time frame that does not jeopardize safety or environmental protection. Again, if the specified time period cannot be met because the operator is waiting for a permit to be granted, RSPA/OPS expects an operator to show it has applied for the permit and is taking all necessary steps for the permit to be processed and granted.

RSPA/OPS recently proposed integrity management remediation requirements for natural gas transmission pipelines (*see* 68 FR 4278; Jan. 28, 2003). Similar to the remediation requirements for hazardous liquid integrity programs, until a repair is made, the proposed regulation would allow continued operation with a reduction in operating pressure or notification to RSPA/OPS, if pressure reduction is impracticable. Under the proposal, an operator would be able to implement alternative mitigative measures while it has applied for and is waiting for the permit to be granted.

RSPA/OPS discussed the need for additional requirements including alternative mitigative measures with its advisory committees, the Technical Hazardous Liquid Pipeline Safety Standards Committee and the Technical Pipeline Safety Standards Committee, at a joint meeting held on March 26, 2003. The Committees agreed that the existing allowance for pressure reduction or case-by-case definition of alternative measures, via operator notification to RSPA/OPS, represents viable alternative

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State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map Date	Date certain federal assistance no longer available in SFHAs
Taft, Town of, Muskogee County	400128	June 26, 1976, Emerg; August 25, 1987, Reg; February 4, 2011, Susp.	.....do*	Do.
Wainwright, Town of, Muskogee County	400129	March 9, 1976, Emerg; August 8, 1978, Reg; February 4, 2011, Susp.	.....do*	Do.
Warner, Town of, Muskogee County	400130	December 29, 1976, Emerg; May 25, 1978, Reg; February 4, 2011, Susp.	.....do*	Do.
Webbers Falls, Town of, Muskogee County.	400131	November 28, 1975, Emerg; May 1, 1980, Reg; February 4, 2011, Susp.	.....do*	Do.
Texas:				
Bandera County, Unincorporated Areas	480020	January 21, 1974, Emerg; November 1, 1978, Reg; February 4, 2011, Susp.	.....do*	Do.
Benavides, City of, Duval County	480792	July 24, 1975, Emerg; March 4, 1986, Reg; February 4, 2011, Susp.	.....do*	Do.
Colorado County, WCID Number 2	481489	October 28, 1977, Emerg; June 1, 1988, Reg; February 4, 2011, Susp.	.....do*	Do.
Colorado County, Unincorporated Areas	480144	February 29, 1980, Emerg; September 19, 1990, Reg; February 4, 2011, Susp.	.....do*	Do.
Columbus, City of, Colorado County	480145	February 19, 1975, Emerg; June 19, 1985, Reg; February 4, 2011, Susp.	.....do*	Do.
Duval County, Unincorporated Areas	480202	July 24, 1975, Emerg; May 1, 1987, Reg; February 4, 2011, Susp.	.....do*	Do.
Eagle Lake, City of, Colorado County ...	480146	July 30, 1975, Emerg; April 1, 1987, Reg; February 4, 2011, Susp.	.....do*	Do.
Lamesa, City of, Dawson County	480191	February 25, 1972, Emerg; April 30, 1976, Reg; February 4, 2011, Susp.	.....do*	Do.
San Diego, City of, Duval and Jim Wells Counties.	481199	December 26, 1975, Emerg; March 1, 1987, Reg; February 4, 2011, Susp.	.....do*	Do.

*-do- = Ditto.

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: January 19, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation.

[FR Doc. 2011-1930 Filed 1-27-11; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 26

[Docket No. OST-2010-0118]

RIN 2105-AD75

Disadvantaged Business Enterprise: Program Improvements

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Final rule.

SUMMARY: This rule improves the administration of the Disadvantaged Business Enterprise (DBE) program by increasing accountability for recipients with respect to meeting overall goals, modifying and updating certification requirements, adjusting the personal net worth (PNW) threshold for inflation, providing for expedited interstate certification, adding provisions to foster small business participation, improving

post-award oversight, and addressing other issues.

DATES: Effective Dates: This rule is effective February 28, 2011.

FOR FURTHER INFORMATION CONTACT:

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, Room W94-302, 202-366-9310, bob.ashby@dot.gov.

SUPPLEMENTARY INFORMATION: The Department of Transportation issued an advance notice of proposed rulemaking (ANPRM) concerning several DBE program issues on April 8, 2009 (74 FR 15904). The first issue raised in the ANPRM concerned counting of items obtained by a DBE subcontractor from its prime contractor. The second concerned ways of encouraging the “unbundling” of contracts to facilitate participation by small businesses, including DBEs. The third was a request for comments on potential improvements to the DBE application form and personal net worth (PNW) form. The fourth asked for suggestions related to program oversight. The fifth concerned potential regulatory action to facilitate certification for firms seeking to work as DBEs in more than one state.

The sixth concerned additional limitations on the discretion of prime contractors to terminate DBEs for convenience, once the prime contractor had committed to using the DBE as part of its showing of good faith efforts. The Department received approximately 30 comment letters regarding these issues.

On May 10, 2010, the Department issued a notice of proposed rulemaking (NPRM) seeking further comment on proposals based on the ANPRM and proposing new provisions (75 FR 25815). The NPRM proposed an inflationary adjustment of the PNW cap to \$1.31 million, the figure that would result from proposed Federal Aviation Administration (FAA) reauthorization legislation then pending in both Houses of Congress. The Department proposed additional measures to hold recipients accountable for their performance in achieving DBE overall goals.

The NPRM also proposed amendments to the certification-related provisions of the DBE regulation. Those proposals resulted from the Department’s experience dealing with certification issues and certification appeal cases during the years since the last major revision of the DBE rule in 1999. The proposed amendments were intended to clarify issues that have arisen and avoid problems with which

recipients (*i.e.*, state highway agencies, transit authorities, and airport sponsors who receive DOT grant financial assistance) and the Department have had to grapple over the last 11 years.

The Department received approximately 160 comments on the NPRM from a variety of interested parties, including DBE and non-DBE firms, associations representing them, and recipients of DOT financial assistance. A summary of comments on the major issues in the rulemaking, and the Department's responses to those comments, follows.

Counting Purchases From Prime Contractors

Under current counting rules, a DBE subcontractor and its prime contractor may count for DBE credit the entire cost of a construction contract, including items that the DBE subcontractor purchases or leases from a third party (*e.g.*, in a so-called "furnish and install" contract). There is an exception to this general rule: A DBE and its prime contractor may not count toward goals items that the DBE purchases or leases from its own prime contractor. The reason for this provision is that doing so would allow the prime contractor to count for DBE credit items that it produced itself.

As noted in the ANPRM, one DBE subcontractor and a number of prime contractors objected to this approach, saying that it unfairly denies a DBE in this situation the opportunity to count credit for items it has obtained from its prime contractor rather than from other sources. Especially in situations in which a commodity might only be available from a single source—a prime contractor or its affiliate—the rule would create a hardship, according to proponents of this view. The ANPRM proposed four options (1) keeping the rule as is; (2) keeping the basic rule as is, but allowing recipients to make exceptions in some cases; (3) allowing DBEs to count items purchased from any third party source, including the DBE's prime contractor; and (4) not allowing any items obtained from any non-DBE third party to be counted for DBE credit. Comment was divided among the four alternatives, which each garnering some support. For purposes of the NPRM, the Department decided not to propose any change from the current rule.

Comment on the issue was again divided. Seven commenters favored allowing items obtained from any source to be counted for credit, including the firm that was the original proponent of the idea and another DBE, two prime contractors' associations, a

prime contractor, and two State Departments of Transportation (DOTs). These commenters generally made the same arguments as had proponents of this view at the ANPRM stage. Thirteen commenters, among which were several recipients, a DBE contractors' association, and DBE contractors, favored the NPRM's proposed approach of not making any change to the existing rule, and they endorsed the NPRM's rationale. Sixteen commenters, including a recipient association and a number of DBE companies, supported disallowing credit for any items purchased or leased from a non-DBE source. They believed that this approach supported the general principle of awarding DBE credit only for contributions that DBEs themselves make on a contract.

DOT Response

The Department remains unconvinced that it is appropriate for a prime contractor to produce an item (*e.g.*, asphalt), provide it to its own DBE subcontractor, and then count the value of the item toward its good faith efforts to meet DBE goals. The item—*asphalt*, in this example—is a contribution to the project made by the prime contractor itself and simply passed through the DBE. That is, the prime contractor, on paper, sells the item to the DBE, who then charges the cost of the item it just bought from the prime contractor as part of its subcontract price, which the prime then reports as DBE participation. In the Department's view, this pass-through relationship is inconsistent with the most important principle of counting DBE participation, which is that credit should only be counted for value that is added to the transaction by the DBE itself.

As mentioned in the ANPRM and NPRM, the current rule treats counting of items purchased by DBEs from non-DBE sources differently, depending on whether the items are obtained from the DBE's prime contractor or from a third-party source. The Department's current approach is a reasonable compromise between the commonly accepted practice of obtaining items from non-DBE sources as part of the contracting process and maintaining the principle of counting only the DBE's own contributions for credit toward goals, which is most seriously violated when the prime contractor itself is the source of the items. This compromise respects the dual, somewhat divergent, goals of accommodating a common way of doing business and avoiding a too-close relationship between a prime contractor and a DBE subcontractor that distorts the counting of credit toward DBE goals.

This compromise has been part of the regulation since 1999 and, with the exception of the proponent of changing the regulation and its prime contractor partners, has never been raised by program participants as a widespread problem requiring regulatory change. For these reasons, the Department will leave the existing regulatory language intact.

Terminations of DBE Firms

The NPRM proposed that a prime contractor who, in the course of meeting its good faith efforts requirements on a procurement involving a contract goal, had submitted the names of one or more DBEs to work on the project, could not terminate a DBE firm without the written consent of the recipient. The firm could be terminated only for good cause. The NPRM proposed a list of what constituted good cause for this purpose.

Over 40 comments addressed this subject, a significant majority of which supported the proposal. Two recipients said the proposal was unnecessary and a third expressed concern about workload implications. Several recipients said that they already followed this practice.

