

**COMPLIANCE REVIEW REPORT
OF THE
NORTH CAROLINA
UNIFIED CERTIFICATION PROGRAM**

Final Report

August 2010

**Prepared for the
Federal Transit Administration
Office of Civil Rights**

by

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Section 1 – General Information

Hosting Grant Recipient: North Carolina Department of Transportation
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City/State: Raleigh, NC 27601

Executive Official: Gene Conti
Secretary of Transportation

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Site visit Dates: April 1 – 2, 2009

**Compliance Review Team
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John Clare

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 subrecipients with Section 12 of the Master Agreement, Federal Transit Administration M.A., (15), October 1, 2008 and 49 CFR Part 26, “Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs.”

The Federal Transit Administration (FTA) of the U.S. Department of Transportation (DOT) provides financial assistance to transit agencies, Metropolitan Planning Organizations (MPOs) and State Departments of Transportation (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.

The North Carolina Unified Certification Program (NCUCP) members, 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. This regulation defines the components that must be addressed and incorporated in NCUCP’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 subrecipients 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 Carolina Unified Certification Program (NCUCP) is necessary.

The primary purpose of the compliance review is to determine the extent to which the NCUCP has met its DBE certification program goals and objectives, as represented to DOT in its Unified Certification Program agreement. This compliance review is intended to be a fact-finding process to: (1) examine NCUCP 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 subrecipients, 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 (USDOT) 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; and
- 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 NCUCP is honoring the Unified Certification Program agreement submitted to the Secretary of Transportation;
- examine the required certification procedures and standards of the NCUCP against the Disadvantaged Business Enterprise program compliance standards set forth in the regulation and to document the compliance status of each component; and
- gather information and data regarding the operation of the NCUCP 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 DOT assisted projects as a Disadvantaged Business Enterprise (DBE) could be required to be certified by multiple DOT recipients in a state. Subpart E, of 49 CFR Part 26.81 now requires DOT recipients to participate in a Unified Certification Program (UCP) that shall 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 part 26, on the same basis as recipients. The UCP is also required to cooperate fully with oversight, review, and monitoring activities of DOT and its operating administration.

Approach

The North Carolina Department of Transportation (NCDOT) was entrusted to spearhead the development of the UCP and thus act as the lead agency. The lead agency was expected to develop the process, identify stakeholders, and host meetings to facilitate the development of the UCP. Additionally, the lead agency was to ensure that the documents were prepared and submitted for approval within the necessary timeframes. After the document was approved, the lead agency would answer inquiries from recipients and ensure the data was properly maintained.

One approach to achieve the overall goal and stakeholder involvement was to:

- Identify a core planning group comprised of the NCDOT Director of Civil Rights and Business Development (or the designee), the Civil Rights Program Manager from FHWA, an Attorney for the North Carolina Department of Justice to provide legal counsel to NCDOT, and two Consultants from Productivity Services. The group was responsible for gathering information, preparing correspondence, and planning meetings of the UCP Development Team.
- Plan and conduct a series of UCP Development Team meetings to facilitate the development of the UCP. The UCP Development Team was responsible for identifying and resolving issues that impacted the development and management of the Unified Certification Program.

The UCP Development Team was derived from the group that attended the UCP Workshop sponsored by the Federal Highway Administration in Atlanta in March 2001. These people were found to have in depth knowledge of the certification process and represented a balanced cross-section of the recipients that should participate in the UCP following its development.

The team identified stake holders and created a communication plan to continuously involve them in the development process. The team also identified issues that needed to be resolved in order to meet the implementation date directed by USDOT, created action plans, and assigned task to subgroups.

The team circulated the program draft among the stakeholders, including agencies, DBEs, and agency management, to gather feedback on the layout and content. The feedback was collected and integrated, then redistributed for additional feedback. With the feedback, a conference was held to present the final plan for North Carolina's Unified Certification Program.

Governance and Management

The NCUCP submitted its plan to United States Department of Transportation (USDOT) on June 15, 2004. Their plan was approved by USDOT on September 30, 2004. The UCP committee developed two transitional phases. Phase one consisted of organizing and inventorying files, contacting firms, conducting certifications, purging integrity-deficient data and entering accurate data. Phase two included entities purging the database and submitting refined data to NCDOT for entry into the unified directory. Phase two was completed on September 30, 2005 and full implementation of the NCUCP commenced on the same day.

