



F E D E R A L T R A N S I T A D M I N I S T R A T I O N

North Dakota Department of Transportation Unified Certification Program (UCP) Final Report

October 2012

Federal Transit Administration

CONDUCTED BY
Milligan & Company, LLC



U.S. Department of Transportation
Federal Transit Administration

North Dakota Department of Transportation
UCP Compliance Review
Final Report

October 2012

CONDUCTED BY

Milligan & Company, LLC
105 N. 22nd Street, 2nd Floor
Philadelphia, PA 19103

PREPARED FOR

Federal Transit Administration
Office of Civil Rights

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Section 1 General Information

Hosting Grant Recipient

North Dakota Department of Transportation
608 Boulevard Avenue

City/State

Bismarck, ND 58505

Executive Official

Francis G. Ziegler, P.E.
Director

On-Site Liaison

Deborah Igoe
Director, Civil Rights Division
(701) 328-2576

Report Prepared by

MILLIGAN AND CO., LLC
105 N. 22nd Street, 2nd Floor
Philadelphia, PA 19103
(215) 496-9100

Site Visit Dates

May 24–26, 2011

Compliance Review Team Members

Benjamin Sumpter, Lead Reviewer
Habibatu Atta
Kristin Szwajkowski

Section 2 Jurisdiction and Authorities

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of Transportation to conduct civil rights compliance reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and sub-recipients with Section 12 of the Master Agreement, Federal Transit Administration M.A. (17), October 1, 2010, and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Programs."

FTA, of the U.S. Department of Transportation (DOT), provides financial assistance to transit agencies, Metropolitan Planning Organizations (MPOs) and State DOTs. These recipients are required to comply with Federal civil rights provisions. The FTA Office of Civil Rights (TCR) oversees grantee compliance with these provisions through compliance reviews, which are conducted at TCR's discretion.

Members of the North Dakota Unified Certification Program (ND UCP), which are direct or indirect recipients of FTA funding assistance, are subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of these funds pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in ND UCP's agreement and were the basis for the selection of compliance elements that were reviewed.

Section 3 Purpose and Objectives

Purpose

The FTA Office of Civil Rights periodically conducts discretionary reviews of grant recipients and sub-recipients to determine whether they are honoring their commitment, as represented by certification to FTA, to comply with their responsibilities under 49 CFR Part 26. In keeping with its regulations and guidelines, FTA has determined that a compliance review of the North Dakota Unified Certification Program (ND UCP) is necessary.

The primary purpose of the compliance review is to determine the extent to which the ND UCP has met its DBE certification program goals and objectives, as represented to DOT in its UCP agreement. This compliance review is intended to be a fact-finding process to (1) examine the North Dakota Unified Certification Program and its implementation, (2) make recommendations regarding corrective actions deemed necessary and appropriate, and (3) provide technical assistance.

This compliance review is not to directly investigate whether there has been discrimination against disadvantaged businesses by the grant recipient or its sub-recipients, nor to adjudicate these issues in behalf of any party.

Objectives

The objectives of Unified Certification Programs, as specified in 49 CFR Part 26, are to:

- follow the certification procedures and standards and the non-discrimination requirements of 49 CFR Parts 26 and 23;
- cooperate fully with all oversight, review and monitoring activities of the United States Department of Transportation and its operating administrations;
- implement USDOT directives and guidance on DBE certification matters;
- make all certification and decertification decisions on behalf of all UCP members with respect to participation in the USDOT DBE Program. Certification decisions by the UCP shall be binding on all UCP members. Certification decision must be made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE;
- provide a single DBE certification that will be honored by all UCP members;
- maintain a unified DBE directory containing at least the following information for each firm listed: address, phone number, and the types of work the firm has been certified to perform. The UCP shall make the directory available to the public electronically, on the Internet, as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made;
- ensure the UCP agreement shall commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of 49 CFR Part 26 and 23.

The objectives of this compliance review are to:

- determine whether the ND UCP is honoring the Unified Certification Program agreement submitted to the Secretary of Transportation

- examine the required certification procedures and standards of the ND UCP against the DBE program compliance standards set forth in the regulations and to document the compliance status of each component
- gather information and data regarding the operation of the ND UCP from certifying members through interviews and certification file review

Section 4 Background Information

Prior to the 1999 DBE Final Rule 49 CFR Part 26, applicants seeking participation on USDOT-assisted projects as a DBE could be required to be certified by multiple USDOT recipients in a state. Subpart E of 49 CFR Part 26.81 now requires USDOT recipients to participate in a UCP that must provide one-stop shopping to applicants for DBE certification. An applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

An agreement establishing the UCP for the State was to be submitted to the Secretary of Transportation within three years of March 4, 1999. The agreement was to provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify the UCP will follow all certification procedures and standards of 49 CFR Part 26, on the same basis as recipients. The UCP is also required to cooperate fully with oversight, review, and monitoring activities of USDOT and its operating administration.