However, commenters made a variety of suggestions with respect to the details of the proposal. A DBE firm questioned a good cause element that would allow a firm to be terminated for not meeting reasonable bonding requirements, noting that lack of access to bonding is a serious problem for many DBEs. A DBE contractors' association said that a DBE's action to halt performance should not necessarily be a ground for termination, because in some cases such an action could be a justified response to an action beyond its control (*e.g.*, the prime failing to make timely payments). A DBE requested clarification of what being "not responsible" meant in this context. A number of commenters, including recipients and DBEs, suggested that a prime could terminate a DBE only if the DBE "unreasonably" failed to perform or follow instructions from the prime.

A prime contractors' association suggested additional grounds for good cause to terminate, including not performing to schedule or not performing a commercially useful function. Another such association said the rule should be consistent with normal business practices and not impede a prime contractor's ability to remove a poorly performing subcontractor for good cause. A recipient wanted a public safety exception to the time frame for a DBE's reply to a prime contractor's notice

proposing termination, and another recipient wanted to shorten that period from five to two days. A State unified certification program (UCP) suggested adopting its State's list of good cause reasons, and a consultant suggested that contracting officers, not just the DBE Liaison Officer (DBELO), should be involved in the decision about whether to concur in a prime contractor's desire to terminate a DBE. A recipient wanted to add language concerning the prime contractor's obligation to make good faith efforts to replace a terminated DBE with another DBE.

DOT Response

The Department, like the majority of commenters on this issue, believes that the proposed amendment will help to prevent situations in which a DBE subcontractor, to which a prime contractor has committed work, is arbitrarily dismissed from the project by the prime contractor. Comments to the docket and in the earlier stakeholder sessions have underlined that this has been a persistent problem. By specifying that a DBE can be terminated only for good cause—not simply for the convenience of the prime contractor—and with the written consent of the recipient, this amendment should help to end this abuse.

With respect to the kinds of situations in which “good cause” for termination can exist, the Department has modified the language of the rule to say that good cause includes a situation where the DBE subcontractor has failed or refused to perform the work of its subcontract in accordance with normal industry standards. We note that industry standards may vary among projects, and could be higher for some projects than others, a matter the recipient could take into account in determining whether to consent to a prime contractor's proposal to terminate a DBE firm. However, good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor (e.g., the failure of the prime contractor to make timely payments or the unnecessary placing of obstacles in the path of the DBE's work).

Good cause also does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that it can self-perform the work in question or substitute another DBE or non-DBE firm. This approach responds to commenters who were concerned about prime contractors imposing unreasonable demands on DBE subcontractors while offering recipients a more definite standard than simple

reasonableness in deciding whether to approve a prime contractor's proposal to terminate a DBE firm. We have also adopted a recipient's suggestion to permit the time frame for the process to be shortened in a case where public necessity (e.g., safety) requires a shorter period of time before the recipient's decision.

In addition to the enumerated grounds, a recipient may permit a prime contractor to terminate a DBE for “other documented good cause that the recipient determines compels the termination of the DBE subcontractor.” This means that the recipient must document the basis for any such determination, and the prime contractor's reasons for terminating the DBE subcontractor make the termination essential, not merely discretionary or advantageous. While the recipient need not obtain DOT operating administration concurrence for such a decision, FHWA, FTA, and FAA retain the right to oversee such determinations by recipients.

Personal Net Worth

The NPRM proposed to make an inflationary adjustment in the personal net worth (PNW) cap from its present \$750,000 to \$1.31 million, based on the consumer price index (CPI) and relating back to 1989, as proposed in FAA authorization bills pending in Congress. The NPRM noted that such an adjustment had long been sought by DBE groups and that it maintained the status quo in real dollar terms. The Department also asked for comment on the issue of whether assets counted toward the PNW calculation should continue to include retirement savings products. The rule currently does include them, but the pending FAA legislation would move in the direction of excluding them from the calculation.

Of the 95 commenters who addressed the basic issue of whether the Department should make the proposed inflationary adjustment, 71—representing all categories of commenters—favored doing so. Many said that such an adjustment was long overdue and that it would mitigate the problem of a “glass ceiling” limiting the growth and development of DBE firms. A few commenters said that such adjustments should be done regionally or locally rather than nationally, to reflect economic differences among areas of the country. A number of the commenters wanted to make sure the Department made similar adjustments annually in the future. A member of Congress suggested that the PNW should be increased to \$2.5 million, while a few recipients favored a smaller

increase (e.g., to \$1 million). A few commenters also suggested that the Department explore some method of adjusting PNW other than the CPI, but they generally did not spell out what the alternative approaches might be.

The opponents of making the adjustment, mostly recipients and DBEs, made several arguments. The first was that \$1.31 million was too high and would include businesses owners who were not truly disadvantaged. The second was that raising the PNW number would favor larger, established, richer DBEs at the expense of smaller, start-up firms. These larger companies could then stay in the program longer, to the detriment of the program's aims. Some commenters said that the experience in their states was that very few firms were becoming ineligible for PNW reasons, suggesting that a change in the current standard was unnecessary.

With respect to the issue of retirement assets, about 28 comments, primarily from DBE groups and recipients, favored excluding some retirement assets from the PNW calculation, often asserting that this was appropriate because such funds are illiquid and not readily available to contribute toward the owners' businesses. Following this logic, some of the comments said that Federally-regulated illiquid retirement plans (e.g., 401k, Roth IRA, Keough, and Deferred Compensation plans, as well as 529 college savings plans) be excluded while other assets that are more liquid (CDs, savings accounts) be counted, even if said to be for retirement purposes. A number of these commenters said that a monetary cap on the amount that could be excluded (e.g., \$500,000) would be acceptable.

The 17 comments opposing excluding retirement accounts from the PNW calculation generally supported the rationale of the existing regulation, which is that assets of this kind, even if illiquid, should be regarded as part of an individual's wealth for PNW purposes. A few commenters also said that, since it is most likely wealthier DBE owners who have such retirement accounts, excluding them would help these more established DBEs at the expense of smaller DBEs who are less likely to be able to afford significant retirement savings products. Again, commenters said that this provision, by effectively raising the PNW cap, would inappropriately allow larger firms to stay in the program longer. Some of the commenters would accept exclusion of retirement accounts if an appropriate cap were put in place, however.

Finally, several commenters asked for a revised and improved PNW form with

additional guidance and instructions on how to make PNW calculations (*e.g.*, with respect to determining the value of a house or business).

DOT Response

To understand the purpose and effect of the Department's proposal to change the PNW threshold from the long-standing \$750,000 figure, it is important to keep in mind what an inflationary adjustment does. (Because of the passage of time from the issuance of the NPRM to the present time, the amount of the inflationary adjustment has changed slightly, from \$1.31 million to \$1.32 million.) The final rule's adjustment is based on the Department of Labor's consumer price index (CPI) calculator. This calculator was used because, of various readily available means of indexing for inflation, CPI appears to be the one that is most nearly relevant to an individual's personal wealth. Such an adjustment simply keeps things as they were originally in real dollar terms.

That is, in 1989, \$750,000 bought a certain amount of goods and services. In 2010, given the effects of inflation over 21 years, it would take \$1.32 million in today's dollars to buy the same amount of goods and services. The buying power of assets totaling \$750,000 in 1989 is the same as the buying power of assets totaling \$1.32 million in 2010. Notwithstanding the fact that \$1.32 million, on its face, is a higher number than \$750,000, the wealth of someone with \$1.32 million in assets today is the same, in real dollar or buying power terms, as that of someone with \$750,000 in 1989.

Put another way, if the Department did not adjust the \$750,000 number for inflation, our inaction would have the effect of establishing a significantly lower PNW cap in real dollar terms. A PNW cap of \$750,000 in 2010 dollars is equivalent to a PNW cap of approximately \$425,700 in 1989 dollars. This means that a DBE applicant today would be allowed to have \$325,000 less in real dollar assets than his or her counterpart in 1989.

The Department believes, in light of this understanding of an inflationary adjustment, that making the proposed adjustment at this time is appropriate. This is a judgment that is shared by the majority of commenters and both Houses of Congress. We do not believe that any important policy interest is served by continuing to lower the real dollar PNW threshold, which we believe would have the effect of further limiting the pool of eligible DBE owners beyond what is intended by the Department in adopting the PNW standard.

The Department is using 1989 as the base year for its inflationary adjustment for two reasons. First, doing so is consistent with what both the House and Senate determined was appropriate in the context of FAA authorization bills that both chambers passed. Second, while the Department adopted a PNW standard in 1999, the standard itself, which was adopted by the Small Business Administration (SBA) before 1989, has never been adjusted for inflation at any time. By 1999, the real dollar value of the original \$750,000 standard had already been eroded by inflation, and the Department believes that it is reasonable to take into account the effect of inflation on the standard that occurred before as well as after the Department adopted it.

We appreciate the concerns of commenters who opposed the proposed inflationary adjustment. Some of these commenters, it appears, may not have fully understood that an inflationary adjustment simply maintains the status quo in real dollar terms. The concern that making the adjustment would favor larger, established DBEs over smaller, start-up companies has some basis, and reflects the longstanding tension in the program between its role as an incubator for new firms and its purpose of allowing DBE firms to grow and develop to the point where they may be in a better position to compete for work outside the DBE program. Allowing persons with larger facial amounts of assets may seem to permit participation of people who are less disadvantaged than formerly in the program, but disadvantage in the DBE program has always properly been understood as relative disadvantage (*i.e.*, relative to owners and businesses in the economy generally), not absolute deprivation. People who own successful businesses are more affluent, by and large, than many people who participate in the economy only as employees, but this does not negate the fact that socially disadvantaged persons who own businesses may well, because of the effects of discrimination, accumulate less wealth than their non-socially disadvantaged counterparts. Consequently, the concerns of opponents of this change are not sufficient to persuade us to avoid making the proposed inflationary adjustment.