NCDOT established the required positions, to include a UCP Director, within the agency to implement and manage the UCP. The UCP Director responsibilities are clarifying issues regarding UCP policy and procedure, coordinating the periodic meetings of the UCP Steering Committee and insuring the integrity of information contained in DBE database.

The UCP Oversight Committee remained intact to discuss and resolve issues regarding the UCP as they arose. Committee members were responsible for attending periodic meetings and ensuring appropriate representation from their region was active in the management of the UCP. After initial development and implementation of the UCP, membership on the Steering committee was reviewed to ensure membership remained consistent with DBE distribution and demographics.

Under North Carolina's UCP, all certification are conducted by the NCDOT, with the exception of airport concessions, whose certifications are verified by the airport for lease space availability.

DBE Directory

The NCDOT maintains the unified DBE directory for the NCUCP. The recipients had two requirements in relation to the DBE directory. First, the recipient had to initiate the appropriate measures to ensure their database files accurately reflected qualified and certified DBEs prior to relinquishing files to the NCDOT. The recipient was responsible for bearing the cost of cleanup and transfer of data. Second, the recipient had to agree in a reasonable cost sharing option as agreed upon by the stakeholders.

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 DOT-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 DOT recipients in your state must participate in a Unified Certification Program (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. You must accept the certification applications, forms and packages submitted by a firm to the SBA for either the 8(a) BD or SDB programs, in lieu of requiring the applicant firm to complete your own application forms and packages [49 CFR 26.84 and 26.85].
11. 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].

12. 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, dates for the site visit were coordinated.

An agenda letter was then compiled and sent to the NCUCP by FTA's Office of Civil Rights. The agenda letter notified the NCUCP of the planned site visit, requested preliminary documents, and informed the NCUCP 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 NCUCP Certifying Members and the review team.

Subsequent to the entrance conference, a review was conducted of the NCUCP agreement and other documents submitted to the review team by the NCUCP representative. Interviews were then conducted with NCUCP Certifying Members regarding DBE program certification standards and certification procedures. These interviews included members with the responsibility of certification. A sample of certification files (see table on next page) were then selected and reviewed for required DBE elements.

At the end of the review, an exit conference was held with the NCUCP Certifying Members and the review team. A list of attendees is included at the end of this report. At the exit conference, initial findings and corrective actions were discussed with the NCUCP Certifying Members. Subsequent to the exit conference, a draft report was issued. Responses to that draft report are incorporated into this final report.

North Carolina Department of Transportation

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Approval <1 year	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Approval <1 year	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Approval >1 year	[REDACTED]	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
Initial Denial	[REDACTED]	Y	Y	Y	N/A	Y/N	N/A	Y	N/A
Appeal Initial Denial	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	Y	Y
Appeal Initial Denial	[REDACTED]	Y	Y	Y	N/A	N/N	N/A	Y	Y
SBA Approval	[REDACTED]	N	Y	Y	Y	Y/Y	Y	N/A	N/A
SBA Removal	[REDACTED]	N	Y	N	N	N/N	Y	N	N/A
Removal	[REDACTED]	N**	Y	Y	Y	Y/Y	Y	Y	N/A
Removal	[REDACTED]	Y	Y	Y	Y	Y/Y	N/A	Y	N/A
Removal	[REDACTED]	Y	Y	Y	N	N/N	N/A	Y	N/A
Removal	[REDACTED]	N**	Y	Y	Y	Y/Y	N/A	Y	N/A
Removal	[REDACTED]	N*	Y	Y	Y	Y/Y	N/A	Y	N/A
Removal	[REDACTED]	Y	Y	Y	N	Y/Y	N/A	Y	N/A
Appeal Removal	[REDACTED]	N*	Y	Y	Y	Y/Y	N/A	Y	Y
Appeal Removal	[REDACTED]	Y	Y	Y	Y	Y/Y	N/A	Y	Y

*Application form prior to 2003 USDOT Form

**Grandfathered file inherited from a former certification recipient

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 NCUCP uses the USDOT Uniform Application Form found in Appendix F of 49 CFR Part 26, which includes the statement of social disadvantage.