North Dakota Unified Certification Program

For the past 20 years, the North Dakota Department of Transportation (NDDOT) has acted as the certifying agent for DBE certification statewide. NDDOT makes certification determinations on behalf of FTA, Federal Highway Administration (FHWA), and Federal Aviation Administration (FAA) recipients as the sole certifying member in the North Dakota Unified Certification Program (ND UCP). An applicant is required to apply to the Unified Certification Board for DBE certification and once certified, the certification is honored by all USDOT recipients in North Dakota.

Under the UCP the DBE certification standards of Subpart D of 49 CFR Part 26, the DBE certification procedures of Subpart E of Part 26 and Part 23 for airport concessions are used to determine eligibility of firm to participate as DBEs in USDOT-assisted contracts.

The DBE Liaison Officer (LO) has a staff of two Civil Rights Officers (CROs) and an Administrative Assistant (AA) assigned to the DBE program as part of their duties. Both CROs are members of the DBE Unified Certification Board and can process DBE applications, compile data for the DBE Directory, conduct DBE project site and home office reviews, conduct and write the annual review of the supportive services contractor, and prepare statistical data for various reports.

The DBE Unified Certification Board is made up of three members. Should an applicant apply for certification as a concessionaire, the ND Aeronautics Commissioner has designated an aviation planner from the ND Aeronautics Commission to serve on the DBE Unified Certification Board. The ND Aeronautics Commission designee serves in place of the representative from the Construction Services Division.

New members to the DBE Unified Certification Board are provided training as required. Generally, they sit in as an observer for approximately six months before they become a voting member.

Following are the recipients and sub-recipients of the North Dakota UCP:

- Adams County Airport Authority
- Barnes County Airport Authority
- Bis-Man Transit Board
- Bismarck-Mandan MPO
- Bismarck Municipal Airport

- Bottineau Municipal Airport
- Bowman County Airport Authority
- Cando Municipal Airport
- Carrington Municipal Airport
- Casselton Municipal Airport
- Cavalier Municipal Airport
- Cities Area Transit
- City of Dickinson
- City of Fargo
- City of Glen Ullin
- City of Hazen
- City of Jamestown
- City of Minot
- City of Williston
- Cooperstown Municipal Airport
- Crosby Municipal Airport
- Devils Lake Municipal Airport
- Dickey County Senior Citizens
- Dickinson Municipal Airport
- Dunn County Council on Aging
- Edgeley Municipal Airport
- Elder Care (Stark County Council on Agency)
- Ellendale Municipal Airport
- Emmons County Council on Aging
- Fargo Municipal Airport
- Fargo Senior Commission
- Garrison Municipal Airport
- Glen Ullin Municipal Airport
- Golden Valley/Billings County Council on Aging
- Golden Valley County Airport Authority
- Grafton Municipal Airport
- Grand Forks Public Transportation Department
- Grand Forks Regional Airport
- Gwinner Municipal Airport
- Handi-Wheels Transportation
- Harvey Municipal Airport
- Hillsboro Municipal Airport
- International Peace Garden
- James River Senior Citizens
- Jamestown Municipal Airport
- Jefferson Lines
- Kenmare Meals & Wheels
- Kenmare Municipal Airport
- Kidder/Emmons Senior Services
- Kindred-Davenport Municipal Airport
- Lakota Municipal Airport
- Langdon Municipal Airport
- Linton Municipal Airport
- Mandan Municipal Airport
- Mercer County Airport Authority

- Mercy Medical Center
- Minot Commission on Aging
- Minot Municipal Airport
- Mohall Municipal Airport
- Mott Municipal Airport
- Nelson County Council on Aging
- North Central Planning Council
- North Dakota Aeronautics Commission
- Northwood Municipal Airport
- Park River Municipal Airport
- Parshall Municipal Airport
- Pembina County Meals & Transportation
- Pembina Municipal Airport
- Rolla Municipal Airport
- Rugby Municipal Airport
- Sitting Bull College
- Souris Basin Transportation
- South Central Adult Services Council
- Southwest Transportation Services
- Three Affiliated Tribes Aging Program
- Tioga Municipal Airport
- Tioga Senior Citizens Club
- Trenton Indian Service Area
- Wahpeton Municipal Airport
- Walhalla Municipal Airport
- Walsh County Transportation Program
- Washburn Municipal Airport
- Watford Municipal Airport
- West River Transportation Council
- Wildrose Senior Transportation
- Williston Council for the Aging
- Williston Municipal Airport

Section 5 Scope and Methodology

Scope

Implementation of the following twelve required DBE UCP program components specified by the FTA are reviewed in this report:

1. You must rebuttably presume that members of the designated groups identified in 26.67 are socially and economically disadvantaged. [49 CFR 26.61]
2. If you have a well-founded reason to question the individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group. [49 CFR 26.63]
3. You must apply current Small Business Administration (SBA) business size standards found in 13 CFR Part 121 appropriate to the type(s) of work the firm seeks to perform in USDOT-assisted contracts. [49 CFR 26.65]
4. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged. [49 CFR 26.67]
5. In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole. [49 CFR 26.69]
6. In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole. [49 CFR 26.71]
7. Other rules affecting certification include not considering commercially-useful function issues, evaluating the eligibility of a firm on the basis of present circumstances, and making sure only firms organized for profit may be eligible DBEs. [49 CFR 26.73]
8. You and all other USDOT recipients in your state must participate in a UCP. You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program. [49 CFR 26.81 and 26.31]
9. You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program. [49 CFR 26.83]
10. When you deny a request by a firm to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial. [49 CFR 26.86 – 26.89]
11. If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds or refusal to approve projects, grants, or contracts until deficiencies are remedied. [49 CFR 26.101 – 26.109]

Methodology

The initial step in the scope of this Compliance Review consisted of consultation with the FTA Office of Civil Rights and a review of available information from the UCP websites and other sources. Subsequent to this review, potential dates for the site visit were coordinated.

An agenda letter was then compiled and sent to the ND UCP by FTA's Office of Civil Rights. The agenda letter notified the ND UCP of the planned site visit, requested preliminary documents, and informed the ND UCP of additional documents needed and areas that would be covered during the on-site portion of the review. The documents received prior to the on-site portion of the review were examined, and an itinerary for the site visit was developed.

An entrance conference was conducted at the beginning of the Compliance Review with the ND UCP Certifying Member and the review team. Subsequent to the entrance conference, a review was conducted of the ND UCP agreement and other documents submitted to the review team by the ND UCP representative. Interviews were then conducted with NDDOT Certifying Member representatives regarding DBE program certification standards and certification procedures. A sample of certification files were then selected and reviewed for the DBE required elements.

At the end of the review, an exit conference was held with the NDDOT Certifying Member representatives and the review team. A list of participants is included at the end of this report. At the exit conference, initial findings and corrective actions were discussed with the representatives.

Following the site visit, this report was compiled.

Materials and information to address the findings and corrective actions in the report should be sent to the attention of:

Rebecca Ubando Tanrath
Civil Rights Officer
FTA, Region VIII
12300 West Dakota Avenue, Suite 310
Lakewood, CO 80228
rebecca.tanrath@dot.gov

North Dakota Department of Transportation

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter	90 day Cert. Decision	SBA Size	DOT/ SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision	Concession Business	ACDBE Size Standards	PNW	ACDBE Dir.
Removal	A-Marrick Construction, Inc.	Y	Y	Y	N/A	N/Y	N/A	N/A	N/A	Y	Y	N/A	Y	Y	Y	Y	N/A				
Initial Certification Denial	H & S Contracting, Inc.	Y	Y	Y	N/A	Y/Y	N/A	Y	N/A	N	Y	N/A	Y	Y	N/A	N/A	N/A				
Existing	Agency MABU	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A	Y	Y	N/A	Y	Y	N/A	N/A	N/A				
Removal	Beeter Trucking	Y	Y	Y	Y	N/N	N/A	N/A	N/A	Y	N/A	N/A	Y	Y	Y	Y	N/A				
Existing	LSCO, LLC	Y	Y	Y	N/A	N/Y	N/A	N/A	N/A	N	Y	N/A	Y	Y	N/A	N/A	N/A	Y	Y	Y	Y
Initial Certification Denial	Stampede Concrete	Y	Y	Y	N/A	N/Y	N/A	Y	N/A	N	Y	N/A	Y	Y	N/A	N/A	N/A				

Section 6 Issues and Recommendations

1. Burden of Proof

Basic Requirement: (49 CFR Part 26.61) UCPs must rebuttably presume that members of the designated groups identified in 26.67(a) are socially and economically disadvantaged. This means they do not have the burden of proving to you that they are socially and economically disadvantaged. Individuals must submit a signed, notarized statement that they are a member of one of the groups in 26.67.

Discussion: During this UCP Compliance review, no deficiencies were found with requirements for burden of proof.

The ND UCP certification process is outlined in the NDDOT DBE Program Administration Manual. It is stated in the manual that certification determinations are made in accordance to 49 CFR Parts 23 and 26. Certification decisions are said to be based on the facts as a whole, and the burden of proof of eligibility within the program is upon the applicant, not NDDOT. The certification application includes an affidavit of social and economic disadvantage that requires notarization. The ND UCP application also includes a Verification of Reading DBE Standards form that all owners must sign, confirming that they have read and understand the DBE regulations.

2. Group Membership

Basic Requirement: (49 CFR Part 26.63) If a UCP has a well-founded reason to question the an individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group. You must provide the individual a written explanation of your reasons for questioning his or her group membership. You must take special care to ensure that you do not impose a disproportionate burden on members of any particular designated group.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirements for group membership.

