

Nevada Department of Transportation



DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

October 2019



Federal Transit Administration

**Nevada Department of Transportation
Disadvantaged Business Enterprise Program**

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Nevada Department of Transportation Disadvantaged Business Enterprise Program

POLICY STATEMENT

The Nevada Department of Transportation (NDOT) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 CFR Part 26. The Nevada Department of Transportation receives Federal financial assistance from the United States Department of Transportation (USDOT), and as a condition of receiving this assistance, NDOT has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of NDOT to ensure DBE firms, as defined in part 26, have an equal opportunity to receive and participate in USDOT-assisted contracts. It is our policy:

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

The External Civil Rights Officer has been designated as the NDOT DBE Liaison Officer (DBELO). In that capacity, the Civil Rights Officer is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by NDOT in its financial assistance agreements with the USDOT.

NDOT will ensure that this policy statement will be disseminated directly to all division heads, resident engineers, and parties with responsibilities outlined in this plan. It will be posted on NDOT's SharePoint site where it is available to all employees. NDOT will distribute this statement directly to all certified DBE firms and all prequalified contractors. It will also be posted on the NDOT website where it is available to all members of the public.

DocuSigned by:
Kristina L. Swallow

NDOT Director

10/10/2019

Date

I) General

The Nevada Department of Transportation (NDOT) recognizes the responsibility to ensure that Disadvantaged Business Enterprise (DBE) firms have equal opportunity to participate in the performance of USDOT assisted contracts administered by NDOT. As part of NDOT's continued effort to fulfill this responsibility, NDOT has revised the DBE Program Plan to reflect the requirements and guidance contained in title 49 Code of Federal Regulations Part 26.

Significant changes in the Plan will be submitted to the local Federal Transit Administration (FTA) offices for approval.

A. Objectives of the DBE Program §26.1

NDOT seeks to achieve several objectives:

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

The NDOT DBE program applies to all types of firms working on USDOT-funded contracts:

- Contractors and consultants
- Professional Service Agreements (training, computer, etc.)
- Architectural/Engineering Contracts

B. Applicability §26.3

As a recipient of Federal funds NDOT is required to administer a DBE program in compliance with all laws, regulations, Executive Orders, and guidance.

The DBE Program applies to all USDOT-assisted transportation-related contracts administered by NDOT and funded using Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405.

Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405.

Airport funds authorized by 49 USC 47101, et seq., are also included. This program remains in effect until the end of the fiscal year in which all such funds from USDOT have been expended.

Other NDOT Divisions that receive USDOT funds include the Right of Way Division and The Transit Division within Planning. These Divisions have reviewed, adopted, and assure compliance with the conditions of the NDOT DBE Plan. As appropriate, NDOT's Civil Rights Unit will develop, a semi-annual DBE participation goal using the methodology established in this DBE Plan. The goal will be provided by NDOT to the appropriate USDOT administration.

In accordance with 49 CFR 26.49, transit vehicle manufacturers, as a condition of being authorized to bid on FTA-assisted transit vehicle procurements, will also be required to establish and submit for FTA's approval, an overall DBE percentage goal.

Sub-recipients who receive USDOT (FTA and FAA) funds through NDOT as noted above and award more than \$250,000 in prime contracts in a fiscal year are required to comply with the provisions of 49 CFR Part 26 and

develop their own DBE Program Plan or adopt and utilize the NDOT DBE Program Plan.

Additionally, agreements between NDOT and all sub-recipients will contain assurances that sub-recipients will not discriminate on the basis of race, color, national origin, sex, age, disability/handicap, and income status in the performance of this contract as well as language that obligates sub-recipients to develop, and implement, their own DBE Plan or to adopt, and implement, the provisions of the NDOT DBE Program.

C. Terminology §26.5

Terms used in the NDOT DBE Plan have the same meaning as terms used in 49 CFR Part 26 and are attached as Exhibit G.

Acronyms used in this plan:

ANC - Alaska Native Corporation
BDP - Business Development Program
CCM - Contract Compliance Manager
CFR - Code of Federal Regulations
CUF - Commercially Useful Function
DBE - Disadvantaged Business Enterprise
DBELO - Disadvantaged Business Enterprise Liaison Officer
DBESS - Disadvantaged Business Enterprise Supportive Services
DOCR - Department of Civil Rights
DOT - United States Department of Transportation
FAA - Federal Aviation Administration
FTA - Federal Transit Administration
GFE - Good Faith Efforts
NAICS - North American Industrial Classification System
NDOT - Nevada Department of Transportation
NSBDC - Nevada Small Business Development Center
OA - Operating Administration
RE - Resident Engineer
SBA - Small Business Administration
SBE - Small Business Enterprise
STIP - State Transportation Improvement Plan
UCP - Unified Certification Program
USDOT - United States Department of Transportation

D. Forbidden Discriminatory Actions §26.7

The purpose of the DBE Program Plan is to provide guidance to NDOT personnel in implementing 49 CFR Part 26 and provide DBEs and other contractor's information on responsibilities for USDOT assisted contracts and NDOT's implementing procedures. The Plan assures USDOT that NDOT will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award or performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex or national origin.

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

E. AUTHORITY AND APPLICABLE LAWS §26.9

USDOT regulations, 49 CFR Part 23 (revised) and Part 26 (revised).

F. RECORD KEEPING §26.11

1. Nevada Department of Transportation

- a) NDOT reports DBE participation semi-annually, on December 1st and June 1st, to FTA and other USDOT modal administrations as directed. NDOT's process for accurate reporting is found in Exhibit: H.
- b) NDOT obtains, through a Bidder Registration Form, a Bidders List of all prime and subcontractors bidding on NDOT contracts. The list contains the following information:

- Firm Name
- Firm Address
- Firm's Status as a DBE or Non-DBE
- Age of the Firm
- Gross Receipts range of the Firm
- Business Type
- Work areas

This information is updated on an ongoing basis using the NDOT E-Bidding portal.

- c) NDOT maintains a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site

reviews. These records are retained in electronic format indefinitely in accordance with applicable record retention requirements. Other certification or compliance related records are retained for a minimum of three (3) years.

d) NDOT reports to the US Department of Transportation's Office of Civil Rights on January 1st each year, the percentage and location in the State of certified DBE firms in the UCP Directory controlled by the following:

- Women;
- Socially and economically disadvantaged individuals (other than women); and
- Individuals who are women and are otherwise socially and economically disadvantaged individuals.

G. FEDERAL FINANCIAL ASSISTANCE AGREEMENT ASSURANCE §26.13

NDOT has signed the following assurance, applicable to all USDOT-assisted contracts and their administration.

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

Any person who believes that NDOT has failed to comply with obligations under this program may file a written complaint with the appropriate USDOT Modal Administration as listed under 49 CFR 26.103 and 26.105.

NDOT will not intimidate, threaten, coerce, or discriminate against any individual or firm for any reason.

Each contract NDOT signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) will include the following assurance:

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

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

H. INFORMATION, CONFIDENTIALITY, COOPERATION, & INTIMIDATION AND RETALIATION §26.109

NDOT complies with 49 CFR §26.109 as they pertain to:

- (a) Availability of records
- (b) Confidentiality of information on complainants
- (c) Cooperation
- (d) Intimidation and retaliation

II) ADMINISTRATION

A. DBE PLAN UPDATES §26.21

NDOT will submit significant changes in the DBE Plan to FTA for approval within 30 days of implementation of a significant change.

All NDOT sub-recipients of FTA funds must comply with the NDOT DBE Plan and may not have a plan independent from NDOT.

B. DBE LIAISON OFFICER (DBELO) §26.25

DBE program objectives are implemented and monitored by External Civil Rights Division personnel under the direction of the External Civil Rights Officer (CRO), who is designated as the DBE Liaison Officer (DBELO) with overall responsibility for the program.

The Civil Rights Officer has direct independent access to the Director concerning DBE program matters as reflected on the attached (Exhibit: A) organizational chart.

CRO Duties and responsibilities include:

- Advising the Director and the Transportation Board on DBE matters and achievements;
- Providing direction and guidance to the External Civil Rights Division and other staff on implementing all aspects of NDOT's DBE Program.
- Gathering and reporting statistical data and other information required by USDOT;
- Working with all internal and external entities to set overall annual goals;
- Identifying contracts and procurements so that DBE goals are included, when possible, in solicitations and monitor results;
- Analyzing NDOT's progress toward goal attainment and identifies ways to improve progress;
- Processing applications for DBE certification timely and in accordance with 49 CFR Part 26;
- Participating in the UCP Certification Committee certifying DBEs according to the criteria set by USDOT and act as liaison to the Uniform Certification Program in Nevada;
- Maintaining NDOT's directory of certified DBEs, ensuring the list is up-to-date and posted publicly, annual no-change affidavits (NCA) are processed timely, and DBEs who are not responsive on their NCAs or are no longer certified are removed from the list;
- Reviewing Good Faith Effort Documents as required on bids and proposals, and as related to DBE goal non-attainment;
- Planning and participating in DBE training seminars;
- Providing outreach to DBEs and community organizations to advise them of opportunities;
- Ensuring that bid notices and requests for proposals contain the appropriate DBE goals and contractual language;
- Ensuring that first-line bid review of DBE documentation are performed, ensuring appropriate reports and commitment letters are present and DBEs are properly certified;
- Participating in pre-bid and pre-construction meetings; and
- In collaboration with project managers and Resident Engineers, collecting monthly reports of payments to subcontractors and supporting documentation (check stubs, invoices, etc.), determining contractor compliance with commercially useful function requirements, and conducting on-site visits and interviews.

The NDOT DBELO contact information is as follows:

Sonnie Braih
Civil Rights Officer
(702) 730-3301
sbraih@dot.nv.gov

C. DBE FINANCIAL INSTITUTIONS §26.27

The Nevada Department of Transportation has determined that there are no financial institutions owned and controlled by socially and economically disadvantaged individuals in the State of Nevada. NDOT will check on the availability of DBE financial institutions on an annual basis. If any financial institutions owned and controlled by socially or economically disadvantaged individuals are identified, NDOT will make reasonable efforts to use these institutions and encourage prime contractors to use such institutions.

D. PAYMENTS TO SUBCONTRACTORS §26.29

NDOT includes the following provision in each USDOT-assisted contract:

The contractor shall pay each subcontractor for satisfactory performance of its contract items no later than fifteen (15) calendar days from receipt of each payment the contractor receives from the Department. The contractor shall return retainage payments to each subcontractor within fifteen (15) calendar days after the subcontractor's work is satisfactorily completed. The contractor shall certify that payment to each subcontractor has been made on certification forms provided by the Department.

All sub-contracts between the prime contractor and subcontractors must include this provision. These requirements shall apply to all subcontractors at all tiers, and contracts/subcontracts in any form.

NDOT maintains an electronic database to actively monitor contracts obtained by DBE firms. This database provides a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), which includes a means of comparing these attainments to commitments. The prime contractor provides a notice through the electronic database that payment has been made to the DBE firms and all other subcontractors on a monthly basis, after which subcontractors are sent an electronic notice to verify payments as part of a compliance audit. Subcontractors may verify payments (dates, amounts, and scope covered in payment) to prime contractors on the NDOT website.