We do not believe that it is practical, in terms of program administration, to have standards that vary with recipient or region. We acknowledge that one size may not fit all to perfection, but the complexity of administering a national program with a key eligibility standard that varies, perhaps significantly, among

jurisdictions would be, in our view, an even greater problem. Nor do we see a strong policy rationale for a change to some fixed figure (*e.g.*, \$1 million, \$2.5 million) that is not tied to inflation. We do agree, however, that an improved PNW form would be an asset to the program, and we will propose such a form for comment in the next stage NPRM on the DBE program, which we hope to issue in 2011. This NPRM may also continue to examine other PNW issues.

Whenever there is a change in a rule of this sort, the issue of how to handle the transition between the former rule and the new rule inevitably arises. We provide the following guidance for recipients and firms applying for DBE certification.

- For applications or decertification actions pending on the date this amendment is published, but before its effective date, recipients should make decisions based on the new standards, though these decisions should not take effect until the amendment's effective date.

- Beginning on the effective date of this amendment, all new certification decisions must be based on the revised PNW standard, even if the application was filed or a decertification action pertaining to PNW began before this date.

- If a denial of an application or decertification occurred before the publication date of this amendment, because the owner's PNW was above \$750,000 but not above \$1.32 million, and the matter is now being appealed within the recipient's or unified certification program's (UCP's) process, then the recipient or UCP should resolve the appeal using the new standard. Recipients and UCPs may request updated information where relevant. In the case of an appeal pending before the Departmental Office of Civil Rights (DOCR) under section 26.89, DOCR will take the same approach or remand the matter, as appropriate.

- If a firm was decertified or its application denied within a year before the effective date of this amendment, because the owner's PNW was above \$750,000 but not above \$1.32 million, the recipient or UCP should permit the firm to resubmit PNW information without any further waiting period, and the firm should be recertified if the owner's PNW is not over \$1.32 million and the firm is otherwise eligible.

- We view any individual who has misrepresented his or her PNW information, whether before or after the inflationary adjustment takes effect, as having failed to cooperate with the DBE

program, in violation of 49 CFR 26.109(c). In addition to other remedies that may apply to such conduct, recipients should not certify a firm that has misrepresented this information.

The Department is not ready, at this time, to make a decision on the issue of retirement assets. The comments suggested a number of detailed issues the Department should consider before proposing any specific provisions on this subject. We will further consider commenters' thoughts on this issue at a future time.

Interstate Certification

In response to longstanding concerns of DBEs and their groups, the NPRM proposed a mechanism to make interstate certification easier. The proposed mechanism did not involve pure national reciprocity (*i.e.*, in which each state would give full faith and credit to other states' certification decisions, with the result that a certification by any state would be honored nationwide). Rather, it created a rebuttable presumption that a firm certified in its home state would be certified in other states. A firm certified in home state A could take its application materials to State B. Within 30 days, State B would decide either to accept State A's certification or object to it. If it did not object, the firm would be certified in State B. If State B did object, the firm would be entitled to a proceeding in which State B bore the burden of proof to demonstrate that the firm should not be certified in State B. The NPRM also proposed that the DOT Departmental Office of Civil Rights (DOCR) would create a database that would be populated with denials and decertifications, which the various State UCPs would check with respect to applicants and currently certified firms.

This issue was one of the most frequently commented-upon subjects in the rulemaking. Over 30 comments, from a variety of sources including DBEs, DBE organizations, and a prime contractors' association. Members of Congress and others supported the proposed approach. They emphasized that the necessity for repeated certification applications to various UCPs, and the very real possibility of inconsistent results on the same facts, were time-consuming, burdensome, and costly for DBEs. In a national program, they said, there should be national criteria, uniformity of forms and interpretations, and more consistent training of certification personnel. The proposed approach, they said, while not ideal, would be a useful step toward those goals.

An approximately equal number of commenters, predominantly recipients but also including some DBEs and associations, opposed the proposal, preferring to keep the existing rules (under which recipients can, but are not required to, accept certifications made by other recipients) in place. Many of these commenters said that their certification programs frequently had to reject out-of-state firms that had been certified by their home states because the home states had not done a good job of vetting the qualifications of the firms for certification. They asserted that there was too much variation among states concerning applicable laws and regulations (*e.g.*, with respect to business licensing or marital property laws), interpretations of the DBE rule, forms and procedures, and the training of certifying agency personnel for something like the NPRM proposal to work well. Before going to something like the NPRM proposal, some of these commenters said, DOT should do more to ensure uniform national training, interpretations, forms etc.

Commenters opposed to the NPRM proposal were concerned that the integrity of the program would be compromised, as questionable firms certified by one state would slip into the directories of other states without adequate vetting. Moreover, the number of certification actions each state had to consider, and the number of certified firms that each state would have to manage, could increase significantly, straining already scarce resources.

A smaller number of commenters addressed the idea of national reciprocity. Some of these commenters said that, at least for the future, national reciprocity was a valuable goal to work toward. Some of these commenters, including an association that performs certification reviews nationally for MBE and WBE suppliers (albeit without on-site reviews) and a Member of Congress, supported using such a model now. On the other hand, other commenters believed national reciprocity was an idea whose time had not come, for many of the same reasons stated by commenters opposed to the NPRM proposal. Some of the commenters on the NPRM proposal said that the proposal would result in *de facto* national reciprocity, which they believed was bad for the program.

Two features of the NPRM proposal attracted considerable adverse comment. Thirty-one of the 34 comments addressing the proposed 30-day window for "State B" to decide whether to object to a home state certification of a firm said that the proposed time was too short. These

commenters, mostly recipients, suggested time frames ranging from 45–90 days. They said that the 30-day time frame would be very difficult to meet, given their resources, and would cause States to accept questionable certifications from other States simply because there was insufficient time to review the documentation they had been given. Moreover, the 30-day window would mean that out-of-state firms would jump to the front of the line for consideration over in-state firms, concerning which the rule allows 90 days for certification. This would be unfair to in-state firms, they said.

In addition, 22 of 28 commenters on the issue of the burden of proof for interstate certification—again, predominantly recipients—said that it was the out-of-state applicant firm, rather than State B, that should have the burden of proof once State B objected to a home state certification of the firm. These commenters also said that it is more sensible to put the out-of-state firm in the same position as any other applicant for certification by having to demonstrate to the certifying agency that it was eligible, rather than placing the certification agency in the position of the proponent in a decertification action for a firm that it had previously certified. Again, commenters said, the NPRM proposal would favor out-of-state over in-state applicants.

A few comments suggested trying reciprocal certification on a regional basis (*e.g.*, in the 10 Federal regions) before moving to a more national approach. Others suggested that only recent information (*e.g.*, applications and on-site reports less than three years old) be acceptable for interstate certification purposes. Some states pointed to state laws requiring local licenses or registration before a firm could do business in the State: Some commenters favored limiting out-of-state applications to those firms that had obtained the necessary permits, while one commenter suggested prohibiting States from imposing such requirements prior to DBE certification. Some comments suggested limiting the grounds on which State B could object to the home state certification of a firm (*i.e.*, "good cause" rather than "interpretive differences," differences in state law, evidence of fraud in obtaining home state certification).

There was a variety of other comments relevant to the issue of interstate certification. Most commenters who addressed the idea of the DOCR database supported it, though some said that denial/decertification data should be available only to certification agencies, not the general

public. Some also said that having to input and repeatedly check the data base would be burdensome. One commenter suggested including a firm's Federal Taxpayer ID number in the database entry. One commenter suggested a larger role for the database: Applicants should electronically input their application materials to the database, which would then be available to all certifying agencies, making individual submissions of application information to the States unnecessary. Some commenters wanted DOT to create or lead a national training and/or accreditation effort for certifier personnel.

DOT Response

Commenters on interstate were almost evenly divided on the best course of action for the Department to take. Most DBEs favored making interstate certification less difficult for firms that wanted to work outside their home states; most recipients took the opposite point of view. This disagreement reflects, we believe, a tension between two fundamental objectives of the program. On one hand, it is important to facilitate the entry of DBE firms into this national program, so that they can compete for DOT-assisted contracting wherever those opportunities exist, while reducing administrative burdens and costs on the small businesses that seek to participate. On the other hand, it is important to maintain the integrity of the program, so that only eligible firms participate and ineligible firms do not take unfair advantage of the program.

The main concern of proponents of the NPRM proposal was that failing to make changes to facilitate interstate certification would leave in place unnecessary and unreasonable barriers to the participation of firms outside of their home states. The main concern of opponents of the NPRM proposal was that making the proposed changes would negatively affect program integrity. Their comments suggest that there is considerable mistrust among certification agencies and programs. Many commenters appear to believe that, while their own certification programs do a good job, other states' certification programs do not. Much of the opposition to facilitating interstate certification appears to have arisen from this mistrust, as certification agencies seek to prevent questionable firms certified by what they perceive as weak certification programs in other states from infiltrating their domains.

The Department does not believe that it is constructive to take the position that certification programs nationwide

are so hopelessly inadequate that the best response is to leave interstate barriers in place to contain the perceived contagion of poorly qualified, albeit certified, firms within the boundaries of their own states. To the contrary, we believe that, under a system like that proposed in the NPRM, if firms certified by State A are regularly rebuffed by States B, C, D, etc., State A firms will have an incentive to bring pressure on their certification agency to improve its performance.

The Department also believes that suggestions made by commenters, such as improving training and standardizing forms and interpretations, can improve the performance of certification agencies generally. In the follow-on NPRM the Department hopes to issue in 2011, one of the subjects we will address is improvements in the certification application and PNW forms, which certification agencies then would be required to use without alteration. DOT already provides many training opportunities to certification personnel, such as the National Transportation Institute courses provided by the Federal Transit Administration, presentations by knowledgeable DOT DBE staff at meetings of transportation organizations, and webinars and other training opportunities provided by Departmental Office of Civil Rights personnel. The Department will consider further ways of fostering training and education for certifiers (e.g., a DOT-provided web-based training course for certifiers). The Department also produces guidance on certification-related issues to assist certifiers in making decisions that are consistent with this regulation, and we will continue that practice.