Proof of group membership status is requested in the ND UCP application of supporting documents. The NDDOT DBE LO indicated that the minority population is small and that Native Americans make up a large percentage of the minority population. The applicant is given a choice to submit a tribal enrollment, birth certificate, naturalization papers, non-resident visa, armed service discharged papers, membership letter, or certification by an ethnic organization.

3. Business Size

Basic Requirement: (49 CFR Part 26.65) A UCP must apply current SBA business size standard(s) found in 13 CFR Part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts. A firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts over \$22.41 million.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement of business size.

The interview with the North Dakota certification personnel verified that the current business size standards are used for the DBE and ACDBE programs. The NDDOT DBE LO indicated that the applicants and DBEs in the program are small in size. One trucking firm was said to be near the SBA size standards, and none were near the DBE size standard.

NDDOT does not use the NAICS code in its approval letters or directory. The DBE LO advised the review team that they will incorporate the NAICS codes in the directory to meet 2011 DBE Final Rule requirements.

4. Social and Economic Disadvantage

A) Presumption of Disadvantage

Basic Requirement: (49 CFR Part 26.67 (a)(1)) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement for presumption of disadvantage.

Part 26.61 (c) states you must presume members of groups identified in Part 26.67(a) are socially disadvantaged. This means they do not have the burden of proving to you (UCPs) that they are socially and economically disadvantaged. Part 26.67 (a)(1) requires the applicant to submit a signed, notarized certification that the disadvantaged owner is socially and economically disadvantaged. This notarized Affidavit of Certification is part of the Uniform Certification Application found in Appendix F of the DBE regulations. The certification files reviewed by the review team included the statement of disadvantage.

B) Personal Net Worth

Basic Requirement: (49 CFR Part 26.67 (a)(2)) A UCP must require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$1.32 million.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement for Personal Net Worth (PNW) statements.

The ND UCP Personal Financial Statement instructions require each economically disadvantaged proprietor, partner, stockholder, or any person or entity upon which their status is depended on to achieve the status of “disadvantaged” to complete the form. The certification evaluations included a thorough review of PNW eligibility of applicants and DBEs. The certification for Beeter Trucking was removed due to the discovery of additional assets of the qualifying owner during the annual update process.

C) Individual Determinations of Social and Economic Disadvantage

Basic Requirement: (49 CFR Part 26.67 (d)) Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged may apply for DBE

certification. UCPs must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged.

Discussion: During the UCP Compliance Review, no deficiencies were found with the requirement of individual determinations.

The certification staff indicated they have received applicants seeking individual determinations of social and economic disadvantage. H & S Contracting was previously certified as an 8(a) firm by the SBA and a DBE by Minnesota UCP. ND UCP staff discovered a discrepancy concerning the qualifying owner's group membership and requested that the firm apply on an individual basis. The firm failed to cooperate with the requests for additional information and was denied certification. More is discussed with this file in Section 11, Denials.

5. Ownership

Basic Requirement: (49 CFR Part 26.69) In determining whether the socially and economically disadvantaged participants in a firm own the firm, UCPs must consider all the facts in the record, viewed as a whole. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement of ownership. However, an advisory comment was made.

UCPs must evaluate if applicant firms are at least 51 percent owned by socially and economically disadvantaged individuals. 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. Based on the certification files reviewed, it appears that the ND UCP certifying members are appropriately allocating ownership percentages of socially and economically disadvantaged owners for certification.

The certification file for [REDACTED] was examined by the review team. The firm was certified as an Airport Concession DBE. The DBE application was submitted to NDDOT in April 2009. However, the female applicant indicated "will own 5/1/09" in the application section for "owned this firm since." The female owner had acquired 100% ownership interest in the business from her parents. A sales agreement between [REDACTED] seller, and [REDACTED], purchaser, was included in the application. The agreement was for the installment purchase of equipment and inventory of the airport concession business know as [REDACTED]. A monthly installment plan dated April 30, 2009, for 24 monthly payments of \$1,800 was established beginning July 1, 2009, and continuing until paid in full.

The Unified Certification Board requested proof of the \$25,000 investment in the firm, to which the firm replied that there was no upfront investment, only installment payments to her parents. After an on-site visit and oral interview with the Board, copies of cancelled checks from the new female owner showing monthly payments to the seller were requested.

The Board also requested that a check-signing limitation be set for one of the non-disadvantaged participants in the firm, [REDACTED]. The email message indicated that "this limitation is to protect you, the company owner. We do not tell you what dollar amount limit to set, but it should be realistic to your firm's operation. It is our suggestion that you set the amount to cover payroll and any other expenses that may come up over a one-week period in the event

that you are unavailable to sign or are out of the office. You could write a short company memo stating this and the limitation amount, and then have both you and [REDACTED] sign the memo indicating he is aware of the new requirement.”