2. Group Membership

Basic Requirement: (49 CFR Part 26.63) If a UCP has 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. 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 made with the requirement for group membership. The NCUCP application includes an Affidavit of Social and Economic Disadvantage. The applicant certifies under penalty of perjury that they are a member of one of the designated groups identified. They further certify that the owner of the company seeking DBE certification has experienced social disadvantage due to the effects of discrimination based upon race, ethnicity, gender or other reasons. This statement is signed by the qualifying applicant and notarized.

The certifying representatives indicated they sometimes will request tribal cards for applicants claiming Native American status if there is a question of group membership. The review team did not find any irregularities in the certification files examined concerning overburdening any particular group regarding submission of additional proof of group membership.

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 \$20.41 million.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement of business size. The NCUCP utilizes the North American Industry Classification System (NAICS) codes to determine if an applicant firm meets the requirements of 13 CFR 121 for the appropriate type(s) of work the firm seeks to perform in DOT-assisted contracts.

One of the four certifiers for the NCDOT debated if business size should be calculated by taking the current year gross revenue instead of the average gross revenue of the past three years. It was inconclusive if this individual was calculating business size incorrectly or just seeking clarification. The section in the regulation was discussed by the review team requiring averaging of the past three years' gross revenue to calculate business size. The review team found no issues with how firms were coded for the types of work performed in the files reviewed. The NCUCP also appeared to accurately assess the current DOT size standard of \$20.41 million to be considered a small business concern for certification in the DBE program.

4. Social and Economic Disadvantage

A) 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 \$750,000.

Discussion: During this UCP Compliance Review, deficiencies were found with the requirement for personal net worth (PNW) statements. The NCUCP application includes an Affidavit of Social and Economic Disadvantage. The applicant certifies under penalty of perjury for the personal financial statement section that their personal net worth does not exceed \$750,000. The applicant selects whether the financial statement is supported by either a signed, notarized statement of personal net worth with appropriate supporting documentation; or a signed, notarized statement from a certified public accountant (CPA) attesting that he/she has examined their personal net worth and determined, consistent with the provisions of 26.67 CFR (a)(2) and generally accepted accounting standards, that their personal net worth does not exceed \$750,000.

The 2003 DBE Final Rule included published comments about authorizing CPAs to attest that an individual's personal net worth was less than \$750,000. The Department

considered allowing recipients to accept a notarized statement from an applicant's CPA that they reviewed the applicant's personal net worth and determined it to be less than \$750,000. The Rule also published comments of why this was not the best option for recipients to use to make an unequivocal determination of an individual's personal net worth. The Department was persuaded by the recipients concerns to require an actual personal net worth financial statement with supporting documentation.

The NCUCP allows applicants a choice of submitting a personal financial statement or a statement from a CPA which is inconsistent with the DBE regulation. This was evidenced in the Affidavit of Social and Economic Disadvantage and the request for additional information form from the Standard Operating Procedures documents.

The NCUCP is also not using the appropriate Personal Financial Statement required in the DBE regulation. The 1999 DBE Rule suggested a two page form that was not over burdensome be used to collect information about an individual personal net worth. The 2003 DBE Final Rule published comments concerning the appropriate form to use to collect personal net worth information. After much discussion about the topic, the Department mandated the use of the Small Business Administration (SBA) two-page Personal Financial Statement. The Department added that they have been unable to find a more comprehensive form that can be used uniformly.

The personal financial statement used in the NCUCP is a one-page form about an individual's assets and liabilities. While the SBA's personal financial statement also asks for assets and liabilities, it also includes sections to elaborate on certain types of assets, to identify liabilities, and to describe how loans are secured. This should include specific information about real estate holdings, types of stocks owned and taxes owed. There are significant limitations with the information collected in the personal financial statements utilized in the NCUCP. The NCUCP certifier is restricted to only the numbers included for assets and liabilities, without justification or narrative to substantiate if the value should be included or excluded from an individual's net worth.

For example, the review team found discrepancies in the personal financial information collected for the owner of [REDACTED]. The owner submitted a personal net worth of \$1,838,689 for 2007 and \$1,834,492 in 2008. However, NCDOT removed their certification in 2008 due to the owner exceeding the \$750,000 personal net worth cap. The owner listed the value of his primary real estate in 2007 as \$582,500 and ownership in the applicant business at \$1,534,696, both of which called for exclusion of the equity in these assets. The owner had no amount listed for stocks and bonds in 2007. For 2008, the applicant listed the same amount for his primary real estate value but no assets for ownership in the applicant business, and \$1,533,750 for stocks and bonds. Stocks and bonds outside the applicant business are not exclusions for personal net worth in the DBE program, so the individual's net worth was deemed to exceed the \$750,000 cap.