While we will continue to work with our state and local partners to improve the certification process, we do not believe that steps to facilitate interstate certification should be taken only after all recipients achieve an optimal level of performance. The DBE program is a national program; administrative barriers to participation impair the important program objective of encouraging DBE firms to compete for business opportunities; provisions to facilitate interstate certification can be drafted in a way that permits "State B" to screen out firms that are not eligible in accordance with this regulation. Consequently, the Department has decided to proceed with a modified form of the NPRM proposal. However, the final rule will not make compliance with the new section 26.85 mandatory until January 1, 2012, in order to provide additional time for recipients and UCPs to take advantage of training

opportunities and to establish any needed administrative mechanisms to carry out the new provision. This will also provide time for DOCR to make its database for denials and decertifications operational.

As under the NPRM, a firm certified in its home state would present its certification application package to State B. In response to commenters' concerns about the time available, State B would have 60 days, rather than 30 as in the NPRM, to determine whether it had specific objections to the firm's eligibility and to communicate those objections to the firm. If State B believed that the firm was ineligible, State B would state, with particularity, the specific reasons or objections to the firm's eligibility. The firm would then have the opportunity to respond and to present information and arguments to State B concerning the specific objections that State B had made. This could be done in writing, at an in-person meeting with State B's decision maker, or both. Again in response to commenters' concerns, the firm, rather than State B, would have the burden of proof with respect, and only with respect, to the specific issues raised by State B's objections. We believe that these changes will enhance the ability of certification agencies to protect the integrity of the program while also enhancing firms' ability to pursue business opportunities outside their home states.

We emphasize that State B's objections must be specific, so that the firm can respond with information and arguments focused clearly on the particular issues State B has identified, rather than having to make an unnecessarily broad presentation. It is not enough for State B to say "the firm is not controlled by its disadvantaged owner" or "the owner exceeds the PNW cap." These are conclusions, not specific, fact-based objections. Rather, State B might say "the disadvantaged owner has a full-time job with another organization and has not shown that he has sufficient time to exercise control over the day-to-day operations of the firm" or "the owner's property interests in assets X, Y, and Z were improperly valued and cause his PNW to exceed \$1.32 million." This degree of specificity is mandatory regardless of the regulatory ground (e.g., new information, factual errors in State A's certification: See section 26.85(d)(2)) on which State B makes an objection. For example, if State B objected to the firm's State A certification on the basis that State B's law required a different result, State B would say something like "State B Revised Statutes Section xx.yyyy

provides only that a registered engineer has the power to control an engineering firm in State B, and the disadvantaged owner of the firm is not a registered engineer, who is therefore by law precluded from controlling the firm in State B.”

On receiving this specific objection, the owner of the firm would have the burden of proof that he or she does meet the applicable requirements of Part 26. In the first example above, the owner would have to show that either he or she does not now have a full-time job elsewhere or that, despite the demands of the other job, he or she can and does control the day-to-day operations of the firm seeking certification. This burden would be to make the required demonstration by a preponderance of the evidence, the same standard used for initial certification actions generally. This owner would not bear any burden of proof with respect to size, disadvantage, ownership, or other aspects of control, none of which would be at issue in the proceeding. The proceeding, and the firm’s burden of proof, would concern only matters about which State B had made a particularized, specific objection. This narrowing of the issues should save time and resources for firms and certification agencies alike.

The firm’s response to State B’s particularized objections could be in writing and/or in the form of an in-person meeting with State B’s decision maker to discuss State B’s objections to the firm’s eligibility. The decision maker would have to be someone who is knowledgeable about the eligibility provisions of the DBE rule.

We recognize that, in unusual circumstances, the information the firm provided to State B in response to State B’s specific objections could contain new information, not part of the original record, that could form the basis for an additional objection to the firm’s certification. In such a case, State B would immediately notify the firm of the new objection and offer the firm a prompt opportunity to respond.

Section 26.85(d)(2) of the final rule lists the grounds a State B can rely upon to object to a State A certification of a firm. These are largely the same as in the NPRM. In response to a comment, the Department cautions that by saying that a ground for objection is that State A’s certification is inconsistent with this regulation, we do not intend for mere interpretive disagreements about the meaning of a regulatory provision to form a ground for objection. Rather, State B would have to cite something in State A’s certification that contradicted

a provision in the regulatory text of Part 26.

The final rule also gives, as a ground for objecting to a State A certification, that a State B law “requires” a result different from the law of State (*see* the engineering example above). To form the basis for an objection on this ground, a difference between state laws must be outcome-determinative with respect to a certification. For example, State A may treat marital property as jointly held property, while State B is a community property state. The laws are different, but both, in a given case, may well result in each spouse having a 50 percent share of marital assets. This would not form the basis for a State B objection.

With respect to state requirements for business licenses, the Department believes that states should not erect a “Catch 22” to prevent DBE firms from other states from becoming certified. That is, if a firm from State A wants to do business in State B as a DBE, it is unlikely to want to pay a fee to State B for a business license before it knows whether it will be certified. Making the firm get the business license and pay the fee before the certification process takes place would be an unnecessary barrier to the firm’s participation that would be contrary to this regulation.

The Department believes that regional certification consortia, or reciprocity agreements among states in a region, are a very good idea, and we anticipate working with UCPs in the future to help create such arrangements. Among other things, the experience of actually working together could help to mitigate the current mistrust among certification agencies. However, we do not believe it would be appropriate to mandate such arrangements at this time.

The Department believes that the DOCR database of decertification and denial actions would be of great use in the certification process. However, the system is not yet up and running. Consequently, the final rule includes a one-year delay in the implementation date of requirements for use of the database.

Other Certification-Related Issues

The NPRM asked for comment on whether there should be a requirement for periodic certification reviews and/or updates of on-site reviews concerning certified firms. The interval most frequently mentioned by commenters on this subject was five years, though there was also some support for three-, six-, and seven-year intervals. A number of commenters suggested that such reviews should include an on-site update only when the firm’s circumstances had

changed materially, in order to avoid burdening the limited resources of certifying agencies. Having a standardized on-site review form would reduce burdens, some commenters suggested. Other commenters suggested that the timing of reviews should be left to certifying agencies’ discretion, or that on-site updates should be done on a random basis of a smaller number of firms.

The NPRM also asked about the handling of situations where an applicant withdraws its application before the certifying agency makes a decision. Should certifying agencies be able to apply the waiting period (*e.g.*, six or 12 months) used for reapplications after denials in this situation? Comments on this issue, mostly from recipients but also from some DBEs and their associations, were divided. Some commenters said that there were often good reasons for a firm to withdraw and correct an application (*e.g.*, a new firm unaccustomed to the certification process) and that their experience did not suggest that a lot of firms tried to game the system through repeated withdrawals. On the other hand, some commenters said that having to repeatedly process withdrawn and resubmitted applications was a burden on their resources that they would want to mitigate through applying a reapplication waiting period. One recipient said that, even in the absence of a waiting period, the resubmitted application should go to the back of the line for processing. Still others wanted to be able to apply case-by-case discretion concerning whether to impose a waiting period on a particular firm. A few commenters suggested middle-ground positions, such as imposing a shorter waiting period (*e.g.*, 90 days) than that imposed on firms who are denied or applying a waiting period only for a second or subsequent withdrawal and reapplication by the same firm.

Generally, commenters were supportive of the various detail-level certification provision changes proposed in the NPRM (*e.g.*, basing certification decisions on current circumstances of a firm). Commenters did speak to a wide variety of certification issues, however. One commenter said that in its state, the UCP arbitrarily limited the number of NAICS codes in which a firm could be certified, a practice the commenter said the regulation should forbid. In addition, this commenter said, the UCP inappropriately limited certification of professional services firms owned by someone who was not a licensed professional in a field, even in the

absence of a state law requiring such licensure. A number of commenters said that recipients should not have to automatically certify SBA-certified 8(a) firms, while another commenter recommended reviving the now-lapsed DOT-SBA memorandum of understanding (MOU) on certification issues. A DBE association said that certifying agencies should not count against firms seeking certification (e.g., with respect to independence determinations) investments from or relationships with larger firms that are permitted under other Federal programs (e.g., HubZone or other SBA programs). One commenter favored, and another opposed, allowing States to use their own business specialty classifications in addition to or in lieu of NAICS codes.

One recipient recommended a provision to prevent owners from transferring personal assets to their companies to avoid counting them in the PNW calculation. Another said the certification for the PNW statement should specifically say that the information is "complete" as well as true. Yet another suggested that a prime contractor who owns a high percentage (e.g., 49 percent) of a DBE should not be able to use that DBE for credit. There were a number of suggestions that more of the certification process be done electronically, rather than on paper. A few comments said that getting back to an applicant within 20 days, as proposed in the NPRM, concerning whether the application was complete was too difficult for some recipients who have small staffs.

DOT Response

The Department believes that regularly updated on-site reviews are an extremely important tool in helping avoid fraudulent firms or firms that no longer meet eligibility requirements from participating in the DBE program. Ensuring that only eligible firms participate is a key part of maintaining the integrity of the program. We also realize that on-site reviews can be time- and resource-intensive. Consequently, while we believe that it is advisable for recipients and UCPs to conduct updated on-site reviews of certified companies on regular and reasonably frequent basis, and we strongly encourage such undated reviews, we have decided not to mandate a particular schedule, though we urge recipients to regard on-site reviews as a critical part of their compliance activities. When recipients or UCPs become aware of a change in circumstances or concerns that a firm may be ineligible or engaging in misconduct (e.g., from notifications of changes by the firm itself, complaints,

information in the media, etc.), the recipient or UCP should review the firm's eligibility, including doing an on-site review.

When recipients in other states (see discussion of interstate certification above) obtain the home state's certification information, they must rely on the on-site report that the home state has in its files plus the affidavits of no change, etc. that the firm has filed with the home state. It is not appropriate for State B to object to an out-of-state firm's certification because the home state's on-site review is older than State B thinks desirable, since that would unfairly punish a firm for State A's failure to update the firm's on-site review. However, if an on-site report is more than three years old, State B could require that the firm provide an affidavit to the effect that all the facts in the report remain true and correct.