The review team cautions the ND Unified Certification Board and staff on coaching applicants through the certification process and making business recommendations.

The review team visited the concession business at the North Dakota Airport and observed the female owner working at the concession.

6. Control

Basic Requirement: (49 CFR Part 26.71) In determining whether socially and economically disadvantaged owners control a firm, UCPs must consider all the facts in the record, viewed as a whole.

Discussion: During this UCP Compliance Review, no deficiencies were found with determining control.

The certification recommendations are made by a three-person panel for approval, denial, removal, or addition work areas determinations. The final concurrence of recommendation is made by the NDDOT Director of Operations. In addition to the two certification staff from the Civil Rights Division, appointment of a third member is based on the type of services provided by the applicant or DBE firm. The third member is rotated between the Financial Management Division, Construction Services Division, Environment & Transportation Services Division, and the North Dakota Aeronautics Commission.

After the on-site visit is conducted, an oral interview is scheduled with the applicant to determine if the individual has the required expertise to provide the services they are seeking to be certified as a DBE.

The certification file of Stampede Concrete was examined by the review team. The firm was denied certification based on lack of adequate expertise. The female 100% owner provide a resume stating the following: “I have my cosmetology license and worked in that field from 1984 through 2004. I also worked with mentally disabled individuals from 1985–2007. My experience in concrete work started in 2007, working with my husband. I have had hands-on experience in all areas of concrete work. I just started my concrete company in June of 2010. We do all kinds of concrete work including flat work, countertops, stamped concrete, overlays, resurfacing, and bobcat work.”

During the oral interview, the specific questions were asked of the female owner regarding concrete flat work for curb & gutter, driveways, and sidewalks. The female owner was unsure of many of the answers and responded that her husband “knows all of that.” The applicant was denied for lack of expertise in the areas for which certification was sought and because she was unable to answer questions regarding testing of concrete, Davis-Bacon wage rates, and question relating to highway construction projects.

The DBE Rule states that you must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm needs to demonstrate to you only

that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You may not, in this situation, require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

The firm A-Marrick Construction, Inc. requested to expand their DBE certification services. The firm was certified in the area of trucking, including hauling sand, gravel, and riprap. The firm wanted to also be certified as a regular dealer of hauling sand, gravel, and riprap. The Unified Certification Board recommended denying the additional services request, which was concurred with by the Director of Operations. A letter of denial was sent to the DBE firm explaining the reasons why their request for expanding services was denied.

7. Other Rules Affecting Certification

Basic Requirement: (49 CFR Part 26.73) UCPs must not consider commercially-useful function issues in any way in making decisions about whether to certify a firm as a DBE. DBE firms and firms seeking DBE certification shall cooperate fully with UCP requests for information relevant to the certification process.

Discussion: During this UCP Compliance Review, no deficiencies were found with other rules affecting certification.

The 2003 amended DBE regulations included a separate evaluation process for an Alaska Native Corporations (ANCs) seeking DBE certification. The North Dakota DBE manual does not discuss certification of Native Hawaiian organizations or Alaska Native Corporations.

8. UCP Requirements

A) UCP Agreement

Basic Requirements: (49 CFR Part 26.81) All USDOT recipients in a state must participate in a Unified Certification Program. Recipients must sign an agreement establishing the UCP for the state and submit the agreement to the Secretary for approval.

Discussion: During this UCP Compliance Review, no deficiencies were found regarding the ND UCP Agreement. However, an advisory comment was made.

The NDDOT signed agreements with fifty-two USDOT recipients to establish the UCP. The agreements and UCP procedures were sent to USDOT in 2002. No information was available to the review team regarding when the ND UCP was approved by USDOT.

The review team recommended changes to several areas of certification procedures noted in the ND DBE program manual. The manual states that firms wishing to participate as DBE contractors, subcontractors, manufacturers, regular dealers, joint ventures, or a mentor-protégé in any project using federal funds from FHWA, FTA, or FAA must be certified by the ND UCP. The manual continues that each business (including the DBE partner in a joint venture) wishing to participate as a DBE must complete and submit the DBE Uniform Certification Application (SFN 18787). Each entity wishing to participate as a DBE joint venture must, in addition, complete and submit the Application for Joint Venture Eligibility (SFN 6805). Applicants wishing to apply for DBE status or DBE joint venture eligibility may contact the Civil Rights Division of NDDOT.

The joint venture definition in the DBE regulation indicates that the DBE firm participating in a joint venture is certified rather than the joint venture itself. The review team inquired about joint venture eligibility process being included in the certification section rather than the counting of DBE participation section of the manual. The review team was advised that the Construction Services Division recommended this eligibility review be included in the certification process. The representatives interviewed indicated that no joint venture eligibility reviews had been conducted or approved to date. The review team advised NDDOT to consider including this process in the counting section since joint venture participation is outlined in 26.55 of the regulation.