Penalties for a contractor's failure to comply with the terms and conditions of this part may include but are not limited to:

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

NDOT will take all necessary steps resolve payment disputes that are not able to be resolved between the prime contractor and subcontractor during the electronic verification process.

Resolution to disputes concerning a subcontractor's performance will be governed by the terms of the contract documents between the prime contractor and subcontractor. NDOT will take all necessary steps to resolve performance disputes that are not able to be resolved between the prime contractor and subcontractor which are not governed by contractual means.

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, NDOT Resident Engineers or their designee perform Commercially Useful Function (CUF) Reviews on each project and submit the completed CUF review to Contract Compliance for monitoring and enforcement purposes.

NDOT holds retainage from prime contractors and provides for prompt and regular incremental acceptances of portions of the prime contract, pays retainage to prime contractors based on these acceptances, and requires a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 15 days after NDOT's payment to the prime contractor. Any delay or postponement of payment among the parties may take place only for good cause, with prior written approval of NDOT. 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.

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 NDOT. When NDOT 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.

E. DBE DIRECTORY OF CERTIFIED FIRMS §26.31

1. NDOT compiles and maintains a directory of firms currently certified as eligible to participate in transportation-related contracts under the DBE Program. The DBE directory is available on the Internet at www.nevadadbe.com. The Directory contains: firm name, address, telephone number(s) and the types of work (by NAICS code) that the firm has been certified to perform as a DBE. All DBE certified firms are included in one Unified Certification Program (UCP) directory for the State of Nevada.

Anyone interested in obtaining DBE services or supplies, may contact the following address:

Nevada Department of Transportation
External Civil Rights Division
123 E. Washington Avenue, Bldg. G
Las Vegas, NV 89101
(702) 730-3309

2. NDOT solicits potential DBE contractors for certification by working with the Nevada Small Business Development Center (NSBDC) through our DBE Supportive Service (DBESS) Program:
 - a) Outreach to ethnic and minority groups, DBE, and small business advocacy organizations throughout Nevada;
 - b) Outreach through business fairs and statewide program presentations.

F. OVERCONCENTRATION IN SUBCONTRACTING AREAS §26.33

If the DBELO, in coordination with other NDOT personnel, determines that DBEs in one or more areas of work are so over concentrated as to unduly burden the opportunity of non-DBE firms to participate in this type of work, a request will be submitted to the FTA for approval of the determination and the remedial action proposed as provided in 49 CFR 26.33.

Any allegations or determinations of overconcentration shall be forwarded to the Operating Administration (OA) for consultation.

G. MENTOR-PROTÉGÉ PROGRAM §26.35

NDOT has established a DBE business development program (BDP) to assist DBE firms in gaining the ability to compete successfully in the marketplace outside the DBE program. A copy of the Mentor-Protégé Program is attached as Exhibit F.

H. MONITORING COMPLIANCE §26.37

NDOT will bring to the attention of the FTA or USDOT any false, fraudulent, or dishonest conduct in connection with the program so that USDOT may initiate steps (e.g., referral to Justice Department or USDOT Inspector General) provided in 26.109. NDOT will also consider similar action under its own legal authority.

When the DBE subcontractor begins work on the project, the Resident Engineer reviews the DBE's operation and completes form [052-073](#), Commercial Useful Function Determination.

1. The Resident Engineer ensures that DBE owners, supervisory personnel and employees are distinguishable from other personnel on the job.
2. If the Resident Engineer determines that a DBE firm is not performing a commercially useful function, he/she will notify the Contract Compliance Office who will notify the prime contractor in writing, specifying those actions which violate the terms of the contract.
3. If the contractor fails to remedy the violation, the Resident Engineer in conjunction with the Contract Compliance Office shall impose one or more sanctions, and the payments made to that DBE will not be credited toward the contract goal.
4. At the request of the Resident Engineer, the Contract Compliance Office will investigate the non-performing DBE to determine if the DBE's job performance contains a pattern of relationships with non-minority businesses that brings the DBE's independence and control, and therefore its eligibility to participate, into question.
5. Subcontracts are uploaded by the prime contractor to NDOT's electronic record, they are then reviewed by the Contract Compliance Office for quality assurance and approval.
6. All compliance monitoring records are stored via electronic or hard copy in the NDOT Contract Compliance Office.
7. NDOT maintains an electronic database to actively monitor contracts obtained by DBE firms. This database provides a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), which includes a means of comparing these attainments to commitments, annual goal attainment, and tracks information for accurate federal reporting. 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, NDOT Resident Engineers or their designee perform Commercially Useful Function (CUF) Reviews on each project and submit the completed CUF review to Contract Compliance for monitoring and enforcement purposes.

I. Small Business Element §26.39

1. NDOT's Small Business Element was submitted for approval as part the DBE program before February 28, 2012.
2. NDOT fosters small business participation by providing race-neutral small business goals on federally assisted projects that do not have DBE goals. For purposes of this program, small businesses are defined as those firms that meet the small business size standards defined in section 3 of the Small Business Act (SBA) and the SBA regulations implementing it (13 CFR Part 121). Small businesses must also not exceed the cap on average annual gross receipts specified in §26.65(b) and the SBA program personal net worth size limit.
3. SBA size standards define whether a business is "small" and thus eligible for government programs and preferences reserved for "small business"

concerns. Size standards are usually reflected in the business's number of employees and three-year average annual receipts. SBA size standards have been established for types of economic activity, or industry, generally under the [North American Industry Classification System \(NAICS\)](#).

49 CFR Part 26 (DBE Program) caps business sizes to \$23.98 million in average gross receipts averaged over three years. In order to level the playing field between certified DBE firms and non-DBE firms awarded SBE contracts, we will strictly apply the SBA small business size standards and DBE program size limits. As a result, firms that meet the SBA small business size limit for a particular industry will not be any larger than a certified DBE firm in the same industry. This DBE program size limit, regardless of industry, restricts both certified DBE firms and non-DBE firms to average gross receipts of no more than \$23.98 million. For example, the SBA small business size limit for most general contractors is \$33.5 million in receipts averaged over three years. The DBE program size limit is \$23.98 million in receipts averaged over three years. Therefore, general contractors averaging more than \$23.98 million in receipts would not be eligible for SBE contracts.

- a) NDOT must verify a firm's eligibility to participate in the SBE program. First, to ensure that a firm is in fact eligible for an SBE contract and to minimize fraud and abuse, NDOT will outline eligibility requirements in bid documents. NDOT will then verify the eligibility of the apparent low bidder in meeting these requirements before the contract is awarded. A certified DBE is presumed eligible to participate in this small business program; the small business program complies with 49 CFR Part 26, Section 26.39.
- b) Firms currently certified by the SBA 8A, HUBZone or Small Disadvantaged Business programs need only provide evidence of that certification. In those cases where the firm has not been previously certified as a small business by the SBA, NDOT will provide a certification process administered by the Nevada Unified Certification Program (UCP), as follows:

A firm who wishes to participate as an SBE on a federally-assisted NDOT project and has not been certified as a DBE or verified as an SBE by one of the certifying agencies of the Nevada Unified Certification Program within the preceding 12 months may apply for verification as an SBE by filing a Small Business Enterprise (SBE) Verification Form and submitting the form along with all required attachments at the time of bid.

Firms applying for certification as an SBE must provide all required information and documentation necessary to verify that they meet the definition of a Small Business Enterprise.

- c) To determine whether or not a firm's average three years gross receipts meet the SBA small business size limit, the firm will be required to provide

- the most current three years federal corporate income tax returns (including all schedules). Firms with three-year average gross receipts that exceed their SBA small business size limit or the DBE program size limit of \$23.98 million are not eligible for award of a SBE contract.
- d) SBE program eligibility is also contingent upon the personal net worth of the owner(s) of the firm. A personal net worth size limit of \$1.32 million will apply to the owner(s). Owner(s) of the firms will be asked to submit a personal net worth statement and a copy of each of their most current three years of federal personal income tax returns (including all schedules and W-2s). Those firms whose owner(s) personal net worth exceeds \$1.32 million are not eligible for participation in the SBE program.
 - e) Owners must submit a signed, notarized statement of personal net worth, with appropriate supporting documentation. Before the firm can be eligible for the SBE program, the firm must provide a copy of the SBE personal net worth statement, three years of the owner's most recent personal and corporate income tax returns (including all schedules and W-2s), and a current balance sheet. Other supporting documents will be requested if verification questions arise.
4. In determining an individual's net worth, NDOT will 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 firm).
 - c) Contingent liabilities will not be used 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.
5. SBE contracts will not be restricted to any particular type of contract. SBE contracts are a subset within the DBE program; therefore, any federally assisted contract opportunity funded through the Nevada Department of Transportation will be evaluated as a candidate for an SBE contract. SBE contracts can be prime contracts or subcontracts. NDOT funded construction contracts are typically managed within the State Transportation Improvement Program (STIP). The STIP is a four-year plan of projects that are funded from a variety of sources (state gas tax, for example). The STIP is reviewed and approved during NDOT Transportation Board Meetings. Federally funded STIP construction projects will be evaluated and identified for solicitation as SBE contracts. NDOT staff will evaluate which construction

contracts may be suitable for solicitation as SBE subcontracts or more suited for solicitation as prime contracts.

- a) SBE prime contract amounts are not size limited. Any federally-assisted NDOT project that the NDOT staff believes can be primed by a firm meeting the SBA business size and owner personal net worth limits, can be offered as a SBE contract. SBE prime contracts **will not** have **DBE** contract goals. SBE contracts and SBE goals will be a size that small businesses, including DBEs, can reasonably expect to perform.
 - b) While not required, NDOT will set an SBE program goal requiring prime contractors to identify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform. In multi-year design build or other large contracts (e.g. for “mega-projects”), NDOT will review the projects to accommodate utilization of DBEs and small businesses on SBE contracts. NDOT will monitor the effectiveness of the Program goal approach to ensure that it is effective in fostering increased small business participation.
 - c) On all NDOT federally-assisted prime contracts not having **DBE** contract goals, NDOT will examine the feasibility of setting SBE goals that require 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. NDOT may identify the type of work provided under the SBE contract.
 - d) NDOT will track the total dollar amount and number of SBE contracts awarded each year and will monitor to help ensure to meet or exceed the race neutral portion of our three-year overall DBE goal. When practical, the SBE contracts will be prime contracts.
 - e) The number of SBE contracts awarded each year will depend on the number and dollar amount of Federal funding received by NDOT.
6. Professional services, including engineering and design contracts and other contracts that have Federal funding will be reviewed by the appropriate NDOT staff to determine whether or not the contract is a candidate for an SBE contract.

III) GOALS, GOOD FAITH EFFORTS, & COUNTING

A. QUOTAS §26.43

In meeting the objectives of the DBE Program, NDOT will not use quotas or set asides in any way.