The review team questioned the certifier about the possibility that the \$1.5 million in stocks and bonds for 2008 could have been ownership value in the business as was the case in 2007, since the company had grossed over \$13 million in the past. This meant that the \$1.5 million would have been a business asset and reduced the individual's net

worth to under \$750,000. This may mean that the DBE could still be certified. Another possibility is that the applicant incorrectly omitted stocks and bonds asset values and should have had their certification removed in 2007. The certifier indicated that the individual had the right to an appeal the decision if in disagreement. If the NCUCP used the proper SBA personal financial statement, any stocks and bonds listed as an asset on page one would be described in detail on page two. This includes number of shares, name of securities, cost, market value and total value. The \$1.5 million in stocks and bonds for 2008 would have been readily identified as DBE business interest or stock from a publicly traded company.

Corrective Action and Schedule: Within 90 days of the issuance of the final report, NCUCP must submit the following to Ryan Inman at FTA's Office of Civil Rights:

1. An updated statement of Social and Economic Disadvantage removing the option to submit a notarized statement for a CPA attesting to an individual's personal net worth.
2. Adoption of the SBA personal financial statement to determine an individual personal net worth.

UCP Response 1: Per the 2003 DBE Final Rule, the affidavit of Social and Economic Disadvantage form will be revised, and the option to have signed, notarized statement from a CPA, attesting that the personal net worth of the individual does not exceed \$750,000 will be removed.

USDOT Response 1: USDOT concurs with UCP response. This finding is now closed.

UCP Response 2: In response to the appropriate Personal Financial Statement, the rule (49 CFR 26.67 (a)(2)) requires each disadvantaged owner of a firm applying for DBE eligibility to submit a statement of personal net worth and appropriate supporting documentation as part of the certification process. The department has complied with the federal regulation in the Personal Net Worth Statement form; however, modification to the form to expand on the information collected for assets and liabilities will be reviewed.

DOT Response 2: Subsequent the compliance review, the Department issued an Advanced Notice of Proposed Rulemaking on the April 8, 2009. Use of the SBA Personal Financial Statement is being reconsidered and comments were sought regarding use of an appropriate personal net worth form for DBE certification. In light of the department's reconsideration of an appropriate form, the department concurs with the UCP modification to their current form to expand on the information collected for assets and liabilities. This finding is now closed.

B) 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. Individuals who are not members of a presumed group can apply for an individual determination of social and economic disadvantage. The UCP 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. The applicant is required to provide sufficient information to permit determinations under the guidance of Appendix E of the regulation. The NCUCP certifiers interviewed indicated they had experience evaluating these types of request and verified that they used the guidance of Appendix E to make the determinations. The review team provided guidance on interpretation of certain elements in this section of the regulation.

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. UCP 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 NCUCP certifiers are appropriately allocating ownership percentages of socially and economically disadvantaged owners for certification.

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 in the area of control. The interviews and files reviewed indicated that the certifiers of the NCUCP had a strong grasp of the elements concerning socially and economically disadvantaged individuals controlling the applicant firm. Several of the denials of initial certification were based on lack of control in the applicant firm. The reasons were well documented and referenced the areas of concern for each applicant denied certification as a DBE.

The Official Questions and Answers for DBE Program Regulation were updated on June 18, 2008. Section 26.71 included the question, *If a firm is certified as a DBE or ACDBE*

in on type of business, under what circumstances can it be certified for another type of business? The Department mentions that disadvantaged owners can delegate some management and other functions to other persons. However, this does not eliminate the need for the disadvantaged owners to possess the requisite experience and expertise to control the overall business decisions and daily operation of the business seeking certification. The review team recommended that the NCUCP discuss adding some written procedures for adding additional types of work to DBE certifications.

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 the other rules affecting certification. This section of the regulation covers areas dealing with commercially useful functions and regular dealer issues affecting the certification determination. None of the interviews or file reviewed indicated any issues in the NCUCP with either of these areas. This section also covers determination of ownership and control through parent or holding companies. In these situations, disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary. The UCP may certify the subsidiary if it otherwise meets all requirements of subpart D. No NCUCP files were reviewed that met the criteria of a subsidiary controlled by disadvantaged individuals through a parent company.