Other recommended changes are discussed in the applicable sections of this report.

B) UCP Directory

Basic Requirements: (49 CFR Part 26.31 and 26.81(g)) UCPs must maintain a unified DBE directory containing, for all firms certified by the UCP, the information required by Part 26.31. The listing shall include for each firm, its address and phone number, and the types of work the firm has been certified to perform as a DBE. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

Discussion: During this DBE compliance review, no deficiencies were found with the requirements for the UCP directory.

The DBE directory is maintained by the Civil Rights Division. The directory lists the firm's name, owner's name, address, phone number, type of DBE designation, year formed, whether bonded, whether insured, area of work, labor force, equipment, and the type of work the DBE firms has been certified to perform. The DBE manual states that the directory is updated by including additions, deletions, and other changes as they are made, approximately 10–12 times per year. The NDDOT representative advised the review team that the directory was now updated immediately as changes are made. The webpage also includes a link to historical directories from previous months to see changes and removed firms.

January 2011 DBE Program Rulemaking

Requires that directories include by August 26, 2011, the most specific NAICS that describes the type of work for which DBE are certified. NDDOT states that it will be in compliance with the NAICS designation requirement.

9. UCP Procedures

A) On-Site Visits

Basic Requirements: (49 CFR Part 26.83(c)) UCPs must perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their resumes and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for on-site visits. However, an advisory comment was made.

On-site visits are conducted by a DBE architectural design, design build, and drafting consultant, Ohitika Designs. Ohitika conducts a home office review with the qualifying owner in the

applicant firm and downloads the information to the NDDOT website. Pictures are taken of the facility and the nine-page DBE Home Office Review form is completed with the owner. General, financial, management, project, equipment, and logistics information is collected on the review form. The review team advised that the form should also include an area to perform jobsites visits, when applicable. The NDDOT representative informed the review team that NDDOT had not conducted jobsite visits in the past. It will incorporate procedures and make adjustments even though it was stated that its DBE applicants are small and most likely do not have active jobsites at the time of certification. Additional on-site reviews or project-site reviews are conducted at random to determine continued eligibility of a DBE firm.

After the on-site review is conducted, all applicants must appear before the Unified Certification Board for an oral interview. If attendance proves to be a hardship for an applicant, the Board will make other arrangements for the oral interview on a case-by-case basis. The recorded interviews pose questions to the qualifying owner(s) concerning ownership, financial arrangements, day-to-day management, and control regarding expertise in the areas in which the applicant is seeking certification.

The review team discovered an email request in a certification file for copies of on-site visits for three firms certified by the Minnesota UCP. The email request was sent from NDDOT to a representative at Metropolitan Council and forwarded to Minnesota DOT, which had file custody of the three files. The Minnesota DOT representative provided an on-site copy for one of the DBE firms and responded that an on-site visit had not been conducted yet for one of the firms and was unsure if the on-site visit had been conducted for the third firm. More of the Minnesota UCP is discussed in Section 11, Denial.

B) Uniform Application

Basic Requirements: (49 CFR Part 26.83 (i)) UCPs must use the application form provided in Appendix F of the regulations without change or revision. However, you may in your DBE program, with the approval of the concerned operating administration, supplement the form by requesting additional information not inconsistent with this part.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for using the Uniform Certification Application Form in Appendix F. However, advisory comments were made.

The requirements to use the Uniform Certification Application Form were in the 2003 amendment to 49 CFR Part 26. ND UCP uses the appropriate certification application form for determining eligibility in the DBE program; however, there were several comments regarding the supplemental information in the certification application.

The application includes a checklist of services on which the applicant or DBE would indicate which services they would like to be included in their certification. The services listed are highway-specific and could give the appearance that other industries are not certifiable. Since NDDOT is the UCP for FHWA, FTA and FAA, it is recommended that the services listed be expanded to include more FTA- and FAA-related activities. This process could facilitate more outreach to non-highway-related firms and assist UCP members with achieving DBE goals and participation.

The application includes DBE and airport concession certification standards. The references made in the airport concession section of the application are inconsistent with the current 49

CFR Part 23 guidelines. References are made to sections 23.89, Definitions; 23.95G, Certification Standards, which state joint ventures are eligible for certification as DBEs under this subpart; 23.95H, Businesses Not Eligible for Certification; and an outdated size standard table for airport concessionaires of \$30 million. These standards appear to be from regulations prior to the 2005 ACDBE Final Rule and amendments are needed.

One practice used by NDDOT includes ensuring that all certifications by the UCP are pre-certifications, i.e., certifications that have been made final before the due date of the bid. To ensure compliance with this part, NDDOT includes the bid-opening schedule in the application package. Applicants are given the bid-opening schedule for the year with applicable deadlines for submitting their certification application so that a determination can be completed by the Board prior to the due date of the bid.