B. OVERALL GOALS (FTA funded programs) §26.45

1. Overall DBE goals are submitted to the operating administration triennially, by August 1st.

2. NDOT closely follows the two-step goal setting methodology, as outlined in 49 CFR §26.45.
3. NDOT holds an open public meeting to announce its proposed triennial goal, and the public is given thirty (30) days to submit comments. The triennial goal is also posted in NDOT's External Civil Rights website at <https://www.nevadadot.com/doing-business/external-civil-rights/dbe-program>.
4. NDOT implemented the use of race-conscious goals in May 2010, pursuant to the directive of the FTA. Race conscious goals are required when DBE program goals cannot be met through race neutral measures alone. Accordingly, NDOT reviews all proposed NDOT federally-assisted projects, prior to solicitation, to determine if and how much of a DBE goal to set, based on among other things, the overall NDOT DBE Program goal to be met and the availability of DBEs to perform subcontract work on the project.
5. In 2017, NDOT hired a firm to conduct a disparity study. This study will aid in the calculation of the DBE goal for the upcoming three-year period for USDOT funded contracts. The study will also provide a goal-setting methodology that NDOT will use, after the study has ended, to set future DBE goals.
6. Contract goals will be used to meet the portion of the overall goal not projected to be met by race-neutral means and will be expressed as a percentage of the federal portion of USDOT-assisted contracts. If during the course of the year it becomes apparent that NDOT will exceed its overall goal based on race-neutral means, contract goals will be reduced to the extent required so as not to exceed the overall goal. If it appears the race-neutral portion will not be met, NDOT will increase the amount of contract goals.

Before soliciting bids, the appropriate NDOT External Civil Rights Office personnel will review each contract to determine the percentage goal, if any, that will be assigned to the contract. Those contracts with limited or no subcontracting potential will have a zero goal.

- Availability of qualified DBEs
- Location of the project
- Type of project
- Estimated total cost of the project, or portions of the project
- Number of contract line items with the most DBE subcontracting, service, or supplier potential

Contract goals can be met only by Nevada UCP certified DBEs; goals will not be subdivided into group-specific goals. The contract goal will pertain to the entire project.

§26.47 NDOT cannot be penalized or treated by DOT as being in noncompliance with the 49 CFR Part 26 if NDOT's annual DBE participation falls short of the overall goal set by NDOT and approved by the relevant Operating Administration, unless:

- a) NDOT has failed to implement and administer the DBE program in good faith;
- b) NDOT does not have an approved DBE program; or
- c) NDOT does not have an overall DBE goal.

If the awards and commitments shown on NDOT's Uniform Report of Awards or Commitments and Payments at the end of any federal fiscal year are less than the overall goal applicable to that fiscal year, NDOT will take the following action in order to be regarded by the DOT as implementing its DBE program in good faith:

- a) Analyze in detail the reasons for the difference between the overall goal and awards and commitments in that fiscal year by reviewing factors such as: effectiveness of its DBE contract goal methodology, i.e., percentage of goal set compared to goal achieved; effectiveness of efforts to promote race neutral participation; efficacy of training and outreach efforts for contractors, DBE, and other stakeholders percentage of contracts not meeting DBE goals; percentage of good faith efforts awards approved; DBE termination and substitutions approved; and new DBE certification and retention rates.
- b) Establish specific steps and milestones to correct the problems NDOT identifies in its analysis and to enable it to meet fully its goal for the new fiscal year;
- c) Submit, within 90 days of the end of the Federal fiscal year, the analysis and corrective actions developed in accordance with sections (a) and (b) above to the appropriate OA for approval. If the OA approves the report, NDOT will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

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

NDOT may be regarded as being in noncompliance with 49 CFR Part 26 and therefore subject to the remedies in 49 CFR 26.103 or 26.105 and other applicable regulations, for failing to implement its DBE Program in good faith if any of the following occurs:

- a) NDOT did not submit its analysis and corrective actions to the OA in a timely manner as required under paragraph (c)(3) of this section;
- b) The OA disapproves NDOT's analysis or corrective actions; or
- c) NDOT does not fully implement the corrective actions to which it has committed or conditions that the OA has imposed following review of NDOT's analysis and corrective actions.

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

DESIGN-BUILD CONTRACTING

If NDOT uses design-build contracting, DBE goals will be established as outlined in 49 CFR 26.53(e) for both the design phase and construction phase of the design-build project.

C. RACE-NEUTRAL METHODS §26.51

To obtain the maximum feasible portion of its overall DBE Goal through race neutral means, NDOT External Civil Rights Division uses the following methods:

- Implementation of the SBE program which will include the use of SBE goals on federally assisted contracts without DBE goals;
- Publicizing construction project notices and consulting requests for proposal in order to encourage DBEs and other small businesses to participate;
- Implementing a supportive services program for DBEs and other small businesses to develop record-keeping and business management skills;
- Providing training to DBEs and other small businesses to improve management, record keeping, financial and accounting capabilities;
- Providing services to DBEs and other small businesses to improve long-term development, ability to handle increasingly significant projects, and achieve eventual self-sufficiency;
- Assisting DBEs and other small businesses to develop their capability by utilizing emerging technology and conducting business through electronic media;
- Providing other technical assistance to DBEs and other small businesses as needed
- Review and identify projects that can be unbundled in order to promote small businesses including DBEs to perform as a prime.

D. GOOD FAITH EFFORTS (GFE) §26.53

The following procedures apply to USDOT assisted Contracts. If a contractor or proposer provides a bid or proposal and does not meet the DBE goal stated in the bidding documents, the bidder/proposer must provide detailed documentation of the steps they took to meet the DBE goal. For low bid contracts, these documents must be provided no later than the next working day after the opening of the bids or with the proposal in the case of a Request for a Proposal. §26.53 (j) NDOT includes language in all contracts that require subcontracts to be made available upon request. The prime contractor must provide NDOT a copy of all subcontracts.

1. If the apparent low bidder's DBE commitment(s) do not meet the contract goal, the bidder must provide a detailed document outlining the steps they took to meet the DBE goal. These steps must have been **aggressive and designed to meet the goal**.
2. The Civil Rights Staff will evaluate information submitted by the bidder to determine what efforts were made, when they were made, and how intensely those efforts were undertaken.

All efforts must include the following information and submitted at the time of the bid opening:

- The names and addresses of DBE firms that will participate in the contract;
- A description of the work that each DBE will perform (NAICS codes);
- The dollar amount of the participation of each DBE firm participating;
- Written documentation of the bidder/offeror's commitment to use a DBE subcontractor(s) identified at the time of bid award; and
- Written confirmation from each listed DBE firm that is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.

All efforts may also include the following but are not limited to:

- a) Whether the bidder solicited DBEs through all reasonable and available means, allowing adequate time for response, and following up on initial solicitations;
- b) Whether the bidder selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the DBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate DBE participation);

- c) Whether the bidder provided interested DBEs with information about the plans, specifications, and requirements of the contract in a timely manner;
 - d) Whether the bidder negotiated in good faith with interested DBEs, not rejecting DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;
 - e) Whether the bidder made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by NDOT or the bidder;
 - f) Whether the bidder made efforts to assist interested DBEs in obtaining equipment, supplies, materials, or related assistance or services; and
 - g) Whether the bidder effectively used the services of available: minority/women community organizations, contractors' groups, government business assistance offices, or others that might assist in identifying DBE firms.
3. After evaluation of the bidder's good faith efforts, the Civil Rights Staff with the approval of the Civil Rights Officer, will notify the bidder that either:
- a) The bidder's explanation/documentation has been accepted and will forward the "Notice to Proceed"; or
 - b) The bidder's good faith effort has been rejected and state the reason(s) for the rejection, in writing, and offer the bidder an opportunity for administrative reconsideration by providing written documentation or oral hearing.
4. If the apparent low bidder fails to respond within five (5) days from the date of the rejection, the bid will be considered non-responsive. NDOT will then follow Department procedures regarding non-responsive bids.
5. If the bidder requests reconsideration, a meeting will be scheduled with a reconsideration official (who was not involved in the original decision) knowledgeable of the DBE program at a time and place convenient for both participants.
6. The reconsideration official will advise the bidder in writing of his/her decision within ten (10) working days of the meeting. If the reconsideration official determines that good faith effort was not made, the letter will state the reasons for that decision. The decision of the reconsideration official is administratively final.
7. In a "design-build" contracting situation, in which NDOT lets a master contract to a prime contractor, who in turn lets subsequent subcontracts for the work of the project, NDOT establishes a goal for the project. The design-build prime contractor then establishes

contract goals, as appropriate, for the subcontracts it lets. NDOT maintains oversight of the design-build prime contractor's activities.

8. In the event of change orders, the prime contractor is required to identify additional DBE subcontracting opportunities to fulfill the DBE Goal or provide GFE.
9. §26.53 (i) When a DBE bidder/offeror for a prime contract has met a contract goal, NDOT counts 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.

GOOD FAITH EFFORTS WHEN REPLACING DBEs

Prime contractors cannot terminate a DBE subcontractor without good cause and the written consent of NDOT.

1. Prior to termination the contractor must notify the NDOT Resident Engineer (RE), the Contract Compliance Office and the DBE firm in writing, of the intent to terminate the DBE. The DBE must respond within 10 calendar days regarding the termination. If the DBE fails to respond within the allotted time frame the termination may be authorized by NDOT.
2. In the event the DBE fails to respond, the contractor must notify the RE who will forward the request to the Contract Compliance Manager (CCM) with recommendation for approval or denial. The CCM then requests written release from the defaulting DBE and will notify the RE on whether the commitment is or is not terminated.
3. The contractor must make a good faith effort to replace the defaulting DBE with another DBE to the extent needed to meet the contract goal. The contractor must document good faith efforts made to replace the DBE with another DBE firm. See section D above for GFE requirements.
4. The contractor must obtain written approval of substitute DBE(s) from the CCM before signing and submitting copies of the revised or new subcontracts.
5. If the contractor is unable to obtain substitute DBEs, he must submit documentation of good faith efforts (listed above) in obtaining substitute DBEs to complete the unfinished work, or break out other contract items to subcontract. NDOT may waive or adjust the goal as appropriate, depending on project circumstances.
6. Good cause includes the following circumstances:
 - a) The listed DBE subcontractor fails or refuses to execute a written contract;
 - b) 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;
- c) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.
 - d) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
 - e) 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;
 - f) NDOT has determined that the listed DBE subcontractor is not a responsible contractor;
 - g) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;
 - h) The listed DBE is ineligible to receive DBE credit for the type of work required;
 - i) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;
 - j) Other documented good cause that NDOT determines 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.

E. COUNTING DBE PARTICIPATION TOWARD CONTRACT GOALS §26.55

1. Only the value of the work actually performed by and paid to DBEs is creditable toward the DBE goal, including the cost of supplies and materials obtained by the DBE for work on the contract (except supplies and equipment purchases or leases from the prime contractor or their affiliate).
2. 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 contracted to a non-DBE firm does not count toward the goals.
3. A DBE must be certified by the Nevada UCP for their participation to be counted toward meeting the DBE goal. If a DBE is declared ineligible after the execution of a contract or subcontract, the DBE may complete the work. The DBE's participation will be counted toward the contract goal, if applicable. However, the work remaining after Removal of Certification will not count toward NDOT's overall Program goal. If the DBE firm's certification is removed before the DBE has signed a contract, the ineligible firm does not count toward the contract

goal or Program goal. The prime contractor will be directed to meet the contract goal with an eligible DBE firm or demonstrate good faith efforts to do so.