While we recognize that reports that have not been updated, or which do not appear to contain sufficient analysis of a firm's eligibility, make certification tasks more difficult, our expectation is that the Department's enhanced interstate certification process will result in improved quality in on-site reviews so that recipients in various states have a clear picture of the structure and operation of firms and the qualifications of their owners. To this end, we encourage recipients and UCPs to establish and maintain communication in ways that enable information collected in one state to be shared readily with certification agencies in other states. This information sharing can be done electronically to reduce costs.

Firms may withdraw pending applications for certification for a variety of reasons, many of them legitimate. A withdrawal of an application is not the equivalent of a denial of that application. Consequently, we believe that it is inappropriate for recipients and UCPs to penalize firms that withdraw pending applications by applying the up-to-12 month waiting period of section 26.86(c) to such withdrawals, thereby preventing the firm from resubmitting the application before that time elapses. We believe that permitting recipients to place resubmitted applications at the end of the line for consideration sufficiently protects the recipients' workloads from being overwhelmed by repeated resubmissions. For example, suppose that Firm X withdraws its application in August. It resubmits the application in October. Meanwhile, 20 other firms have submitted applications. The recipient must accept Firm X's resubmission in October, but is not

required to consider it before the 20 applications that arrived in the meantime. Recipients should also closely examine changes made to the firm since the time of its first application.

We agree with commenters that it is not appropriate for recipients to limit NAICS codes in which a firm is certified to a certain number. Firms may be certified in NAICS codes for however many types of business they demonstrate that they perform and concerning which their disadvantaged owners can demonstrate that they control. We have added language to the regulation making this point. We also agree that it is not appropriate for a recipient or UCP to insist on professional certification as a *per se* condition for controlling a firm where state law does not impose such a requirement. We have no objection to a recipient or UCP voluntarily using its own business classification system in addition to using NAICS codes, but it is necessary to use NAICS codes.

SBA has now gone to a self-certification approach for small disadvantaged business, the SBA 8(a) program differs from the DBE program in important respects, and the SBA-DOT memorandum of understanding (MOU) on certification matters lapsed over five years ago. Under these circumstances, we have decided to delete former sections 26.84 and 26.85, relating to provisions of that MOU.

DBE firms in the DBE program must be fully independent, as provided in Part 26. If a firm has become dependent on a non-DBE firm through participation in another program, then it may be found ineligible for DBE program purposes. To say otherwise would create inconsistent standards that would enable firms already participating in other programs to meet a lower standard than other firms for DBE participation.

We believe that adding a regulatory provision prohibiting owners from transferring personal assets to their companies to avoid counting them in the PNW calculation would be difficult to implement, since owners of businesses often invest assets in the companies for legitimate reasons. However, as an interpretive matter, recipients are authorized to examine such transfers and, if they conclude that the transfer is a ruse to avoid counting personal assets toward the PNW calculation rather than a legitimate investment in the company and its growth, recipients or UCPs may continue to count the assets toward PNW.

We agree that the certification for the PNW statement should specifically say

that the information is “complete” as well as true and that a somewhat longer time period would be appropriate for recipients and UCPs to get back to applicants with information on whether their applications were complete. We have added a regulatory text statement on the former point and extended the time period on the latter point to 30 days.

If a prime contractor who owns a high percentage of a DBE that it wishes to use on a contract, issues concerning independence, affiliation, and commercially useful function can easily arise. For this reason, recipients should closely scrutinize such relationships. This scrutiny may well result, in some cases, in denying DBE credit or initiating decertification action.

We encourage the use of electronic methods in the application and certification process. As in other areas, electronic methods can reduce administrative burdens and speed up the process.

Accountability and Goal Submissions

The NPRM proposed that if a recipient failed to meet its overall goal, it would, within 60 days, have to analyze the shortfall, explain the reasons for it, and come up with corrective actions for the future. All State DOTs and the largest transit authorities and airports would have to send their analyses and corrective action plans to DOT operating administrations; smaller transit authorities and airports would retain them on file. While there would not be any requirement to meet a goal—to “hit the number”—failure to comply with these requirements could be regarded as a failure to implement a recipient’s program in good faith, which could lead to a finding of noncompliance with the regulation.

In a related provision, the Department asked questions in the NPRM concerning the recent final provision concerning submitting overall goals on a three-year, rather than an annual, basis. In particular, the NPRM asked whether it should be acceptable for a recipient to submit year-to-year projections of goals within the structure of a three-year goal and how implementation of the accountability proposal would work in the context of a three-year goal, whether or not year-to-year projections were made.

About two-thirds of the 64 comments addressing the accountability provision supported it. These commenters included DBEs, recipients, and some associations and other commenters. Some of these commenters, in fact, thought the proposal should be made

stronger. For example, a commenter suggested that a violation “will” rather than “could” be found for failure to provide the requested information. Another suggested that, beyond looking at goal attainment numbers, the accountability provisions should be broadened to include the recipient’s success with respect to a number of program elements (e.g., good faith efforts on contracts, outreach, DBE liaison officer’s role, training and education of staff).

Commenters also presented various ideas for modifying the proposal. These included suggestions that the Department should add a public input component, provide more guidance on the shortfall analysis and how to do it, delay its effective date to allow recipients to find resources to comply, ensure ongoing measurement of achievements rather than just measuring at the end of a year or three-year period, ensure that there is enough flexibility in explaining the reasons for a shortfall, or lengthen the time recipients have to submit the materials (e.g., 90 days, or 60 days after the recipient’s report of commitments and achievements is due). One commenter suggested that an explanation should be required only when there is a pattern of goal shortfalls, not in individual instances. There could be a provision for excusing recipients who fell short of their goal by very small amount, or even if the recipient made 80 percent of its goal.

Opponents of the proposal—mostly recipients plus a few associations—said that the proposal would be too administratively burdensome. In addition, they feared that making recipients explain a shortfall and propose corrective measures would turn the program into a prohibited set-aside or quota program, a concern that was particularly troublesome in states affected by the *Western States* decision. Moreover, a number of commenters said, the inability of recipients to meet overall goals was often the result of factors beyond their control. In addition, recipients might unrealistically reduce goals in order to avoid having to explain missing a more ambitious target.

With respect to the reporting intervals for goals, 28 of the 39 commenters who addressed the issue favored some form of at least optional yearly reporting of goals, either in the form of annual goal submissions or, more frequently, of year-to-year projections of goals within the framework of a three-year overall goal. The main reason given for this preference was a concern that projects and the availability of Federal funding for them were sufficiently volatile that making a projection that was valid for

a three-year period was problematic. This point of view was advanced especially by airports. Some other commenters favored giving recipients discretion whether to report annually or triennially. Commenters who took the point of view that the three-year interval was preferable agreed with original rationale of reducing repeated paperwork burdens on recipients. One commenter asked that the rule specify that, especially in a three-year interval schedule of goal submission, a recipient “must” submit revisions if circumstances change.

There was discussion in the NPRM of the relationship between the goal submission interval and the accountability provision. For example, if a recipient submitted overall goals on a three-year basis, would the accountability provision be triggered annually, based on the recipient’s annual report (as the NPRM suggested) or only on the basis of the recipient’s performance over the three-year period? If there were year-to-year projections within a three-year goal, would the accountability provision relate to accountability for the annual projection or the cumulative three-year goal? Commenters who favored year-to-year projections appeared to believe that accountability would best relate to each year’s projection, though the discussion of this issue in the comments was often not explicit. Some comments, including one from a Member of Congress, did favor holding recipients accountable for each year’s separate performance.

There was a variety of other comments on goal-related issues. Some commenters asked that the three DOT operating administrations coordinate submitting goals so that a State DOT submitting goals every three years would be able to submit its FHWA, FAA, and FTA goals in the same year. A DBE group wanted the Department to strengthen requirements pertaining to the race-neutral portion of a recipient’s overall goal. A commenter who works with transit vehicle manufacturers requested better monitoring of transit vehicle manufacturers by FTA. A group representing DBEs wanted recipients to focus on potential, and not just certified, DBEs for purposes of goal setting. The same group also urged consideration of separate goals for minority- and women-owned firms.

DOT Response

Under Part 26, the Department has always made unmistakably clear that the DBE program does not impose quotas. No one ever has been, or ever will be, sanctioned for failing to “hit the number.” However, goals must be

implemented in a meaningful way. A recipient's overall goal represents its estimate of the DBE participation it would achieve in the absence of discrimination and its effects. Failing to meet an overall goal means that the recipient has not completely remedied discrimination and its effects in its DOT-assisted contracting. In the Department's view, good faith implementation of a DBE program by a recipient necessarily includes understanding why the recipient has not completely remedied discrimination and its effects, as measured by falling short of its "level playing field" estimate of DBE participation embodied in its overall goal. Good faith implementation further means that, having considered the reasons for such a shortfall, the recipient will devise program actions to help minimize the potential for a shortfall in the future.

Under the Department's procedures for reviewing overall goals and the methodology supporting them, the Department has the responsibility of ensuring that a recipient's goals are well-grounded in relevant data and are derived using a sound methodology. The Department would not approve a recipient's goal submission if it appeared to understate the "level playing field" amount of DBE participation the recipient could rationally expect, whether to avoid being accountable under the new provisions of the rule or for other reasons.

For these reasons, the Department is adopting the NPRM's proposed accountability mechanism. We do not believe that the concerns of some commenters that this mechanism would create a quota system are justified: No one will be penalized for failing to meet an overall goal. Moreover, promoting transparency and accountability is not synonymous with imposing a penalty and should not be viewed as such. Understanding the reasons for not meeting a goal and coming up with ways of avoiding a shortfall in the future, while not creating a quota system, do help to ensure that recipients take seriously the responsibility to address discrimination and its effects.

Moreover, the administrative burden of compliance falls only on those recipients who fail to meet a goal, not on all recipients. Understanding what is happening in one's program, why it is happening, and how to fix problems is, or ought to be, a normal, everyday part of implementing a program, so the analytical tasks involved in meeting this requirement should not be new to recipients. We do not envision that recipients' responses to this requirement

would be book-length; a reasonable succinct summary of the recipient's analysis and proposed actions should be sufficient though, like all documents submitted in connection with the DBE program, it should show the work and reasoning leading to the recipient's conclusions.