8. UCP Requirements

A) UCP Agreement

Basic Requirements: (49 CFR Part 26.81) All DOT 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, an advisory comment was made regarding the NCUCP's processing of certification request from firms outside of the NCUCP. The Department issued guidance to reduce the burdens on firms applying for certification outside of their home states. The Official Questions & Answers includes the question "What steps should recipients and UCPs take to reduce certification burdens on applicants who are certified in other states or certified by SBA?" (posted on 6/18/08). The answer indicated that UCPs should not unnecessarily require the preparation of duplicative certification application packages. The NCUCP certification procedures are silent on processing out-of-state DBE firms seeking certification in North Carolina.

Recommended Action: The NCUCP should revise the NCUCP certification procedures to include a streamlined process for out-of-state DBE firms seeking certification by the NCUCP.

UCP Response: Per the review comments, the UCP guidelines do not outline a streamlined process for out-of-state firms. To address this shortfall, the Department will incorporate the process outline in the most current Q&A by USDOT.

DOT Response: DOT concurs with UCP response.

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 26.31. The listing shall include for each firm, its address, 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 NCUCP procedures state the DBE directory is in accordance with 49 CFR Part 26.31. NCDOT maintains and makes available to interested persons a unified DBE directory identifying all firms eligible to participate as a DBE in North Carolina's program. The directory contains, at a minimum, the firm's name, address, phone number, and the types of work the firm is qualified to perform as a DBE. The on-line unified DBE directory supports real-time revisions and access, and is made available to the public electronically, on the internet, and in print.

NCDOT has a Management Information System (MIS) that electronically organizes certification records. Two Scanning Technicians are tasked with scanning all the documents for a certification record. Once into the system, the records are grouped by certain categories for easy retrieval. The review team thought this was an excellent system for reducing paperwork through their electronic warehousing system. The review team also shared with NCDOT that the system is only as good as the information that is actually scanned in the software. Several items requested by the review team had either not been scanned, lost or destroyed. Files are destroyed by NCDOT once the information is scanned into the system. The review team recommended that some quality control system be adopted to ensure that all material has actually been scanned prior to destroying the physical certification file.

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 deficiency was found with the requirements for on-site visits. The NCUCP certification procedures included a copy of the on-site visit form utilized by NCDOT. This on-site form was evidenced in the certification files examined by the review team. The certification staff at NCDOT informed the review team that in addition to visiting the principal office of the applicant firm, they also will visit the job site if feasible.

USDOT's Official Questions and Answers include the question, "What points should UCP members emphasize in working together to make certifications decisions?" The answer provides guidance on updating on-site visit reviews. The Department recommends that any on-site review over three years old should be updated to reflect current status. The NCUCP incorporated conducting an on-site visit every three years into their certification procedures. This was substantiated by the review team from the files examined during the review.

B) Uniform Application

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

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for using the Uniform Application Form in Appendix F. The NCUCP certification procedures state that NCDOT will use the Uniform Application Form to review DBE applicants seeking certification. The Methodology section of this report indicates the certification files examined during the compliance review. The files reviewed supported that the NCUCP use of the Uniform Application Form.

C) Annual Updates

Basic Requirements: (49CFR Part 26.83 (j)) 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 NCUCP certification procedures include an Annual Renewal of Certification for DBE Programs form and a DBE Recertification Application. Certification with the NCUCP is valid for a period of three years. The DBE is required to submit a notarized one-page Annual Renewal of Certification application every year for the two years and a DBE Recertification Application on the third year. The review team found this process to be accurate in the certification files reviewed.

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, no deficiencies were found with processing SBA certified firms. The NCUCP certification process includes procedures for SBA certified firms. The application is reviewed to determine if the applicant is currently SBA certified. If it is found that the applicant holds a SBA certification, the certifying agency will contact the agency that issued the certification to request the certification documents. After the documentation is received from the SBA certifying agency, a site visit is conducted. This process was substantiated in the certification files examined during the compliance review. DBE applicants [REDACTED] and [REDACTED] were both SBA certified prior to seeking certification with the NCUCP. The SBA information was accepted by the NCUCP in lieu of submitting the DBE Uniform Application Form.