4. NDOT may establish project-specific goals for DBE participation in the procurement of transit vehicles, with FTA approval, in lieu of complying through the procedures, per §26.49(f).
5. Credit toward DBE goals varies with the type of DBE firm:
 - **Joint Ventures between DBE and Non-DBE Firms**
 - That 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. Joint venture agreements must be approved by the DBELO and NDOT Legal Counsel before contracts are signed.
 - **Professional, Technical, Consultant, or Managerial, Bonding or Financial Services** (provided a determination is made that the fees are reasonable) 100%
 - **Construction Firms** (supply labor and materials to perform a distinct element of the work) 100%
 - **Manufacturers** (must operate a factory that produces, on the premises, the materials, supplies, articles or equipment required under the contract and of the general character described in the specifications) 100%
 - **Regular Dealer** (must own, operate or maintain a store or warehouse that regularly sells materials or supplies to the general public) 60%

(NOTE: To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A regular dealer in bulk products (petroleum, steel, etc.) does not need to maintain a place of business, but must own and operate distribution equipment for the products. Any supplementing of a dealer's own distribution equipment shall be by a long-term lease agreement)

- **Packagers, Brokers, Manufactures' Representatives** (no credit for materials or supplies themselves) Brokerage Fee (if reasonable)
 - **Trucking Firm:** 1:1 (as defined by 49 CFR Part 26.55), trucking plans are required at the time of commitment.
5. When the DBE Firm is the prime contractor, NDOT counts 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.

6. NDOT determines the amount of credit awarded to a firm and Commercially Useful Function (CUF) on a contract-by-contract basis.
7. No contract DBE credit will be credited unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

IV) DBE CERTIFICATION PROCESS

NDOT's certification process attempts to identify those existing, for-profit, transportation-related firms that meet the eligibility criteria while ensuring that the benefits of the program are not extended to ineligible applicants.

A. CERTIFICATION ELIGIBILITY REQUIREMENTS

The following criteria are used by NDOT and the UCP in determining whether a firm is owned and controlled by one or more disadvantaged individuals and whether the firm is eligible to be certified as a DBE (49 CFR 26 Subparts D and E and Appendix A to Part 26).

1. **§26.61** - The firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership, and control.
2. NDOT and its UCP Partner Agencies will rebuttably presume that members of the designated groups identified in 49 CFR Part 26.67(a) are socially and economically disadvantaged, which means they do not have the burden of proving to NDOT and its UCP Partner Agencies 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 49 CFR Part 26.67(a). These applicants do have the obligation to provide NDOT and its UCP Partner Agencies with information concerning their economic disadvantage in accordance with 49 CFR Part 26.67 (a).

Individuals who are not presumed to be socially and economically disadvantaged, and individuals whom the presumption of disadvantage has been rebutted, have the burden of proving to NDOT and its UCP Partner Agencies, by a preponderance of the evidence, that they are socially and economically disadvantaged. In making such determination NDOT and its UCP Partner Agencies will request documentation to prove group membership such as but not limited to, tribal membership cards, membership in women or minority organizations that demonstrates that the person has held himself/herself out to be a member of the group over a long period of time prior to application for certification and that the applicant is

regarded as a member of the group by the relevant community. Other documentation requested will include proof of desperate treatment of the applicant found in 49 CFR Part 26, Appendix E, in areas such as education, employment, business, and diminished capital or credit opportunities.

NDOT and its UCP Partner Agencies will 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.

If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group (49 CFR Part 26.61(c)), NDOT and its UCP Partner Agencies has a well-founded reason to question the individual's claim of membership in that group, NDOT and its UCP Partner Agencies will require the individual to present additional evidence that he or she is a member of the group. NDOT and its UCP Partner Agencies DBE Program Plan will provide the individual a written explanation of reasons for questioning his or her group membership and a written request for additional evidence.

NDOT and its UCP Partner Agencies will not impose a disproportionate burden on members of any particular designated group. In making such a determination about an individual's claim of membership in a presumptively disadvantaged group, NDOT and its UCP Partner Agencies will 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. NDOT and its UCP Partner Agencies may require the applicant to produce appropriate documentation of group membership such as a Tribal card or other membership certificate in a presumptively disadvantaged group organization.

§26.63 If NDOT and its UCP Partner Agencies determines 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 to granted DBE certification. NDOT and its UCP Partner Agencies' decisions concerning membership in a designated group are subject to the certification appeals procedures.

3. **§26.65** – Business Size - To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards.

NDOT applies current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant.

Even if it meets the requirements of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$23.98 million.

4. **§26.67** - Economic and Social Disadvantage

NDOT rebuttably presumes 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. NDOT requires applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

- **"Black Americans"** (persons having origins in any of the black racial groups of Africa)
- **"Hispanic Americans"** (persons of Mexican, Puerto Rican, Cuban, Dominican, Central and South American, or other Spanish or Portuguese culture or origin, regardless of race)
- **"Native Americans"** (persons who are American Indians, Eskimos, Aleuts or Native Hawaiians)
- **"Asian-Pacific Americans"** (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the US 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)
- **"Subcontinent Asian Americans"** (persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)
- **Women**
- Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration.

If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group, NDOT has a well-founded reason

to question the individual's claim of membership in that group, NDOT will require the individual to present additional evidence that he or she is a member of the group.

- i. NDOT will provide the individual a written explanation of reasons for questioning his or her group membership and a written request for additional evidence.
- ii. NDOT will take special care to ensure not to impose a disproportionate burden on members of any particular designated group.
- iii. If NDOT determines 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.
- iv. NDOT's decisions concerning membership in a designated group are subject to the certification appeals procedure of §26.89.

NDOT requires 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

NDOT requires each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. NDOT uses the DOT personal net worth form provided in appendix G, without change or revision. Where necessary to accurately determine an individual's personal net worth, NDOT may, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner's spouse is involved in the operation of the company). Requests for additional information shall not be unduly burdensome or intrusive.

In determining an individual's net worth, NDOT observes the following requirements:

- i. Exclude an individual's ownership interest in the applicant firm;
- ii. Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. NDOT will ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth

- purposes are not exclusions for asset valuation or access to capital and credit purposes;
- iii. Do not use a contingent liability to reduce an individual's net worth;
 - iv. 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.

An individual's presumption of economic disadvantage may be rebutted in two ways:

- i. If the statement of personal net worth and supporting documentation that an individual submits shows that the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted.
- ii. If the statement of personal net worth and supporting documentation that an individual submits demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination NDOT may consider factors that include, but are not limited to, the following:
 - (1) Whether the average adjusted gross income of the owner over the most recent three year period exceeds \$350,000;
 - (2) Whether the income was unusual and not likely to occur in the future;
 - (3) Whether the earnings were offset by losses;
 - (4) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;
 - (5) Other evidence that income is not indicative of lack of economic disadvantage; and
 - (6) Whether the total fair market value of the owner's assets exceed \$6 million.

If NDOT has 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 NDOT may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. NDOT will follow the procedures set forth in §26.87.

In such a proceeding, NDOT has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and

economically disadvantaged. NDOT may require the individual to produce information relevant to the determination of his or her disadvantage.

Transfers within two years - NDOT attributes to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of recipient's review of the firm's annual affidavit, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

NDOT does 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.

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. NDOT will 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 NDOT, 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.

5. **§26.69** - Ownership - In determining whether the socially and economically disadvantaged participants in a firm own the firm, NDOT considers all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.
 - a) At least 51 percent ownership of each class of voting stock outstanding and at least 51 percent of the aggregate of all stock outstanding must be held by the disadvantaged owner(s) (in

corporations); 51 percent of each class of partnership interest (as reflected in partnership agreements); or 51 percent of each class of member interest (in limited liability companies) must be held by socially and economically disadvantaged individuals.

- b) 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.
- i) Securities that constitute ownership must be held directly by disadvantaged persons. Under limited circumstances, securities held in trust by and for disadvantaged owners may be counted toward ownership.
- ii) The contributions of capital or expertise by the disadvantaged owners to acquire ownership interests must be real and substantial.
- Promises to contribute capital, unsecured notes payable to the firm or non-disadvantaged owners, or participation in the firm as an employee do not constitute adequate contributions; debt instruments from financial institutions normally are considered adequate contributions.
 - A significant financial investment in the firm must also accompany the disadvantaged owner's contributions of expertise. Expertise must be in a specialized field, of outstanding quality, critical to the firm's operations, indispensable to the firm's potential success, specific to the type of work the firm performs, and documented in the records of the firm.
- iii) Ownership interests obtained through property settlements, inheritance, gifts or transfers must be evaluated against specific criteria contained in 49 CFR 26.69.
- iv) 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. NDOT does not count a greater

portion of joint or community property assets toward ownership than state law recognizes as belonging to the socially or economically disadvantaged owner of the applicant firm.

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.

6. **§26.71** - Control of the firm will be determined by considering all the facts in the record viewed as a whole.
- a) Whether the firm is independent and viable - one that does not depend on its relationship with another firm. The following areas will be examined:
- The relationship between the disadvantaged owner(s) and non-DBE firm in the areas of personnel, facilities, equipment, financial or bonding support, and other resources;
 - Recent employer/employee relationships between the disadvantaged owner(s) and a non-DBE firm;
 - Patterns of exclusive or primary dealings with a prime contractor; and
 - Normal industry practices related to the consistency of relationships between disadvantaged owner(s) and non-DBE firms.
- b) Whether the disadvantaged firm is subject to formal or informal restrictions in the areas of: corporate charter provisions, by-law provisions, contracts, cumulative voting rights, voting powers accompanying different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions of precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights that prohibit the disadvantaged owner(s) from making independent business decisions. Spousal co-signature on documents is not precluded.
- c) Whether the disadvantaged owner(s) 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. The disadvantaged owner(s):
- Must hold the highest officer position in the company;
 - Must control the Board of Directors in a corporation; and

- Must be a general partner in partnerships, with control over all partnership decisions.
- d) Whether non-disadvantaged participants (owners, managers, etc.) have the power to control the firm or are disproportionately responsible for its operations.
 - e) Whether disadvantaged owners retain the power to hire and fire or revoke the authority of non-disadvantaged persons to whom authority has been delegated. The disadvantaged owners must actually exercise control over the firm's operations, management, and policy.
 - f) Whether the disadvantaged owners possess the experience, managerial and technical competence, and overall understanding of the firm's business; whether they can intelligently and critically evaluate information presented by other participants in the firm's activities and use the information to make independent decisions. (Generally, office management, administration, or bookkeeping activities by themselves do not demonstrate control.)
 - g) Whether the disadvantaged owner holds the required license(s) - craft or professional - for the firm's primary type of business as required by state or local law. Lack of licensure, by itself, does not disqualify the firm, but should be considered in evaluating whether the disadvantaged owner(s) controls the firm.
 - h) Whether differences in remuneration between the disadvantaged and non-disadvantaged owners (or other participants) is significant (or explainable) vis-à-vis duties and responsibilities, normal industry practices, and the firm's reinvestment practices. All management positions will be evaluated to determine actual control of the applicant firm.
 - i) Whether the disadvantaged owner engages in outside employment or other business interests that conflict with full-time management of the applicant firm during the firm's normal operating hours.
 - j) Whether the presence of non-disadvantaged family members as owners, managers, or employees jeopardizes the disadvantaged owner's control of the firm. Participation by non-disadvantaged family members will be evaluated without regard to whether they are immediate family members. If it is not clear that the disadvantaged owner - as distinct from the family as a whole - controls the firm, then the applicant has failed to prove eligibility for certification.
 - k) Whether the disadvantaged applicant can demonstrate that the transfer of ownership and control from a non-disadvantaged owner (family or not) to a disadvantaged owner by providing clear and convincing evidence that:

- The transfer of ownership and control was not made solely to obtain DBE certification; and
 - The transfer was accompanied by real management, policy and operational control.
- l) Whether the applicant firm owns equipment necessary to perform the work, or leases (if standard industry practice) equipment from a source that does not jeopardize the firm's independence.
 - m) Whether the applicant has the ability to control the specific type(s) of work identified in the application. When additional types of work are added to the certification, the applicant must demonstrate control of those operations also.
 - n) Whether the applicant operates under a franchise or license agreement and the extent to which the relationship impairs the applicant's ability to control the management and operation of the firm and assume the risks commensurate with ownership.
 - o) Whether the non-disadvantaged partner in the applicant firm has the power to arbitrarily bind the partnership or subject it to contract or tort liability.
 - p) Whether the disadvantaged owners who lease employees from leasing firms assume responsibility for hiring, firing, training, assigning and otherwise controlling the on-the-job activities of the leased employees and pay wage and tax obligations for these employees.