For example, a recipient might determine that its process for ascertaining whether prime bidders who failed to meet contract goals had made adequate good faith efforts was too weak, and that prime bidders consequently received contracts despite making insufficient efforts to find DBEs for contracts. In such a case, the recipient could take corrective action such as more stringent review of bidder submissions or meeting with prime bidders to provide guidance and assistance on how to do a better job of making good faith efforts.

We agree that there may be circumstances in which a recipient's inability to meet a goal is for reasons beyond its control. If that is the case, the recipient's response to this requirement can be to identify such factors, as well as suggesting how these problems may be taken into account and surmounted in the future. We also agree with those commenters who said that good-faith implementation of a DBE program involves more than meeting an overall goal. Factors like those cited by commenters are important as part of an overall evaluation of a recipient's success. This accountability provision, however, is intended to focus on the process recipients are using to achieve their overall goals, rather than to act as a total program evaluation tool. The operating administrations will continue to conduct program reviews that address the breadth of recipients' program implementation.

The Department believes that a clear, bright-line trigger for the application of the accountability provision makes the most sense administratively and in terms of achieving the purpose of the provision. Consequently, we are not adopting suggestions that the provision be triggered only by a pattern of missing goals, or an average of missing goals over the period of a three-year overall goal, or a shortfall of a particular percentage. Any shortfall means that a recipient has dealt only incompletely with the effects of discrimination, and we believe that it is appropriate in any such case that the recipient understand why that is the case and what steps to take to improve program implementation in the future.

The three-year goal review interval was intended to reduce administrative burdens on recipients. Nevertheless, we

understand that some recipients, especially airports, may be more comfortable with annual projections and updates of overall goals. We have no objection to recipients making annual projections, for informational purposes, within the three-year overall goal. It is still the formally submitted and reviewed three-year goal, however, and not the informal annual projections, that count from the point of view of the accountability mechanism. For example, suppose an airport has a three-year annual overall goal of 12 percent. For informational purposes, the airport chooses to make informal annual projections of 6, 12, and 18 percent for years 1–3, respectively (which, by the way, are not required to be submitted to the Department). The accountability mechanism requirements would be triggered in each of the three years covered by the overall goal if DBE achievements in each year were less than 12 percent.

The Department agrees that recipients should be accountable for effectively carrying out the race-neutral portion of their programs. If a recipient fell short of its overall goal because it did not achieve the projected race-neutral portion of its goal, then this is something the recipient would have to explain and establish measures to correct (*e.g.*, by stepping up race-neutral efforts and/or concluding that it needed to increase race-conscious means of achieving its goal). We also agree that it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance. Separate goals for various groups of disadvantaged individuals are possible with a program waiver of the DBE regulation, if a sufficient case is made for the need for group-specific goals.

In the section of the rule concerning goal-setting (49 CFR 26.45), the Department is also taking this opportunity to make a technical correction. In the final rule establishing the three year DBE goal review cycle, the Department inadvertently omitted from § 26.45(f)'s regulatory text paragraphs (3), (4), and (5), which govern the content of goal submissions, operating administration review of the submission, and review of interim goal setting mechanisms. It was never the intent of the Department to remove or otherwise change those provisions of section 26.45(f) of the rule. This final rule corrects that error by restructuring

paragraphs (1) and (2) of section 26.45(f) and restoring the language of paragraphs (3), (4), and (5) of that section of the rule. We apologize for any confusion that this error may have caused.

The Department supports strong outreach efforts by recipients to encourage minority- and women-owned firms to become certified as DBEs, so that recipients can set and meet realistic goals. However, we caution recipients against stating or implying that minority- and women-owned firms can participate in recipients' contracts only if they become certified as DBEs. It would be contrary to nondiscrimination requirements of this part and of Title VI for a recipient to limit the opportunity of minority- or women-owned firms to compete for any contract because the firm was not a certified DBE.

Program Oversight

The NPRM proposed to require recipients to certify that they have monitored the paperwork and on-site performance of DBE contracts to make sure that DBEs actually perform them. Comment was divided on this proposal, with 21 comments favoring either the proposal or stronger oversight mechanisms and 18 opposed.

Commenters who favored the proposal, including DBEs and some associations and recipients, generally believed that the provision would make it less likely that post-award abuse of DBEs by prime contractors would occur. One recipient noted that it already followed this approach with respect to ARRA grants. Some commenters wanted the Department to require additional steps, such as requiring recipients to make periodic visits to the job site and keeping records of each visit, to ensure that the DBELO did in fact have direct access to the organization's CEO concerning DBE matters, and to maintain sufficient trained staff to do needed monitoring. DBE associations wanted mandatory monitoring of good faith efforts (e.g., by keeping records of all contacts made by prime contractors) and terminations of DBEs by prime contractors, as well as to have certifications signed by persons higher up in the organization than the DBELO (e.g., the CEO). Another commenter sought further checking concerning counting issues. A consultant and a recipient suggested that recipient certifications should be more frequent than a one-time affair, (e.g., monthly or quarterly).

Commenters who opposed the NPRM proposal, most of whom were recipients, said that the workload the certification requirement would create would be too administratively

burdensome, particularly for recipients with small staffs. The certification requirement could duplicate existing commercially useful function reviews. They also doubted the payoff in terms of improved DBE program implementation would be worth the effort. Some recipients said that they did monitor post-award performance and that the proposed additional paperwork requirement step would add little to the substance of their processes. One recipient noted that it would be very difficult to perform an on-site review of contract performance in the case of professional services consultants whose work was performed out of state.

One recipient suggested that a middle ground might be to have the recipient certify monitoring of a sample of contracts, since it lacked the staff for field monitoring of all contracts. A consultant suggested selecting contracts for monitoring based on a "risk-based analysis" of contracts or by focusing on contracts where prime contractors' achievements did not measure up to their commitments. One recipient suggested limiting the certification requirement to one commercially useful function review per year on a contract. A few recipients asked for guidance on what constituted adequate staffing for the DBE program.

DOT Response

The Department's DBE rule already includes a provision (49 CFR 26.37(b)) requiring recipients to have a monitoring and enforcement mechanism to ensure that work committed to DBEs is actually performed by DBEs. The trouble is that, based on the Department's experience, this provision is not being implemented by recipients as well as it should be. The FHWA review team that has been examining state implementation of the DBE program found that many states did not have an effective compliance monitoring program in place. DBE fraud cases investigated by the Department's Office of Inspector General and criminal prosecutions in the Federal courts have highlighted numerous cases in which recipients were unaware, often for many years, of situations in which non-DBE companies were claiming DBE credit for work that DBEs did not perform.

The Department believes that, for the DBE program to be meaningful, it is not enough that prime contractors commit to the use of DBEs at the time of contract award. It is also necessary that the DBEs actually perform the work involved. Recipients need to know whether DBEs are actually performing the work involved, lest program effectiveness suffer and the door be left open to fraud.

Recipients must actually monitor each contract, on paper and in the field, to ensure that they have this knowledge. Monitoring DBE compliance on a contract is no less important, and should be no more brushed aside, than compliance of with project specifications. This is important for prime contracts performed by DBEs as well as for situations in which DBEs act as subcontractors, and the monitoring and certification requirements will apply to both situations.

Consequently, the Department believes that the proposed requirement that recipients memorialize the monitoring they are already required to perform has merit. Its intent is to make sure that the monitoring actually takes place and that the recipient stands by the statement that DBE participation claimed on a contract actually occurred. This monitoring, and the recipient's written certification that it took place, must occur with respect to every contract on which DBE participation is claimed, not just a sample or percentage of such contracts, to make sure that the program operates as it is intended. It applies to contracts entered into prior to the effective date of this rule, since the obligation to monitor work performed by DBEs has always been a key feature of the DBE program.

With respect to concerns about administrative burden, the Department believes that monitoring is something that recipients have been responsible for conducting since the inception of Part 26. Therefore, we are not asking recipients to do something with which they can claim they are unfamiliar. Moreover, as the final rule version of this provision makes clear, recipients can combine the on-site monitoring for DBE compliance with other monitoring they do. For example, the inspector who looks at a project to make sure that the contractor met contract specifications before final payment is authorized could also confirm that DBE requirements were honestly met.

While we believe that more intensive and more frequent monitoring of DBE performance on contracts is desirable, we encourage recipients to monitor contracts as closely as they can. However, we do not, for workload reasons, want to mandate more pervasive monitoring at this time. We agree with commenters that it would be difficult to do on-site monitoring of contracts performed outside the state (e.g., an out-of-state consulting contract), and we have added language specifying that the requirement to monitor work sites pertains to work sites in the recipient's state. In reference to what constitutes adequate staffing of

a DBE program, we believe that it is best to look at this question in terms of a performance standard. The Department's rule requires certain tasks (e.g., responding to applications for DBE eligibility, certification and monitoring of DBE performance on contracts) to be performed within certain time frames. If a recipient has sufficient staff to meet these requirements, then its staffing levels are adequate. If not (e.g., applications for DBE certification are backlogged for several months), then staffing is inadequate.

Small Business Provisions

The NPRM proposed that recipients would add an element to their DBE programs to foster small business participation in contracts. The purpose of this proposal was to encourage programs that, by facilitating small business participation, augmented race-neutral efforts to meet DBE goals. The program element could include items such as race-neutral small business set-asides and unbundling provisions. The NPRM did not propose to mandate any specific elements, however.

The majority of commenters addressing this part of the NPRM—38 of 55—favored the NPRM's approach. Commenters approving the proposal were drawn from DBEs, associations, and recipients. Generally, they agreed that steps to create improved opportunities for small business would help achieve the objectives of the DBE program. Specific elements that various commenters supported included unbundling (which some commenters suggested should be made mandatory), prohibiting double-bonding, small business set-asides, expansions of existing small business development programs and mentor-protégé programs.