11. Denials of Certification

A) Initial Request Denials

Basic Requirement: (49 CFR Part 26.86) When a UCP deny a request by a firm, which 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. Several of the certification files examined by the review team were initial denials of DBE certification. The denial letters were very detailed, thoroughly explained the reasons for denial, and referenced the regulation.

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, deficiencies were found with the requirements for removing existing certification. The NCUCP certification procedures outlined a four step process to remove a firm's certification for failure to cooperate. Upon review of the certification files, it was determined that NCDOT certification staff followed an incorrect process for removal of DBE certification. The first letter that is mailed to the DBE is a reminder that the Annual Renewal form is due on a particular date. The second notice is to encourage the DBE firm to submit the Annual Renewal

within 10 days of the letter and explained the benefits of remaining certified with the NCUCP. The third letter notifies the DBE that it has been determined that there is reasonable cause to believe that the firm is ineligible for continued participation in the DBE program. It continues to say, as of this correspondence, NCDOT is progressing to decertify you firm's failure to cooperate in accordance with 49 CFR Part 26.109 (c). This letter does not include a deadline to respond to the intent to decertify the firm. The final letter serves as notice that the firm has been removed from the active data bank as a certified DBE for failure to cooperate and may file an appeal within 30 days to the NCUCP.

The regulation requires that the UCP provide an opportunity for an informal hearing prior to the removal of DBE certification. The third notification letter only gave notice that NCUCP was progressing to remove the firm's certification and gave no avenue for recourse or due process prior to removal. The notice of removal (letter four) gave an opportunity for an appeal to the NCUCP. However, this process is inconsistent with the requirement that a firm be given an opportunity for an informal hearing prior to removal of certification and a right to appeal the final removal determination to the USDOT.

The NCUCP process of removing a firm's certification for cause, i.e. exceeded personal net worth cap, ownership or control issues, is conducted in accordance with the DBE regulation. The certification records reviewed by the review team indicated that a firm was given a proposal to remove their certification based on the DBE owner's personal net worth exceeding \$750,000. The DBE owner was given an opportunity for an informal hearing within 30 days, which was subsequently not exercised. The DBE owner was then sent a notice that their DBE certification was removed based on the above reasons and given an opportunity for an appeal to the USDOT within 90 days.

The review team also recommended that the NCUCP began discussions with its stakeholders concerning notifying them of DBE firms removed from the program. The system utilized on NCDOT project will alert the user if they attempt to give DBE credit for a firm that is no longer DBE certified. This process does not apply to non-NCDOT projects such a transit projects in Charlotte, NC and other parts of the state.

Corrective Action and Schedule: Within 90 days of the issuance of the final report, NCUCP must submit evidence to Ryan Inman at FTA's Office of Civil Rights that the NCUCP certification procedures for the removal of DBE certification based on failure to cooperate is revised. The updated procedures will identify the process to remove a firm's DBE certification for failure to cooperate as the same process for other ineligibility reasons, consistent with the DBE regulation. The NCUCP should also discuss a process of notifying stakeholders of firms that have had their DBE certification removed so that accurate DBE participation can be applied for reporting purposes.

UCP Response: During the UCP Compliance Review of certification files, the reviewers determined that the Department's certification staff followed an incorrect process for removal of DBE certification in that the third letter that was distributed to the firm did not include a deadline to respond to the intent to decertify.

Per 49 CFR Part 26.87, when you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

The UCP letters, in particular, the third letter, will be reviewed and revised to correspond with the regulation above.

DOT Response: USDOT concurs with this response. This finding is now closed.

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 found with the appeals to the USDOT. The NCUCP certification procedures include a process for conducting appeals. This procedure was revised in July 2008 and describes a very detailed process for conducting appeals in the NCUCP. The procedures also accurately state that the North Carolina appeals process is not a remedy that a firm must exhaust before transmitting a certification appeal to USDOT.

The NCUCP appoints a hearing committee that consists of a chairperson and two additional members that meet the following requirements:

- Each member must represent a USDOT operating administration. Specifically, the committee must be represented by Transit, Aviation, and Highway;
- Each member's agency must have an active Memorandum of Agreement on file with the UCP;
- The members must have knowledge of the certification process and expertise in the DBE certification standards and procedures.