NAICS Codes - The types of work a firm can perform is described in terms of the most specific available NAICS code for that type of work. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to. Multiple NAICS codes are assigned where appropriate.

NDOT checks 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 NDOT needs to make an appropriate NAICS code designation.

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 NDOT, 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.

NDOT is not precluded from changing a certification classification or description if there is a factual basis in the record. However, NDOT

will not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

7. **§26.73** - In addition, NDOT will consider the following requirements:
- a) Whether the firm has exhibited a pattern of conduct attempting to evade or subvert the requirements of the DBE program;
 - b) Whether the applicant firm currently meets the requirements of the program. New firms will not automatically be denied certification, nor will firms that previously failed ownership and control criteria be rejected without full evaluation;
 - c) Whether the applicant firm has cooperated and furnished all information required by NDOT for certification; and
 - d) Whether an applicant firm that is an eligible subsidiary of a parent or holding company or is owned by an Indian Tribe as described in 49 CFR 26.73 (e)(1) and (2) and 49 CFR 26.73(h).
 - e) Special rules that apply to the certification of firms related to Alaska Native Corporations (ANCs) as stated in 49 CFR 26.73(i).

B. UNIFIED CERTIFICATION COMMITTEE §26.81

As required in 49 CFR Part 26, the Nevada Unified Certification Program consists of six-member agencies; NDOT, Washoe County Regional Transportation Commission, Southern Nevada Regional Transportation Commission, Carson Area Metropolitan Planning Organization, the McCarran Airport and the Reno, Tahoe Airport Authority. Decisions of the UCP on certification and denial of certification are administratively final (except for appeal to USDOT). Following denial of an initial certification a firm may reapply for certification after twelve months from the date of the denial letter.

The UCP meets monthly. Applications for certification are reviewed by the UCP to determine that all requirements have been met and that adequate, accurate information has been provided on which to determine eligibility. Firms applying for certification have the burden of demonstrating to the UCP, by a preponderance of the evidence, that they meet the requirements of presumptively disadvantaged groups (or individual disadvantage), business size, ownership, and control.

C. APPLICATION PROCEDURE FOR CERTIFICATION §26.83

1. Forms – Application for DBE Certification forms are submitted at no charge electronically to NDOT and can be found at www.nevadadbe.com. NDOT utilizes electronic software to receive, process, and track applications for DBE certification, and submission of the DBE Uniform Certification Application with all supporting documentation as requested.

Certification on-site reviews will be conducted as required by 49 CFR Part 26.

SBA 8(a) - certified firms applying for NDOT DBE status may submit the SBA certification application form and documentation in lieu of the Unified Certification Application form. An on-site review will still be required prior to certification approval. When SBA and USDOT certification standards conflict, USDOT standards will prevail.

2. Unified Certification Program Committee Review

- a) The Certification Committee meets on the last Tuesday of each month. This date can change from time to time to accommodate the needs of the UCP members.
- b) The committee evaluates the application documentation and the information obtained from the On-Site Review as required in 49 CFR Part 26.

Information furnished by the applicant which can reasonably be considered proprietary or confidential business information, as well as personal net worth statements and other personal or financial information, will not be made available to third parties without written consent of the applicant, except when USDOT requires the information in determining disadvantaged status in an appeal procedure.

- c) After thorough examination of all relevant information viewed as a whole, the Committee may:
 - Withhold certification pending receipt of clarifying information - If certification is withheld pending receipt of clarifying information, the certifying agency obtains the information and resubmits the application at a subsequent committee meeting.
 - Clarification of committee questions may be obtained and presented to the committee when requested to satisfy certification regulations.
 - Certify the firm - If the application is approved, a certificate is prepared by the Contract Compliance Office and sent, with a cover letter, to the DBE firm.
 - Deny certification - If certification is denied, the certifying agency notifies the applicant by certified mail, of the committee's decision, reasons for denying certification, and the procedure for appeal to the USDOT. Upon request, all documents and other information on which denial is based will be made available to the applicant.

Applicants denied certification may reapply twelve (12) months from the date of denial.

3. Decisions on eligibility of in-state firms will be made within ninety (90) days of receipt of all required information. This time period may be extended once for an additional sixty (60) days with written notice to the firm. NDOT's failure to make a decision during this time frame constitutes constructive denial of the application. Applicants may appeal to USDOT. Decisions on eligibility on out-of-state applicants will be made within ninety (90) days of receipt of all required information or as otherwise mandated by 49 CFR Part 26.
 - a) NDOT certifies DBEs continuously unless and until certification has been removed (i.e., another state, or NDOT). This continuous certification is contingent on receipt of an Annual No Change Affidavit and supporting documentation as required by NDOT.
 - b) DBEs are not required to reapply for certification or undergo a recertification process. However, a certification review may be conducted, including a new on-site review, if applicable, in light of changed circumstances affecting the firm's abilities to meet size standards, disadvantaged status, ownership, control requirements or any material change in the information provided in the original application.
 - c) When requested for purposes of certification, NDOT will make available to states or other financial recipients of USDOT funds, all relevant information pertaining to an applicant's eligibility, including on-site reviews and other information as requested.
 - d) DBEs must inform NDOT, in a sworn affidavit, of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership and control requirements, management changes or any material change in the information provided in the application form within thirty days of the change. Supporting documentation describing in detail the nature of the changes must be attached. If a DBE fails to make timely notification of such changes, it will be deemed to have failed to cooperate under 49 CFR 26.109(c).

"NO CHANGE" AFFIDAVIT

Annually, NDOT will advise DBEs they must complete a sworn affidavit, declaring that there have been no changes in the firm's circumstances affecting its ability to meet the SBA size standard, disadvantaged status, ownership, or control requirements or any material changes in the information provided in its application form, except for changes about which the DBE has notified NDOT.

Documentation of the firm's size and gross receipts must accompany the affidavit. Typically, the most recent tax year returns will be requested to document the firm's gross receipts.

D. INTERSTATE CERTIFICATION §26.85

1. This section applies with respect to any firm that is currently certified in its home state.
2. When a firm currently certified in its home state applies to NDOT for DBE certification, the applicant firm must provide the information in this section to NDOT.
 - a) The applicant firm must provide to NDOT a complete copy of the application form, all supporting documents, and any other information it has submitted to its home state or any other state related to the firm's certification. This includes affidavits of no change and any notices of changes that have been submitted to the home state, as well as any correspondence with the home state's UCP or any other recipient concerning the firm's application or status as a DBE firm.
 - b) The firm must also provide to NDOT any notices or correspondence from states other than the home state relating to the firm's status as an applicant or certified DBE in those states.
 - c) If the firm has filed a certification appeal with DOT, it must inform NDOT of the fact and provide its letter of appeal and DOT's response to NDOT.
 - d) The firm 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 the firm has submitted all the information required by 49 CFR 26.85 and the information is complete and is an identical copy of the information submitted to the home state.
3. When NDOT receives from an applicant firm all the information required it will take the following actions:
 - a) Within seven days contact the home state of the applicant firm and request a copy of the site visit review report for the firm, any updates to the site visit review, and any evaluation of the firm based on the site visit.
 - b) Determine whether there is good cause to believe that the home state certification of the firm is erroneous or should not apply. Reasons for making such a determination may include the following:

- a) Evidence that the home state certification was obtained by fraud;
 - b) New information, not available to the home state at the time of its certification, showing that the firm does not meet all eligibility criteria;
 - c) The home state certification was factually erroneous or was inconsistent with the requirements of this part;
 - d) The State law of Nevada requires a result different from that of the State law of the home state.
 - e) The information provided by the applicant firm did not meet the requirements of paragraph of this section.
4. Unless NDOT has determined that there is good cause to believe that the home state certification is erroneous or should not apply in Nevada, NDOT will, no later than 60 days from the date on which it received from the applicant firm all the information required by this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms.
5. If NDOT determines that there is good cause to believe that the home state certification is erroneous or should not apply in Nevada, it will, no later than 60 days from the date on which it received from the applicant firm all the information required by this section, send to the applicant firm a notice stating the reasons for its determination.
- a) This notice will state the specific reasons why NDOT believes that the firm does not meet the requirements for DBE eligibility and must offer the firm an opportunity to respond to NDOT with respect to these reasons.
 - b) The firm may elect to respond in writing, to request an in-person meeting with NDOT's decision maker to discuss NDOT's objections to the firm's eligibility, or both. If the firm requests a meeting, NDOT will schedule the meeting to take place within 30 days of receiving the firm's request.
 - c) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements with respect to the issues raised by NDOT's notice. The firm is not otherwise responsible for further demonstrating its eligibility to NDOT.
 - d) The decision maker for NDOT be an individual who is thoroughly familiar with the provisions concerning certification.
 - e) NDOT will 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.
 - f) The firm's application for certification is stayed pending the outcome of this process.
 - g) A decision under this section may be appealed to the Departmental Office of Civil Rights.

6. If NDOT has not received from the home state a copy of the site visit review report by a date 14 days after making a timely request for it, it will hold action in abeyance pending receipt of the site visit review report. In this event, NDOT will, no later than 30 days from the date on which it received from an applicant firm all the information required, notify the firm in writing of the delay in the process and the reason for it.
7. If the NUCP denies a firm's application, rejects the application of a firm certified in their home state or any other State in which the firm is certified, or decertifies a firm, the NUCP will make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. The following information will be entered:
 - a) The name of the firm;
 - b) The name(s) of the firm's owner(s);
 - c) The type and date of the action;
 - d) The reason for the action.
8. NDOT will check the DOCR web site at least once every month to determine whether any firm that is applying for certification or that is already certified is on the list.
9. For any such firm that is on the list, NDOT will promptly request a copy of the listed decision from the UCP that made it.

E. APPEAL TO USDOT ON DENIAL OF INITIAL CERTIFICATION §26.86

1. Applicants who believe they have been wrongly denied certification as a DBE may file an appeal in writing to:

U.S. Department of Transportation
 Departmental Office of Civil Rights
 External Civil Rights Program Division (S-33)
 1200 New Jersey Avenue
 SE. Washington, DC 20590

within ninety (90) days after certification has been denied. The process for appealing, and content of the appeal, are described in 49 CFR 26.89.
2. The decision of NDOT and the Nevada UCP from which the appeal action is taken is binding within Nevada. However, this decision is not binding to other recipients.
3. Applicants may request to withdraw their application, verbally or in writing, at any time prior to being voted on by the UCP Committee.
4. When a firm is denied certification, the firm may reapply for certification after 12 months.