Commenters who did not support the NPRM proposal, most of whom were recipients, were concerned that having small business programs would draw focus from programs targeted more directly at DBEs. They were also concerned about having sufficient resources to carry out the programs they might include in a small business program element. One commenter thought that a small business program element would duplicate existing supportive services programs. Another thought unbundling would not work. A number of recipients thought it would be better for DOT to issue guidance on this subject rather than to create regulatory language. A recipient association characterized the proposal as burdensome and not productive.

Eight commenters addressed the issue of bonding and insurance requirements. A bonding company association

explained that both performance and payment bonds had an appropriate place in contracting and believed that subcontractor bonds were not duplicative of prime contractor bonds. A DBE wanted to prohibit prime contractors from setting bonding requirements for subcontractors. A recipient said the Department should treat prime contractors and subcontractors the same for bonding purposes. One DBE association said the combination of payment bonds, performance bonds, and retention was burdensome for subcontractors and Another DBE association said that it was inappropriate to require bonding of the subcontractor when the prime contractor was already bonded for the overall work of the contract. This association suggested that a prime contractor could not demonstrate good faith efforts to meet a goal if it insisted on such a double bond.

DOT Response

DBEs are small businesses. Program provisions that help small businesses can help DBEs. By facilitating participation for small businesses, recipients can make possible more DBE participation, and participation by additional DBE firms. Consequently, we believe that a program element that pulls together the various ways that a recipient reaches out to small businesses and makes it easier for them to compete for DOT-assisted contracts will foster the objectives of the DBE program. Because small business programs of the kind suggested in the NPRM are race-neutral, use of these programs can assist recipients in meeting the race-neutral portions of their overall goals. This is consistent with the language that under Part 26, recipients are directed to meet as much as possible of their overall goals through race-neutral means.

It is important to keep in mind that race-neutral programs should not be passive. Simply waiting and hoping that occasional DBEs will participate without the use of contract goals does not an effective race-neutral program make. Rather, recipients are responsible for taking active, effective steps to increase race-neutral DBE participation, by implementing programs of the kind mentioned in this section of the NPRM and final rule. The Department will be monitoring recipients' race-neutral programs to make sure that they meet this standard.

In adopting the NPRM proposal requiring a small business program element, the Department believes that this element—which is properly viewed as an integral part of a recipient's DBE

program—need not distract recipients from other key parts of recipients' DBE programs, such as certification and the use of race-conscious measures. There are different ways of encouraging DBE participation and meeting DBE overall goals, and recipients' programs need to address a variety of these means. Many of the provisions that recipients can use to implement the requirements of the new section (e.g., unbundling, race-neutral small business set-asides) are already part of the regulation or DOT guidance, and carrying out these elements should not involve extensive additional burdens.

With respect to bonding, the Department believes that commenters made a good point with respect to the burden of duplicative bonding. By duplicative bonding, we mean insistence by a prime contractor that a DBE provide bonding for work that is already covered by bonding or insurance provided by the prime contractor or the recipient. Like duplicative bonding, excessive bonding—a requirement, which according to participants in the Department's stakeholder meetings, is sometimes imposed to provide a bond in excess of the value of the subcontractor's work—can act as an unnecessary barrier to DBE participation. While we believe that additional action to address these problems may have merit, there was not a great deal of comment on the implications of potential regulatory requirements in these areas. Consequently, we will defer action on these issues at this time and seek additional comment and information in the follow-on NPRM the Department is planning to issue.

Miscellaneous Comments

Several commenters expressed general support for the DBE program and/or the NPRM, while two commenters opposed the DBE program in general. A large number of comments from an advocacy organization's members supported additional bonding assistance and more frequent data reporting. A commenter wanted to add DBE coverage for Federal Railroad Administration (FRA) grants. Commenters also suggested such steps as increasing technical assistance, using project labor agreements to increase DBE participation, an SBA 8(a) program-like term limit on participation in the DBE program, a better uniform reporting form, greater ease in complaining to DOT and recipients about noncompliance issues, and putting current joint check guidance into the rule's text.

DOT Response

The Department already has programs in place concerning bonding and data reporting. There is not currently a direct, specific statutory mandate for a DBE program in FRA financial assistance programs, though the Department is considering ways of ensuring nondiscrimination in contracting in these programs. For example, like all recipients of Federal financial assistance, FRA recipients are subject to requirements under Title VI of the Civil Rights Act of 1964. Existing programs, such as the FHWA supportive services program and various initiatives by the Department's Office of Small and Disadvantaged Business Utilization, are in place to assist DBEs in being competitive. Given the language of the statutes authorizing the DOT DBE program, we do not believe that a term limit on the participation of DBE companies would be permissible. The Department is working on improvements on all its DBE forms, and we expect to seek comment on revised forms in the follow-on NPRM we anticipate publishing. At this point, we think that the joint check guidance is sufficient without codification, but we can look at this issue, among other certification issues, in the next round of rulemaking.

The Continuing Compelling Need for the DBE Program

As numerous court decisions have noted,¹ the Department's DBE regulations, and the statutes authorizing them, are supported by a compelling need to address discrimination and its effects. This basis for the program has been established by Congress and applies on a nationwide basis. Both the House and Senate FAA reauthorization bills contained findings reaffirming the compelling need for the program. We would also call to readers' attention the additional information presented to the House of Representatives in a March 26, 2009, hearing before the Transportation and Infrastructure Committee and made a part of the record of that hearing and a Department of Justice document entitled "The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-

Owned Businesses" and the information and documents cited therein. This information confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.

Regulatory Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This is a nonsignificant regulation for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. Its provisions involve administrative modifications to several provisions of a long-existing and well-established program, designed to improve the program's implementation. The rule does not alter the direction of the program, make major policy changes, or impose significant new costs or burdens.

Regulatory Flexibility Act

A number of provisions of the rule reduce small business burdens or increase opportunities for small business, notably the interstate certification process and the small business DBE program element provisions. Small recipients would not be required to file reports concerning the reasons for overall goal shortfalls and corrective action steps to be taken. Only State DOTs, the 50 largest transit authorities, and the 30–50 airports receiving the greatest amount of FAA financial assistance would have to file these reports. The task of sending copies of on-site review reports to other certification entities fall on UCPs, which are not small entities, and in any case can be handled electronically (*e.g.*, by emailing PDF copies of the documents). While all recipients would have to input information about decertifications and denials into a DOT database, this would be a quick electronic process that would not be costly or burdensome. In any case, this requirement will be phased in as the Department prepares to put the database online. The rule does not make major policy changes that would cause recipients to expend significant resources on program modifications. For these reasons, the Department certifies that the rule does not have a significant economic effect on a substantial number of small entities.

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of

compliance on them. We have analyzed this rule under the Order and have determined that it does not have implications for federalism, since it merely makes administrative modifications to an existing program. It does not change the relationship between the Department and State or local governments, pre-empt State law, or impose substantial direct compliance costs on those governments.

Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995, DOT has submitted the Information Collection Requests (ICRs) below to the Office of Management and Budget (OMB). Before OMB decides whether to approve these proposed collections of information and issue a control number, the public must be provided 30 days to comment. Organizations and individuals desiring to submit comments on the collections of information in this rule should direct them to the Office of Management and Budget, *Attention*: Desk Officer for the Office of the Secretary of Transportation, Office of Information and Regulatory Affairs, Washington, DC 20503. OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

We will respond to any OMB or public comments on the information collection requirements contained in this rule. The Department will not impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. The Department intends to obtain current OMB control numbers for the new information collection requirements resulting from this rulemaking action. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

It is estimated that the total incremental annual burden hours for the information collection requirements in this rule are 47,450 hours in the first year, 83,370 in the second year, and 51,875 thereafter. The following are the information collection requirements in this rule:

Certification of Monitoring (49 CFR 26.37(b))

Each recipient would certify that it had conducted post-award monitoring of contracts which would be counted for

¹ See for instance *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007), *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d 983 (9th Cir. 2005).

DBE credit to ensure that DBEs had done the work for which credit was claimed. The certification is for the purpose of ensuring accountability for monitoring which the regulation already requires.

Respondents: 1,050.

Frequency: 13,400 (i.e., there are about 13,400 contracts per year that have DBE participation, based on 2009 data).

Estimated Burden per Response: 1/2 hour.

Estimated Total Annual Burden: 6,700 hours.

Small Business Program Element (49 CFR 26.39)

Each recipient would add a new DBE program element, consisting of strategies to encourage small business participation in their contracting activities. No specific element would be required, and many of the potential elements are already part of the existing DBE regulation or implementing guidance (e.g., unbundling; race-neutral small business set-asides). The small business program element is intended to pull a recipient's small business efforts into a single, unified place in this DBE Program. This requirement goes into effect a year from the effective date of the rule.

Respondents: 1,050.

Frequency: Once (for a one-time task).

Estimated Burden per Response: 30 hours.

Estimated Total Annual Burden Hours: 31,500 (one time).

Accountability Mechanism (49 CFR 26.47(c))

If a recipient failed to meet its overall goal in a given year, it would have to determine the reasons for its failure and establish corrective steps.

Approximately 150 large recipients would transmit this analysis to DOT; smaller recipients would perform the analysis but would not be required to submit it to DOT. We estimate that about half of recipients would be subject to this requirement in a given year.

Respondents: 525 (150 of which would have to submit reports to DOT).

Frequency: Once per year.

Estimated Average Burden per Response: 80 hours + 5 for recipients sending report to DOT.

Estimated Total Annual Burden Hours: 42,750.

Affidavit of Completeness (49 CFR 26.45(c)(4))

When a firm certified in its home state seeks certification in another state ("State B"), the firm must provide an affidavit that the information the firm

provides to State B is complete and is identical to that submitted to the home state. The calculation of the burden for this item assumes that there will be an average 2600 interstate applications each year to which this requirement would apply. This requirement takes effect a year from the effective date of this rule.

Respondents: 2,600.

Frequency: Once per year to a given recipient.

Estimated Average Burden per Response: 1 hour.

Estimated Total Annual Burden Hours: 2,600 hours.