C) Annual Updates

Basic Requirements: (49CFR Part 26.83) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification. If you are a DBE, you must provide to the UCP, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirement for annual updates.

The NDDOT certifies firms for one year and collects annual updates thereafter. The DBE manual describes the annual update process. DBE firms are required to submit a Notice of Changes and Annual Affirmation of DBE Program Eligibility (SFN 52158) or affidavit of no change by the firm's anniversary date of certification. This is an all-inclusive form on which the DBE completes the applicable sections and returns it to the Civil Rights Division with supporting documentation of changes, personal financial statement, tax returns, etc.

January 2011 DBE Program Rulemaking

Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of Section 26.87. You may not require DBEs to reapply for certification or require "recertification" of currently-certified firms. NDDOT will need to revise letters and procedures to remove references to certification expirations and recertifications.

10. DOT / SBA MOU

Basic Requirements: (49 CFR Part 26.84–26.85) UCPs must accept the certification applications, forms, and packages submitted by a firm to the SBA for either the 8(a) BD or SDB programs, in lieu of requiring the applicant firm to complete your own application forms and packages.

Discussion: During this UCP Compliance Review, the requirement for a DOT / SBA MOU was not applicable.

January 2011 DBE Program Rulemaking

49 CFR Part 26.84 has been removed. The above section and advisory comment are no longer applicable to this compliance review report.

49 CFR Part 26.85 was replaced with Interstate certification requirements. The current guidelines for NDDOT states that out-of-state applicants' home office reviews are requested from home-state departments of transportation or the SBA office. Applicants not certified in their home state are encouraged to do so before applying for certification in North Dakota. However, out-of-state applicants that wish to be certified in North Dakota and not their home state are reviewed on a case-by-case basis.

11. Denials of Certification

A) Initial Request Denials

Basic Requirement: (49 CFR Part 26.86) When a UCP deny a request by a firm that is not currently certified with them to be certified as a DBE, the UCP must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that support each reason for the denial.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement for denial of initial certification request. However, an advisory comment was made.

A list of the firms denied in fiscal years 2009 and 2010 was requested and provided by NDDOT. There were 15 firms denied certification in the 2 fiscal years, and 8 were certified by their home state of Minnesota. The NDDOT DBE LO mentioned that NDDOT has had problems with some of the DBEs certified by the Minnesota UCP.

H & S Contracting was certified by its home state in Minnesota and the SBA as an 8(a) firm. The applicant provided documentation to support his claim of Native American group membership. The applicant submitted a letter indicating that he was a non-enrolled member of an Indian tribe. NDDOT representatives verified with USDOT through a series of emails (included in the file) that the document was not adequate to prove group membership as a Native American. The applicant stated that this was the same documentation provided to Minnesota UCP and the SBA. Based upon guidance from USDOT, NDDOT requested that the applicant apply for certification on an individual basis using Appendix E of the DBE regulations. The applicant subsequently failed to cooperate with the request and was denied certification on that basis.

Applicants who are denied an initial request for certification are notified in writing by Certified Mail, including the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. Applicants are also advised of their right, as provided for in 49 CFR Part 26.89, to appeal to the USDOT. The review team examined certification denials of Stampede Concrete and H & S Contracting. Both denials followed the process described in the NDDOT DBE manual and regulations.

ND DOT does not impose a waiting period for denied firms to reapply for certification. The NDDOT DBE manual states that applicants may correct identified deficiencies, submit a new DBE Uniform Certification Application, and appear at the next scheduled meeting of the DBE Unified Certification Board for an oral interview. The NDDOT DBE LO informed the review team that due to the limited number of certified DBE firms (less than 100), there is no waiting period. The review team advised NDDOT that safeguards should be put in place to ensure that applicants are not being coached through the DBE certification process.

B) *Removing Existing Certification*

Basic Requirement: (49 CFR Part 26.87) If a UCP determines that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirements for removing existing certification.

The NDDOT manual describes the removal process as being initiated either through a third party, a department (recipient), or a USDOT proceeding. The hearing process includes notifying a firm that there is reasonable cause to remove its eligibility and affording an opportunity for an informal hearing.

The separation of function process is described to ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility. The North Dakota Deputy Director of Engineering is the designated official to make these eligibility determinations. The process also includes ground for the decision, notice of decision, status during proceedings, and effects of removal of eligibility and the availability of an appeal.

The review team examined removals of A-Marrick Construction for failure to respond and Beeter Trucking for exceeding the PNW threshold. Both files followed the removal procedures outlined in the NDDOT DBE manual and regulations.

C) *Appeals to the DOT*

Basic Requirement: (49 CFR Part 26.89) When the Department receives an appeal and requests a copy of the recipient's administrative record, the UCP must provide the administrative record, including a hearing transcript, within 20 days of the Department's request.

Discussion: During this DBE Compliance Review, no deficiencies were made with the Appeals to the USDOT.