NDOT will take the following action when a USDOT determination is applicable:

- a) If the USDOT determines that NDOT erroneously certified a firm, NDOT must remove the firm's eligibility upon receipt of the determination. Removal of the firm's eligibility will be effective as of the date of the receipt of the USDOT determination.
- b) If the USDOT determines that NDOT erroneously failed to find reasonable cause to remove a firm's eligibility, NDOT must expeditiously commence procedures to determine if the firm's eligibility should be removed.
- c) If the USDOT determines that NDOT erroneously declined to certify or removed the eligibility of a firm, NDOT must certify the firm effective on the date NDOT received the USDOT determination.
- d) If the USDOT determines that NDOT erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, NDOT must take appropriate corrective action as determined by the USDOT.
- e) If the USDOT affirms NDOT's determination, then no further action is necessary.

F. REMOVAL OF DBE ELIGIBILITY §26.87

NDOT will initiate actions for removal of a DBE firm certification:

- If it is determined that it does not meet one or more of the eligibility standards listed in III) B. of this plan; or
- A DBE "fails to cooperate" or is "unresponsive" to requests for annual "no change" affidavit, or fails to submit an application form at the end of a 3-year review period.
- Firms will not be totally decertified due to exceeding the size standard for one or more of its activities. If a firm meets the size standard for one type of work (e.g., as a general contractor), it will 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).

NDOT will initiate an investigation and removal from the program proceedings when notified by third parties, or USDOT that they are in possession of evidence which questions the eligibility of currently certified DBE firm(s) via the standards and acceptable operating procedures and time frames contained in this plan and 49 CFR 26.87.

The DBE firm remains eligible to participate on NDOT contracts during the pendency of NDOT removal of certification proceedings and hearing but not during appeals to USDOT.

1. Third party complaints submitted to NDOT must be written and contain specific reasons why the complainant believes the DBE is ineligible to participate in the DBE Program. General allegations or anonymous complaints will not be addressed.

- a) If the complainant(s) request their identities be kept confidential, NDOT will honor that request unless it hinders the investigation, hearing, or denies due process to other parties. In these circumstances, complainants will be requested to waive confidentiality and advised that failure to do so may result in closure of the investigation or dismissal of the hearing.
- b) After investigation, NDOT will consider allegations in the complaint and evaluate additional information from the DBE firm or other sources. After a thorough review of the record, NDOT will either:
 - Advise the complainant and the DBE firm in writing that it finds no reasonable cause to believe that the firm is ineligible, the specific reasons for that determination, and the evidence on which the reasons are based; or
 - Advise the DBE firm in writing that it proposes to find the firm ineligible, specifying the reasons for its determination, and the evidence on which those reasons are based. The letter will further offer the DBE firm an opportunity to respond to NDOT's decision at an informal hearing described in 49 CFR Part 26.87.

The complainant or DBE firm may appeal the decision by NDOT to the USDOT. Appeals need to be sent to:

U.S. Department of Transportation
 Departmental Office of Civil Rights
 External Civil Rights Program Division (S-33)
 1200 New Jersey Avenue
 SE. Washington, DC 20590

2. NDOT initiated proceedings may be based on notification by the DBE firm that its circumstances have changed or by information received from outside sources that suggests the DBE is ineligible and should be investigated for potential removal of certification.
 - a) If the Contract Compliance Office receives a written complaint alleging a firm is not eligible to be certified as a DBE or if the contract compliance staff believes there is reasonable cause to find the firm ineligible for the DBE Program, the information will be investigated and a determination will be made.
 - b) If NDOT concludes that the evidence points to ineligibility, the Contract Compliance Office will advise the DBE firm in writing that NDOT proposes to find the firm ineligible, specifying the reasons for its determination, and the evidence on which those reasons are based. The letter will further offer the DBE firm an opportunity to respond to NDOT's decision at an informal hearing, which may be

held in person or via written arguments, at the firm's election. The hearing will be conducted by a member of the UCP who was not involved in the decertification decision but knowledgeable about the certification and decertification rules in 49 CFR Part 26.

3. USDOT-initiated proceedings begin when the FTA advises NDOT that information in a DBE's certification records or other information in their possession gives them reason to believe that a certified firm does not meet the eligibility criteria, and further directs NDOT to initiate proceedings to remove the firm's certification.
 - a) FTA provides NDOT and the DBE firm a notice setting forth the reasons for the directive and supplying other relevant documentation.
 - b) NDOT then begins certification removal procedures as outlined in this Plan.
4. Informal Hearing Procedures. In these proceedings, NDOT bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards.

Note: No hearing is necessary if the DBE firm exceeds the personal net worth cap and does not dispute that fact or the DBE firm submits a written request to be decertified.

- a) The Civil Rights Officer will select a Hearing Officer. The CCM is responsible for arranging the time and place for the hearing in coordination with the DBE firm and the Hearing Officer. The identified Hearing Officer is responsible for evaluating written and verbal arguments and information if the DBE elects to respond to the certification removal notice in that manner. The identified Hearing Officer must be knowledgeable about the certification requirements of the DBE program. (Reasonable extensions of time may be allowed at any step of the following procedure.)
- b) The DBE firm is advised in the Notice of Intent to Remove Certification that it has 10 working days in which to request a hearing and the hearing options available - oral or written - and the procedures accompanying each option:
 - i) Oral hearings are scheduled in a timely manner from the receipt of the DBE's request for hearing, contingent on the schedules of the Hearing Officer, NDOT, and DBE owners. Oral hearings should be audio taped. At the hearing, the DBE owner(s), and the DBE's attorney may present evidence and call/question witnesses. The Civil Rights Officer or the Contract Compliance Manager will present NDOT's position. NDOT will

retain the original record of the hearing. Hearing tapes and transcripts will be available on appeal to USDOT.

- ii) If the DBE requests that arguments be submitted in written form, all arguments and information must be submitted within 15 calendar days from receipt of request for hearing. The Hearing Officer will make a decision within 15 calendar days of receipt of all written information.
Written arguments and information from the DBE are evaluated against the written arguments and information presented by NDOT.
- c) If the DBE fails to attend the scheduled hearing (without reason and notification) or to submit written arguments within time limits established, the firm will be sent a final notice of decertification. The firm may choose to appeal, as provided in subsection (e) below.
- d) The decision by the Hearing Officer on the arguments in either oral or written arguments will be based on any one or more of the following conditions:
 - Changes in the DBE's circumstances since certification that render the DBE ineligible;
 - Receipt of information or evidence not available at the time of certification;
 - Receipt of information that was concealed or misrepresented before or during certification proceedings;
 - Changes in USDOT standards for certification; and/or
 - Documented findings that certification was factually erroneous.
- e) NDOT notifies the DBE by certified mail of the Hearing Officer's decision and reasons for it, including specific references to the evidence in the record that supports each reason for the decision.

If the decision removes eligibility, the notice must further inform the DBE of the consequences of the decision and the DBE's right to appeal to the USDOT. A copy of 49 CFR 26.89 (Process for Certification Appeals to the Department of Transportation) will be sent with the certification removal notice. Copies of the notice are also sent to third party complainants or USDOT, if appropriate.

If the applicant appeals to USDOT, NDOT will provide USDOT (within 20 days of request) the administrative record, including a hearing transcript. The record will be well organized, indexed and paginated. Upon notification by USDOT, NDOT will immediately take action as directed.

If the decision states no reason to remove certification, the DBE is so notified, and the proceedings are closed.

NDOT will list on the Department of Transportation Office of Civil Rights (DOCR's) online database information on any firm whose certification is removed. This data will include the following information:

- Name of firm
- Name(s) of the firm's owner(s)
- Type and date of action
- Reason for action

NDOT will monitor the DOCR web site as required and when needed request any required information from other UCPs within the 7-day time frame. The requested information will be considered for determining any needed actions in respect to certified DBE firms or applicants in Nevada.

5. Effects of Removal of Certification on Contracts

- a) If NDOT has made a commitment to use an ineligible DBE prime contractor, or a prime contractor has committed to using an ineligible DBE, but a contract or subcontract has not been executed before the removal of certification notice has been issued, the ineligible firm does not count toward the contract or overall goal. The prime contractor must meet the contract goal with an eligible DBE firm or demonstrate that it has made good faith effort to do so.
- b) If NDOT has executed a contract with a subsequently ineligible DBE prime contractor, or a prime contractor has executed a subcontract with a subsequently ineligible DBE firm, NDOT and the prime contractor will receive credit toward the DBE goals. However, in either case, that portion of the DBE's contract remaining after Notice of Removal of Certification will not count toward NDOT's overall goal, but will count toward the contract goal, except if the ineligibility stems solely from having exceeded the size standard during the performance of the contract, the DBE's performance will be counted toward both contract and overall goals.

G. SUMMARY SUSPENSION OF CERTIFICATION §26.88

1. NDOT will immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

2. NDOT may immediately suspend a DBE's certification without adhering to the requirements in §26.87 when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify the NDOT in writing of any material change in circumstances or fails to timely file an affidavit of no change.
3. In determining the adequacy of the evidence to issue a suspension, NDOT will consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.
4. The concerned operating administration may direct NDOT to take action pursuant to this section if it determines that information available to it is sufficient to warrant immediate suspension.
5. When a firm is suspended pursuant to this section, NDOT shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.
6. Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under §26.87 to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.
7. While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward NDOT's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.
8. Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide to NDOT information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, NDOT will either lift the suspension and reinstate the firm's certification or commence a decertification action under §26.87. If NDOT commences a decertification proceeding, the suspension remains in effect during the proceeding.
9. The decision to immediately suspend a DBE under this section is not appealable to the US Department of Transportation. The failure NDOT to either lift the suspension and reinstate the firm or commence

a decertification proceeding is appealable to the U.S. Department of Transportation under §26.89 of this part, as a constructive decertification.

H. ACTIONS TAKEN FOLLOWING DOT CERTIFICATION APPEAL DECISIONS §26.91

1. Appeal action decisions pursuant to §26.89 are binding upon NDOT.
 - a) NDOT must take the following action if an appeal decision is applicable:
 - i. If the Department determines that NDOT erroneously certified a firm, NDOT will remove the firm's eligibility on receipt of the determination, without further proceedings.
 - ii. If the Department determines that NDOT erroneously failed to find reasonable cause to remove the firm's eligibility, NDOT will expeditiously commence a proceeding to determine whether the firm's eligibility should be removed.
 - iii. If the Department determines that NDOT erroneously declined to certify or removed the eligibility of the firm, NDOT will certify the firm, effective on the date of your receipt of the written notice of Department's determination.
 - iv. If the Department determines that NDOT erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, NDOT will take appropriate corrective action as determined by the Department.
 - v. If the Department affirms NDOT's determination, no further action is necessary

V) PRE-BID, CONTRACT, AND AWARD PROCEDURES

A. CONTRACT ASSURANCE

NDOT includes in its USDOT-assisted contracts, and reviews all sub-contracts for inclusion, the following clause:

The contractor 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 USDOT -assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this

contract, which may result in the termination of this contract or such other remedy as NDOT deems appropriate.