Transmittal of On-Site Report (49 CFR 26.85(d)(1))

When a "State B" receives a request for certification from a firm certified in "State A," State A must promptly send a copy of that report to State B. This would involve simply emailing a PDF or other electronic copy of an existing report. This requirement takes effect one year from the effective date of this rule.

Respondents: 52.

Frequency: An average of 50 per year per recipient.

Estimated Average Burden per Response: 1/2 hour.

Estimated Total Annual Burden Hours: 1,300.

Transmittal of Decertification/Denial Information (49 CFR 26.85(f)(1))

When a unified certification program (UCP) in a state denies a firm's application for certification or decertifies the firm, it must electronically notify a DOT database of the fact. The information in the database is then available to other certification agencies for their reference. The calculation of the burden of this requirement assumes that there would be an average of 100 such actions per year by each UCP.

Respondents: 52.

Frequency: An average of 100 per year per recipient.

Estimated Average Burden per Response: 1/2 hour.

Estimated Total Annual Burden Hours: 2,600.

Transmittal of Denial/Decertification Documents (49 CFR 26.85(f)(3))

When a UCP notes, from the DOT database, that a firm that has applied or been granted certification was denied or decertified elsewhere, the UCP would request a copy of the decision by the other state, which would then have to send a copy. The Department anticipates that this would be done by an email exchange, the response attaching a PDF or other electronic copy

of an existing document. This requirement goes into effect a year from the effective date of the rule.

Respondents: 52.

Frequency: An average of 75 per year per recipient.

Estimated Average Burden per

Response: five minutes for the request; 1/2 hour for the response.

Estimated Total Annual Burden Hours: 2,625.

List of Subjects in 49 CFR Part 26

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant programs—transportation, Mass transportation, Minority businesses, Reporting and record keeping requirements.

Issued this 11th day of January, 2011, at Washington, DC.

Ray LaHood,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department amends 49 CFR Part 26 as follows:

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

■ 1. The authority citation for part 26 is amended to read as follows:

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

■ 2. In section 26.5, add a definition of "Home state" in alphabetical order to read as follows:

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

* * * * *

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

* * * * *

■ 3. In § 26.11, add paragraph (a) to read as follows:

§ 26.11 What records do recipients keep and report?

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

* * * * *

■ 4. Revise § 26.31 to read as follows:

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

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

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.

■ 5. Revise § 26.37 (b) to read as follows:

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

* * * * *

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

* * * * *

■ 6. Add § 26.39 to subpart B to read as follows:

§ 26.39 Fostering small business participation.

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

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

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

(2) In multi-year design-build contracts or other large contracts (e.g., for "megaprojects") requiring bidders on the prime contract to specify elements of the contract or specific subcontracts

that are of a size that small businesses, including DBEs, can reasonably perform.

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

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

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

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

■ 7. In § 26.45:

■ a. Revise paragraphs (e)(2), (e)(3), (f)(1), and (f)(2);

■ b. Redesignate paragraphs (f)(3) and (f)(4) as (f)(6) and (f)(7), respectively; and

■ c. Add new paragraphs (f)(3), (4), and (5).

The revisions and addition read as follows:

§ 26.45 How do recipients set overall goals?

* * * * *

(e) * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

administration's review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

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

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

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

* * * * *

■ 8. In § 26.47, add paragraphs (c) and (d) to read as follows:

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

■ 9. In § 26.51, revise paragraphs (b)(1) and (f)(1) to read as follows:

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

* * * * *

(b) * * *

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.

* * * * *

(f) * * *

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract

goals during that year, unless it becomes necessary in order meet your overall goal.

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

* * * * *

■ 10. In § 26.53:

■ a. Redesignate paragraph (g) as paragraph (i);

■ b. Redesignate paragraphs (f)(2) and (3) as paragraphs (g) and (h), respectively;

■ c. Revise paragraph (f)(1); and

■ d. Add new paragraphs (f)(2) through (6) to read as follows:

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

* * * * *

(f)(1) You must require that a prime contractor not terminate a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

(2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the DBE firm.

(3) For purposes of this paragraph, good cause includes the following circumstances:

(i) The listed DBE subcontractor fails or refuses to execute a written contract;

(ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;

(iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's

reasonable, nondiscriminatory bond requirements.

(iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;

(v) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;

(vii) You have determined that the listed DBE subcontractor is not a responsible contractor;

(vi) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;

(vii) The listed DBE is ineligible to receive DBE credit for the type of work required;

(viii) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;

(ix) Other documented good cause that you determine compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

(4) Before transmitting to you its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you, of its intent to request to terminate and/or substitute, and the reason for the request.

(5) The prime contractor must give the DBE five days to respond to the prime contractor's notice and advise you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why you should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than five days.

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

* * * * *

■ 11. In § 26.67, revise paragraphs (a)(2)(i) and (iv), and in paragraphs (b), (c), and (d), remove "\$750,000" and add in its place "\$1.32 million".

The revisions read as follows:

§ 26.67 What rules determine social and economic disadvantage?

(a) * * *

(2)(i) You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$1.32 million.

* * * * *

(iv) Notwithstanding any provision of Federal or state law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under section 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

* * * * *

■ 12. Revise § 26.71(n) to read as follows:

§ 26.71 What rules govern determinations concerning control?

* * * * *

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

(1) The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available NAICS code for that type of work. If you choose, you may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. If your Directory does not list types of work for any firm

in a manner consistent with this paragraph (a)(1), you must update the Directory entry for that firm to meet the requirements of this paragraph (a)(1) by August 28, 2011.

(2) Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

(3) If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

(4) A certifier is not precluded from changing a certification classification or description if there is a factual basis in the record. However, certifiers must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

* * * * *

■ 13. Revise § 26.73(b) to read as follows:

§ 26.73 What are other rules affecting certification?

* * * * *

(b)(1) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.

(2) You must not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of

this Part, the firm is eligible for certification.

* * * * *

§ 26.81 [Amended]

■ 14. Amend § 26.81(g) by removing the word “section” and adding in its place the word “part” and by removing the period at the end of the last sentence and adding the words “and shall revise the print version of the Directory at least once a year.”

■ 15. In § 26.83, remove and reserve paragraph (e), revise paragraph (h), and add paragraphs (l) and (m) to read as follows:

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

* * * * *

(h) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of section 26.87. You may not require DBEs to reapply for certification or require “recertification” of currently certified firms. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, three years from the date of the firm’s most recent certification, or sooner if appropriate in light of changed circumstances (*e.g.*, of the kind requiring notice under paragraph (i) of this section), a complaint, or other information concerning the firm’s eligibility. If you have grounds to question the firm’s eligibility, you may conduct an on-site review on an unannounced basis, at the firm’s offices and jobsites.

* * * * *

(l) As a recipient or UCP, you must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

(m) Except as otherwise provided in this paragraph, if an applicant for DBE certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time. As a recipient or UCP, you may not apply the waiting period provided under § 26.86(c) of this part before allowing the applicant to resubmit its application. However, you may place the reapplication at the “end of the line,” behind other applications that have been made since the firm’s previous application was withdrawn. You may also apply the waiting period provided under § 26.86(c) of this part to a firm that has established a pattern of

frequently withdrawing applications before you make a decision.

§ 26.84 [Removed]

■ 16. Remove section 26.84.

■ 17. Revise § 26.85 to read as follows

§ 26.85 Interstate certification.

(a) This section applies with respect to any firm that is currently certified in its home state.

(b) When a firm currently certified in its home state (“State A”) applies to another State (“State B”) for DBE certification, State B may, at its discretion, accept State A’s certification and certify the firm, without further procedures.

(1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.

(2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A’s electronic directory or obtaining written confirmation from State A.

(c) In any situation in which State B chooses not to accept State A’s certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your firm’s certification. This includes affidavits of no change (*see* § 26.83(j)) and any notices of changes (*see* § 26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A’s UCP or any other recipient concerning your application or status as a DBE firm.

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

(3) If you have filed a certification appeal with DOT (*see* § 26.89), you must inform State B of the fact and provide your letter of appeal and DOT’s response to State B.

(4) You must submit an affidavit sworn to by the firm’s owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

(i) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by § 26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct.

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (*see* § 26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by “State A” or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) Determine whether there is good cause to believe that State A’s certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

(i) Evidence that State A’s certification was obtained by fraud;

(ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;

(iii) State A’s certification was factually erroneous or was inconsistent with the requirements of this part;

(iv) The State law of State B requires a result different from that of the State law of State A.

(v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(3) If, as State B, unless you have determined that there is good cause to believe that State A’s certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms.

(4) If, as State B, you have determined that there is good cause to believe that State A’s certification is erroneous or should not apply in your State, you

must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility, or both. If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the firm's request.

(iii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B's notice. The firm is not otherwise responsible for further demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.

(v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.

(vi) The firm's application for certification is stayed pending the outcome of this process.

(vii) A decision under this paragraph (d)(4) may be appealed to the

Departmental Office of Civil Rights under s§ 26.89 of this part.

(e) As State B, if you have not received from State A a copy of the site visit review report by a date 14 days after you have made a timely request for it, you may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.

(f)(1) As a UCP, when you deny a firm's application, reject the application of a firm certified in State A or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm, in whole or in part, you must make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. You must enter the following information:

- (i) The name of the firm;
- (ii) The name(s) of the firm's owner(s);
- (iii) The type and date of the action;
- (iv) The reason for the action.

(2) As a UCP, you must check the DOCR Web site at least once every month to determine whether any firm that is applying to you for certification or that you have already certified is on the list.

(3) For any such firm that is on the list, you must promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, you must provide a copy of the decision to the requesting UCP within 7 days of receiving the request. As the

UCP receiving the decision, you must then consider the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.

(g) You must implement the requirements of this section beginning January 1, 2012.

§ 26.87 [Amended]

■ 18. In § 26.87, remove and reserve paragraph (h).

§ 26.107 [Amended]

■ 19. In § 26.107, in paragraphs (a) and (b), remove "49 CFR part 29" and add in its place, "2 CFR parts 180 and 1200".

■ 20. In § 26.109, revise paragraph (a)(2) to read as follows:

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

(a) * * *

(2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

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