The NCUCP process also includes a DBE Eligibility Complaint Form. A third party can complete this form if they disagree with a determination regarding DBE certification. NCDOT included a complaint form filed by a third party to the USDOT and then remanded back to NCDOT for further development. The NCOT followed the outlined appeal process and provide a timely response to USDOT questions with explicit detail about the case.

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 DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances

indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceeding against you under 49 CFR part 29.

Discussion: During this DBE Compliance Review, no deficiencies were found with DBE enforcement actions. The NCUCP certification application is consistent with the DBE Uniform Application Form which has the necessary language regarding enforcement actions against firms misrepresenting themselves as DBEs or submitting fraudulent information for deceitful purposes.

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 NCUCP. The review team found no breaches of confidentiality based on the certification files reviewed and interviews conducted during the compliance review.

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 DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information.

Discussion: During this DBE Compliance Review, no deficiencies were found with cooperation. The Department addressed cooperation in two areas of the 2008 updated Questions & Answers. UCPs were encouraged to reduce burdens on applicants that are certified in other states or certified by SBA. UCPs must promptly provide requested information or on-site visit information to other UCPs or the SBA.

The other area discussed in the 2008 updated Questions & Answers was the emphasis of UCP members working together to make certification decisions. The guidance instructed UCP members to work through their differences. UCP agreements should always include a dispute-resolution mechanism. The NCDOT is the sole certifying authority in the NCUCP and have no formal written dispute-resolution mechanism. The NCDOT discusses case files on a regular basis internally and if disputes arise, it is taken to a higher level in the organization.

The NCDOT also explained that they promptly address requests for information or on-site visits from other UCPs. The NCDOT representatives did express concerns from some other states being uncooperative with providing information or redacting financial or personal information in an on-site visit copy, making it difficult to make an independent certification determination.

Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Current Status
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) Personal Net Worth	26.67	D	Accepting CPA statement in lieu of submittal of financial statement.	Remove CPA statement option.	Closed
b) Individual determination		ND	PNW form not consistent with SBA form	Adopt the SBA PNW form.	Closed
5. Ownership	26.69	ND			
6. Control	26.71	ND			
7. Other Certification Rules	26.73	ND			

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Current Status
8. UCP Requirements					
a) UCP agreement	26.81	AC	No streamlined process for out-of-state firms.	Discuss developing a streamlined process for processing DBE out-of-state firms.	Concur
b) UCP directory	26.31	ND			
9. UCP Procedures					
a) on-site visits	26.83	ND			
b) Uniform Application		ND			
c) Annual Updates		ND			
10. DOT/SBA MOU	26.84 – 26.85	ND			
11. Denials					
a) Initial Request	26.86	ND			
b) Remove Existing	26.87	D	Removal of firms for failure to cooperate inconsistent with DBE regulation.	Revise current process for removing firms' certification for failure to cooperate to be consistent with current removal process for other reasons that are consistent with regulation.	Closed
c) Appeals	26.89	ND			
12. Compliance and Enforcement					
a) DBE Enforcement Actions	26.107	ND			
b) Confidentiality	26.109	ND			
c) Cooperation	26.109	ND			

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
Erik Wilkes	NCDOT	Certification Officer	919-753-7174	EWilkes@ncdot.gov
Landon Perry	NCDOT	Certification Officer	919-773-7174	loperry@ncdot.gov
Mark Cannady	NCDOT	Certification Officer	919-485-7364	cmcannady@ncdot.gov
Bonnie Robinson	NCDOT	Program Assistant	919-733-7174	bjrobinson@ncdot.gov
Nekeya Swann	NCDOT	Scan Operator	919-733-7174	nmswann@ncdot.gov
Michael Mckoy	NCDOT	State Contractor Utilization	919-733-7174	mmckoy@ncdot.gov
Keith Barnes	NCDOT	Lead Certification Officer	919-733-7174	ksbarnes@ncdot.gov
Terry Canales	NCDOT	State Contractual Services Engineer	919-733-7174	tcanales@ncdot.gov
Miriam Perry	NCDOT	Public Transportation Division	919-733-7174	mperry@ncdot.gov
Jim Westmoreland, P.E.	NCDOT	Deputy Secretary for Transit	919-733-2520	jwestmoreland@ncdot.gov
FTA:				
Conference Call				
Frank Billue	FTA	Region IV CRO	404-865-5628	frank.billue@dot.gov
Milligan & Co LLC:				
Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	215-496-9100	bsumpter@milligancpa.com
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