B. DBE NOTIFICATION

NDOT notifies certified DBE firms of contract opportunities by:

- Assisting DBEs in accessing the; "Notice to Contractors" website and related pages.
- Providing the "Plan Holders" list to DBEs on line.
- Post on-line and forward "Invitations to Bid" from prime contractors to qualified DBE firms through the bidding opportunities page of www.nevadadbe.com.

C. PRIME CONTRACTOR NOTIFICATION

1. When a contract contains a DBE goal, the goal is included in Section 103.08 of the Special Provisions. Contracts without a DBE goal include a notice to utilize SBE and DBE firms.
2. Contractors may contact the External Civil Rights staff at 702-730-3317 for assistance in meeting the goal.

D. AWARD OF CONTRACT

1. The apparent successful bidder is the bidder (DBE or non-DBE) who submits the lowest bid, and who is responsive and responsible. The contractor must sign the proposal document accompanying the bid stating that the firm will perform the work of the contract and comply with the various regulations and special provisions, including the appropriate DBE Special Provisions and the DBE goal, when applicable. These provisions require the contractor to identify, within two hours of the bid, the DBE(s) that will be used, or to document the contractor's good faith efforts to meet the DBE goal when the contract includes a DBE goal requirement that was not met with Nevada certified DBE firms.

After bid opening, NDOT Contract Compliance Office analyzes the bids and notifies the Administrative Services Division that the DBE goals have or have not been met or that a good faith effort was or was not made. Specific bidding processes may be changed from time to time to accommodate electronic or standard bidding procedures. Further information regarding bidding processes can be found in the NDOT Standard Specifications for Road and Bridge Construction.

VI) CONTRACT PERFORMANCE

A. COMMERCIALY USEFUL FUNCTION (CUF)

In order for DBE contractor payments to be counted toward DBE goals, the DBE contractors must perform a commercially useful function, i.e., it must be responsible for execution of the work of the contract and must carry out its responsibilities by actually performing, managing and supervising the work involved, consistent with standard industry practices.

This means that:

1. The DBE must be responsible for ordering its own materials and supplies, determining quantity and quality, negotiating price, installing (where applicable) and paying for the material itself;
 - a) The use of joint checks will be allowed for the payment of materials and supplies when the following conditions are met:
 - i. Second party (typically the prime contractor) acts solely as a guarantor
 - ii. DBE must release the check to the supplier
 - iii. Use of joint checks is a commonly recognized business practice in the industry
 - iv. DBE submits request for pre-approval to NDOT
 - v. All CUF conditions are met and documented by DBE and prime.
2. The DBE must perform work commensurate with the amount of its contract;
3. The DBE's contribution cannot be that of an extra participant or a conduit through which funds are passed in order to obtain the appearance of DBE participation;
4. The DBE must exercise responsibility for at least fifty (50) percent of the total cost of its contract with its own workforce;
5. None of the DBE's work can be subcontracted back to the prime contractor, nor can the DBE employ the prime's, or other subcontractor's supervisors currently working on the project;
6. The DBE's labor force must be separate and apart from that of the prime contractor or other subcontractors on the project. Transferring crews between primes, subcontractors, and DBE contractors is not allowed;
7. The DBE owner must hold a Public Works license and any other professional or craft licenses required for the type of work he/she performs on the project;
8. The DBE may rent or lease, at competitive rates, equipment needed on the project from customary leasing sources or from other subcontractors on the project; and

9. The DBE trucking firm must be responsible for management and supervision of the entire trucking operation for which it is responsible. The following rules also apply to DBE trucking firms:
- a) Must own and operate at least one fully licensed, insured and operational truck used on the contract. Owner/operators must have an agreement with the contractor or subcontractor that contains:
 - Owner/operators name
 - Social security number
 - Copy of vehicle registration receipt
 - Current vehicle license number
 - Vehicle identification number
 - Method of payment (hour, ton or load)
 - b) Leases must indicate that the DBE has exclusive use of and control over the truck, but does not preclude the leased truck from working for others during the term of the lease with consent of the DBE, provided the lease gives the DBE absolute priority for the use of the leased truck.
 - c) Leased trucks must display the name and identification number of the DBE.
 - d) Lease/rental/contract agreements must be approved by the Resident Engineer.

B. RECORD KEEPING

1. Contractors and Subcontractors
 - a) All contract records relating to DBE participation must be maintained by contractors and subcontractors through the project and will follow provisions of the retention schedule from that point. NDOT, and FTA employees must be allowed to interview contractors and DBE employees as necessary. (If a claim, audit, or investigation is underway, records must be retained until final resolution.)
 - b) All DBE records maintained by contractors and subcontractors must be made available to NDOT as required by the retention schedule.
 - c) Failure to comply with a) and b) above may result in the imposition of sanctions.

C. SANCTIONS

1. After investigating and obtaining evidence that the contractor or DBE subcontractor is not complying with the terms of the contract the CCM in conjunction with the Resident Engineer will take the following action:
 - a) Advise the contractor, in writing, that specific (listed) infractions have been observed which must be corrected. and that failure to take corrective action will result in withholding all or part of progress payments;
 - b) If deficiencies are not corrected, the Resident Engineer will withhold progress payments; and
 - c) If violations persist, the CCM and the Resident Engineer, in coordination with the District Engineer and the Construction Division develop a proposed course of action. After consultation with the CCM and the Civil Rights Officer, NDOT may take any of the following actions, as provided in section 103.08 of the Standard Specifications for Road and Bridge Construction:
 - Continue to withhold progress payments until the contractor is in compliance;
 - Deduct as damages
 - Suspend or terminate the contract, No progress payment is made during this time and no time extension made;
 - Deduct as damages to the contractor an amount equal to the unmet portion of the DBE commitment.
 - Notify the FTA to impose additional sanctions through the USDOT Inspector General's office, up to and including suspension and debarment.
 - Refer the matter for criminal prosecution.

EXHIBITS

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

- EXHIBIT A – External Civil Rights Division Organizational Chart
- EXHIBIT B – Denial of DBE Certification Appeals Process
- EXHIBIT C – NDOT Specifications for DBE Requirements
- EXHIBIT D – Tips on Evaluating a Commercially Useful Function
- EXHIBIT E – DBE Application
- EXHIBIT F – Mentor-Protégé Program
- EXHIBIT G – Terminology
- EXHIBIT H – Transit DBE Reporting Procedure

Exhibit A

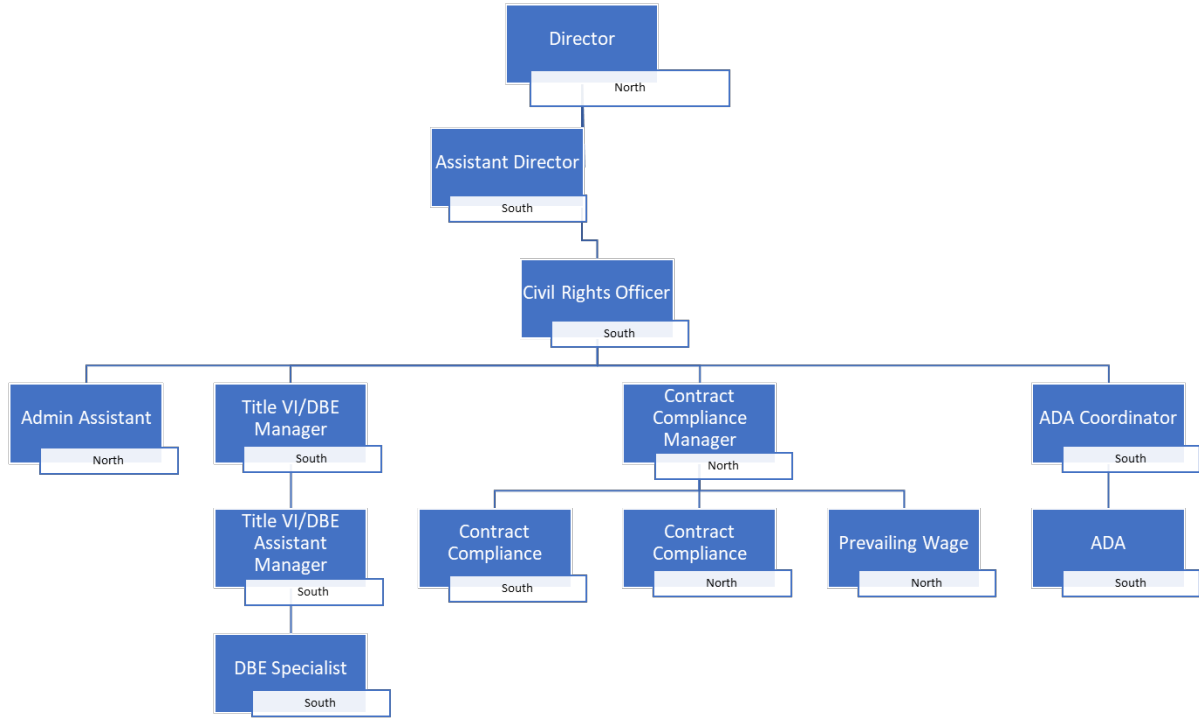


EXHIBIT B

Appeals Process

The process for appealing the denial of a certification application is provided in 49 CFR Subsection §26.89 and is provided below:

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

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

(3) Send appeals to the following address: U.S. Department of Transportation, Departmental Office of Civil Rights, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.

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

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal or in the interest of justice.

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

(e) The Department makes its decision based solely on the entire administrative record as supplemented by the appeal. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may also supplement the

administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, State, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT C

NDOT SPECIFICATIONS FOR DBE REQUIREMENTS

The following sections of the NDOT Standard Specifications for Road and Bridge Construction, as amended from time to time by the Special Provisions, relate to DBE program requirements:

- 102.03 Content of Proposal Forms
- 102.16 DBE and SBE Certification and Bidding Requirements
- 103.08 DBE and SBE Verification and Award Requirements
- 108.01 Subletting of Contract

EXHIBIT D

TIPS ON EVALUATING A COMMERCIALY 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 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 State Transportation Agency (STA) receive credit toward the DBE goal (contract and overall) only when a DBE working on a contract performs a CUF. DBEs generally perform work on a contract either as a contractor, a trucker, a regular dealer, or a manufacturer. While each of these categories is evaluated differently when determining whether the DBE has performed a CUF, there is one guiding principle that must be followed. Under the terms established in 49 CFR §26.55, 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 meet this requirement?” Evaluating these areas will form the basis to render a determination that a DBE has in fact performed a CUF. The contract is the one key reference point for any contract administrator and it is essential for this evaluation process. The contract has an effective description of the work to be performed by a DBE and is a legally recognized document.

The USDOT DBE regulations identify the following key factors that should be analyzed when determining 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 hired to both furnish the material and install it with its own labor force;
- ❑ Whether the DBE’s 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 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 performed by non-DBEs. 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

One of the most important elements to consider in any analysis of whether the DBE is performing a CUF is determining whether its role on the project is consistent with "normal industry practice." This means, one must determine if the DBE is performing the work or services in the manner normally performed by all contractors—DBEs and non-DBEs. However, even if a DBE is performing pursuant to normal industry practices if those practices, in fact, erode the ability of the DBE to control its work and remain independent, the practice may affect how much can be credited toward the DBE goal and may raise questions about the DBE eligibility.