Applicants and DBEs who are denied certification are given information in the denial or removal letter to appeals to the USDOT. The removals and denial letters examined by the review team included USDOT's contact information for filing an appeal and also included the regulations concerning DBE appeals.

12. Compliance and Enforcement

A) *DBE Enforcement Actions*

Basic Requirement: (49 CFR Part 26.107) If a firm does not meet the eligibility criteria of subpart D and attempts to participate in a USDOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceeding against it under 49 CFR Part 29.

Discussion: During this DBE Compliance Review, no deficiencies were found with DBE Enforcement Actions. NDDOT indicated that there had been no suspension or debarment actions regarding certification of any DBE firms.

B) Confidentiality

Basic Requirement: (49 CFR Part 26.109 (a)) Notwithstanding any provision of Federal or state law, UCPs must not release information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes for DBE certification and supporting documentation.

Discussion: During this DBE Compliance Review, no deficiencies were found with the confidentiality issues in the ND UCP. However, an advisory comment was made.

NDDOT states in its DBE manual that the department safeguards from disclosure to unauthorized persons information gathered as part of the certification process that may reasonable be regarded as proprietary or other confidential business information, consistent with applicable federal, state, and local law. It is further stated that the Department returns all tax returns, by Certified Mail, within 10 working days of review by the DBE Unified Certification Board, unless the firm has been determined to be ineligible for certification.

The NDDOT DBE LO stated that tax returns were returned to the owners because of concerns in state law regarding confidentiality. The DBE LO indicated that state laws have now been revised to complement the DBE regulations concerning confidentiality. Tax returns are no longer returned to the owners but are retained in the certification files. The review team advises NDDOT to revise language in its DBE manual to reflect current practices to be consistent with Part 26.109(a) DBE regulation language.

C) Cooperation

Basic Requirement: (49 CFR Part 26.109 (c)) All participants in the Department's DBE program are required to cooperate fully and promptly with USDOT and recipient compliance reviews, certification reviews, investigations, and other requests for information.

Discussion: During this DBE Compliance Review, no deficiencies were made with cooperation.

NDDOT indicated that it promptly responds to request for copies of home office reviews from other UCPs. Since NDDOT is the only certifying member in the UCP, there are no procedures for disputes between UCP certifying members included in the DBE manual.

Section 7 Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site Visit Finding	Description of Deficiencies	Corrective Action(s)	Response Days/Date
1. Burden of Proof	26.61	ND			
2. Group Membership	26.63	ND			
3. Business Size	26.65	ND			
4. Social and Economic Disadvantage A. Presumption of Disadvantage B. Personal Net Worth C. Individual Determination	26.67	ND ND ND			
5. Ownership	26.69	AC	Be careful to avoid coaching applicants		
6. Control	26.71	ND			
7. Other Certification Rules	26.73	ND			
8. UCP Requirements A. UCP Agreement B. UCP Directory	26.81 26.31	AC ND	Update needed in DBE manual regarding certification		
9. UCP Procedures A. On-Site Visits B. Uniform Application C. Annual Updates	26.83	AC AC ND	Include jobsite visit process Revise supplemental forms and instructions in application		
10. DOT/SBA MOU	26.84 – 26.85	N/A			
11. Denials A. Initial Request B. Remove Existing C. Appeals	26.86 26.87 26.89	AC ND ND	Implement safeguards to avoid coaching denied firms through re- application process		
12. Compliance and Enforcement A. DBE Enforcement Actions B. Confidentiality C. Cooperation	26.107 26.109 26.109	ND AC ND	Change language in DBE manual to reflect current practices and DBE regulation requirements		

Findings at the time of the site visit: ND = No deficiencies found; D = Deficiency; NA = Not Applicable; NR = Not Reviewed

Section 8 List of Attendees

Name	Organization	Title	Phone	Email
FTA				
Rebecca Tanrath	FTA Region VIII (via teleconference)	Regional Civil Rights Officer	(720) 963-3313	Rebecca.tanrath@dot.gov
John Ocana	FTA Office of Civil Rights (via teleconference)	EO Specialist		John.ocana@dot.gov
Ryan Inman	FTA Office of Civil Rights (via teleconference)	EO Specialist, DBE Technical Lead	(202) 366-5017	Ryan.inman@dot.gov
NDDOT Members				
Deborah J. Igoe	NDDOT	Director, Civil Rights	(701) 328-2576	digoe@nd.gov
Pat Kreiger	NDDOT	Civil Rights Program Administrator	(701) 328-3116	pkrieger@nd.gov
Milligan & Co., LLC				
Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	(215) 496-9100	Bsumpter@milligan CPA.com
Habibatu Atta	Milligan & Co., LLC	Reviewer	(215) 496-9100	Hatta@milligan CPA.com
Kristin Szwajkowski	Milligan & Co., LLC	Reviewer	(215) 496-9100	Kszwajkowski@milligan CPA.com