One general rule of thumb that can be considered is whether a DBE would be performing in the same manner if there was no DBE program. As further evidence of meeting normal industry practice, one must consider if the DBE performs this work on non-federally assisted contracts.

Monitoring

In keeping with normal contract requirements, it is the primary responsibility of the prime contractor to ensure that the DBE is performing a CUF. The STA, as the contracting agency, has oversight responsibility to ensure that the prime contractor has effectively met this responsibility under its contract with the STA.

The STA needs to have sufficient field personnel and general headquarters staff to monitor the performance of work performed by DBEs 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 STA's various departmental staff responsible to monitor and evaluate the contractor's compliance with the DBE 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: prime or subcontractor, trucker, regular dealer, and manufacturer. The following is an overview of each category, typical CUF questions, and a list of documents to review.

While DBEs are occasionally awarded prime contracts, DBEs primarily work as subcontractors for the prime. Subcontractors typically perform specific contract items and provide their own labor and materials. To determine whether a DBE subcontractor is performing a CUF, 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 its 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 present on the job site and under the DBE owner's direct supervision. The DBE owner must make all operational and managerial decisions for the firm. Mere performance of administrative duties is not considered supervision of daily operations.

Red flags are questionable practices which may warrant further review. The red flags for management operations may include, but are not limited to:

- ❑ The DBE owner or superintendent 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;

- ❑ The DBE's owner is not aware of the status of the work or the performance of the business;
- ❑ Inquiries by department or FTA 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 contract
- ❑ Daily inspection reports and project diaries
- ❑ Payrolls

WORKFORCE

In order to be considered an independent business, a DBE must keep a regular workforce. DBEs 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 controls, with a minimum of 30% of the work to be performed by the DBE's regular employees, or those hired by the DBE for the project from a source, such as a labor union. The DBE, in all instances, must have direct supervision over all of its employees.

The DBE must be responsible for 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 at least 30% of the total cost of its contract with its own workforce. 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 DBE's certified payroll?
- ❑ Have any of the DBE's employees 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 or change orders?
- ❑ Asking DBE employees on the jobsite who they report to and who signs their checks.

Typical Documents to evaluate:

- ❑ Written contract
- ❑ Daily inspection reports and project diaries
- ❑ Certified payrolls
- ❑ Copies of cancelled checks, if necessary

A DBE 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. The lease must specify the terms of the agreement. The lease must be for a short period of time and involve a specialized piece of equipment to be used at the job site. The lease may include an operator for the equipment who remains 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 the lease amount is not counted toward the contract goal. Equipment leased and used by the DBE with payment deducted from the prime contractor's payment (s) to the DBE is not allowed.

Red Flags

Some questionable equipment practices which may warrant further review include, but are not limited to:

- ❑ Equipment used by the DBE 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 uses 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 an agreement identifying the terms and parties? Is it signed by the DBE owner?
- ❑ 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
- ❑ Daily inspection reports and project diaries
- ❑ Leases

For a DBE contractor (furnish and install) to receive credit for supplying materials, the DBE must perform the following four functions: (1) negotiate price; (2) determine quality and quantity; (3) order the materials; and (4) pay for the material itself. If the DBE does not perform all of these functions, it has not performed a CUF with respect to obtaining the materials, and the cost of the materials may not be counted toward the DBE goal. Invoices for the material should show the payor as the DBE.

While the regulations tell recipients to consider normal industry practices, this does not overrule the requirement that the DBE must perform the four functions enumerated above. For example, even if standard industry practices in certain areas of the country allow no subcontractor to perform all four functions enumerated above (e.g. manufacturers will only negotiate with a prime, thereby eliminating the DBE's ability to negotiate the price), the "furnish" portion of the transaction does not lend itself to the performance of a CUF by the DBE, and credit cannot be given for the acquisition or cost of the materials.

Red Flags

Some questionable material supply 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, instead of sent by the DBE;
- ❑ Materials or supplies necessary for the DBE's performance are delivered to, billed to, or paid by another business;
- ❑ Materials are delivered to the jobsite by a party separate from the DBE;

- ❑ Payment for materials is deducted by the prime contractor from payments to the 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 contract 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?
- ❑ Who actually delivered the materials?
- ❑ If two party checks are used, who are the parties identified as payable to?

Typical Documentation to evaluate:

- ❑ Written contract
- ❑ Delivery tickets
- ❑ Invoices
- ❑ Daily inspection reports and project diaries

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 is being done jointly by the DBE 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 is working without a subcontract 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 artificially inflates the DBE participation;
- ❑ An agreement that erodes the ownership, control or independence of the DBE subcontractor;

- ❑ A DBE 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.

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 contract
- ❑ Daily inspection reports or project diaries

DBE TRUCKING FIRMS

To be certified in the DBE program as a trucking firm, the DBE is required to own and operate at least one fully licensed, insured, and operational truck used on the contract. To perform a CUF, a DBE must also be responsible for the management and supervision of the entire trucking operation or a specified portion of the trucking operation to which it has been committed. There cannot be a contrived arrangement for the purpose of meeting a DBE goal.

A DBE can supplement its fleet by leasing 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 the value of DBE trucking services toward a contract goal, the following can occur:

- ❑ The DBE may lease trucks from another DBE, including an owner-operator that is certified as a DBE. The DBE can count the entire value of services performed by these DBE trucks.

- ❑ The DBE may also lease trucks from non-DBEs and owner--operators. The DBE can count the value of these trucking services up to the value of services performed by the DBE trucks used on the contract.
- ❑ DBE participation can be counted for the value of services of non-DBE trucks that exceed the value of the services performed by DBE trucks only in the amount of the fee or commission a DBE receives as a result of the lease arrangement.

In order for the STA or subrecipient to monitor the performance of a DBE trucking firm, the work to be performed must be covered by a subcontract approved by the STA prior to performing the work. Additional documentation required when the DBE leases equipment is a valid lease to be provided to the STA for appropriate action. To be considered valid, the lease 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 lease identifying the terms and parties?
- ❑ Are the rates appropriate?
- ❑ Is there an approved subcontract?
- ❑ If so, who are the parties?
- ❑ Are the DBE's employees shown on the certified payrolls?
- ❑ Subcontracts
- ❑ Leases
- ❑ Payroll records
- ❑ Daily inspection reports and project diaries

DBE REGULAR DEALERS

In order for a firm to operate as a regular dealer, it must perform CUF, and must also comply with other requirements applicable to regular dealers. 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, except as noted below.

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. 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 supplies.

A firm may be a regular dealer in bulk items such 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.

If a DBE meets the requirements of a regular dealer, it may count 60% of the cost of the materials, if reasonable, toward the contract goal. 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 owned or leased, long term by the DBE, used in delivering the product?
- For bulk items, where does the material come from? Does the DBE have a distribution agreement?
- 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. Examples of such items could be a concrete ready mix plant, a crushing operation, or a steel or concrete fabricating plant.

Typical CUF questions could include:

- Is the business's primary function to manufacture 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?
- Does the DBE purchase the raw material used in its plant?

Typical Documents to evaluate:

- ❑ Purchase orders
- ❑ Bill of lading
- ❑ 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 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 an STA could take include, but are not limited to, the following:

- ❑ Deny or limit credit towards the contract goal;
- ❑ Require the prime to make GFE to replace the DBE to 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/diaries
 - ❑ 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 FTA. 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. Even if the certification process has identified the DBE's ability to perform as a contractor, regular dealer, or manufacturer, it is important to review and determine what and how a DBE actually performs during the performance of the contract.

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. An 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. If fraud is suspected the STA should contact the DOT Office of Inspector General.

EXHIBIT G

§26.5 Terminology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as members of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

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

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

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

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

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

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

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

(vi) Women;

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

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

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

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

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

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



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Purpose

The NDOT's DBE Program seeks to ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs and to create a level playing field on which DBEs can compete fairly for DOT-assisted contracts. The FTA Office of Civil Rights is responsible for monitoring FTA recipients' DBE programs and ensuring their compliance with DOT's DBE regulations found at 49 CFR Part 26.

DBE Method

The recipient agrees and assures that it will comply with U.S. DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 CFR part 26. Among other provisions, this regulation requires recipients of DOT Federal financial assistance, namely State and local transportation agencies, to establish goals for the participation of disadvantaged entrepreneurs and certify the eligibility of DBE firms to participate in their DOT-assisted contracts.

Additionally, agreements between NDOT and all sub-recipients will contain assurances that sub-recipients will not discriminate on the basis of race, color, national origin, sex, age, disability/handicap, and income status in the performance of this contract as well as language that obligates sub-recipients to develop, and implement, their own DBE Plan or to adopt, and implement, the provisions of the NDOT DBE Program.

Sub-recipients who receive USDOT (FTA and FAA) funds through NDOT as noted above and award more than \$250,000 in prime contracts in a fiscal year are required to comply with the provisions of 49 CFR Part 26 and develop their own DBE Program Plan or adopt and utilize the NDOT DBE Program Plan. If the subrecipient's do not meet this threshold, they are required to assist the NDOT Transit division in meeting their DBE goal. In doing so the sub recipients report all possible contract opportunities and DBE contracts, they have obtained over a month period, in their bi-annual reporting to the NDOT Transit Division.



DBE Requirements

The 2014 Disadvantaged Business Enterprise regulations require FTA recipients and transit vehicle manufacturers (TVMs) to use the new semi-annual Uniform Report (located at 49 CFR Part 26, Appendix B). The Transit staff sends out a letter, (attached), to all sub recipients, letting them know the semi-annual report is due. We also send the uniform report with guidance located at the bottom of the report (attached).

Oversight

Uniform Reports

The NDOT Transit division notifies Sub recipients 2 months prior to the Uniform Report being due and shares directions on how to fill out the Uniform Report and what is reported on this form, with power point explaining the DBE process. Their reports are due to the Transit Division by May 1 and Nov. 1.

The Transit division review all Uniform reports and logs the back up attached. The transit staff then fills our NDOT Uniform Report. If we have not met our DBE goal set forth in our Triennial DBE Plan, then a shortfall analysis will be prepared accordingly and will be submitted with NDOT Transit Uniform Report.

The transit division compares the sub recipients reporting to data collected monthly on the Sub recipients Invoice and Ridership workbook. The Uniform Report must be submitted to FTA on June 1 and December 1 of each fiscal year. This is done via NDOT External Civil Rights Division.

Transit Vehicle Award Reports

NDOT requires that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, provide certification (TVM) of FTA approval that it has complied with the requirements of §26.49.

Only those vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufactures are eligible to bid.

The 2014 DBE regulation require FTA recipients to report transit vehicle procurement awards. Effective November 2014, FTA recipients are required to submit, within 30 days of making an award, the name of the successful bidder and the total dollar value of the contract. Only eligible TVMs may bid on FTA-assisted transit vehicle procurements. Recipients must use the online Transit Vehicle Award Reporting Form to report the required information on transit vehicle procurement awards.

The transit division, the day the vendor is awarded, places a reminder in the Transit Calendar to fill out the FTA required reporting of successful bidder with in 30 days of award. This procedure will also be found in our Procurement procedures.