

# FTA

FEDERAL TRANSIT ADMINISTRATION

## Colorado Department of Transportation Unified Certification Program (UCP) Compliance Review Final Report

January 2013

Federal Transit Administration

PREPARED BY  
Milligan & Company, LLC



U.S. Department of Transportation  
Federal Transit Administration

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**SECTION 1 - GENERAL INFORMATION**

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4201 East Arkansas Ave.

City/State: Denver, Colorado 80222

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Executive Director

On Site Liaison: Debra A. Gallegos  
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Site visit Dates: August 11-12, 2009

Compliance Review Team  
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## **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., (15), October 1, 2008 and 49 C.F.R. § 26 (2007), “Participation by Disadvantaged Business Enterprises in Department of Transportation (“DOT”) Programs.”

The Federal Transit Administration 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 Colorado Unified Certification Program (“CO UCP”) 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 C.F.R. § 26 (2007). These regulations define the components that must be addressed and incorporated in CO UCP’s agreement and are the basis for this compliance review.

## **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 C.F.R. § 26 (2007). In keeping with its regulations and guidelines, FTA has determined that a compliance review of the Colorado Unified Certification Program was necessary.

The primary purpose of the compliance review is to determine the extent to which the Colorado Unified Certification Program 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 the Colorado 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 C.F.R. § 26 (2007), are to:

- follow the certification procedures and standards and the non-discrimination requirements of 49 C.F.R. §§ 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
- commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of 49 C.F.R. §§ 26 and 23.

The objectives of this compliance review are to:

- determine whether the CO UCP is honoring the Unified Certification Program agreement submitted to the Secretary of Transportation;
- examine the required certification procedures and standards of the CO UCP against the Disadvantaged Business Enterprise program compliance standards set forth in the regulations and to document the compliance status of each component; and
- gather information and data regarding the operation of the CO UCP from certifying members through interviews and certification file review.

## SECTION 4 – BACKGROUND INFORMATION

Prior to the 1999 DBE Final Rule, 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 C.F.R. § 26.81 (2007), 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.

Recipients were required to submit an agreement establishing the UCP to the Secretary of Transportation within three years of March 4, 1999. This agreement certified that the UCP met all requirements of this section. The agreement must specify that 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.

### *Colorado Unified Certification Program*

In March of 2001, a UCP forum was held in Atlanta, Georgia. Representatives from the following Colorado based agencies attended.

- Regional Transportation District (RTD): Colorado’s primary transit funds recipient.
- Colorado Office of Certification (COC): An office of the State of Colorado’s Department of Regulatory Agencies. COC certifies DBE applicants for highway and transit work under 49 CFR Part 26.
- The Mayor’s Office of Contract Compliance (MOCC): Representing the City & County of Denver, and aviation funds recipient.

The Atlanta forum was designed to (1) gather information on how other US DOT recipients were proceeding with their UCP plans; and (2) to utilize applicable information for the development of Colorado’s UCP plan. After this meeting the Colorado Department of Transportation coordinated a meeting between themselves and the above named agencies to begin developing Colorado’s UCP plan. The initial meetings were designed to identify Colorado’s current certification process, brainstorm possible UCP solutions, identify all of Colorado’s recipients, and draft and implement Colorado’s UCP plan.

The UCP Executive Committee (“UCPEX”) includes, but is not limited to, representatives from the following agencies: the Colorado Department of Transportation, the Regional Transportation District, the City and County of Denver’s, Colorado Springs Airport or designated City of Colorado Springs representative, and a fifth member, representing the smaller recipients, invited for the meeting. The purpose of the UCPEX renders decisions on issues relevant to the program, both during implementation and throughout its future evolution. This committee met regularly during UCP implementation and continues to meet semi-annually at a minimum. Issues before the committee are decided by a majority vote of those in attendance. Minutes of these meetings are sent to all UCP partners.

The UCP Executive Committee’s first meetings focused on the formation of the UCP. Subsequently, the committee determined it was time to involve all of Colorado’s recipients in this process. A statewide meeting of recipients was held at the Colorado Division offices of the



Federal Highway Administration on October 30, 2001. It was determined by the committee to adopt the Interagency Recognition option, a form of reciprocity, for the Colorado UCP.

On January 1, 2003, Colorado Governor Bill Owens issued an Executive Order relocating the State Office of Certification from the Colorado Department of Regulatory Agencies to the Colorado Department of Transportation (CDOT) under the Center for Equal Opportunity. Since then the Office of Certification was physically moved to CDOT and the staff are now CDOT employees. The majority of the funding for the Office of Certification continues to come from CDOT with some funding from the Regional Transportation District.

The Colorado UCP was formally approved by the U.S. Department of Transportation on April 5, 2004. There are currently two certifying entities within the state of Colorado UCP, the CDOT Center for Equal Opportunity (“EO”) and the City & County of Denver Office of Economic Development Division of Small Business Opportunity (“DSBO”). Certification responsibility is shared equally between the two certifying entities; however, applicants seeking local and/or airport certification will usually apply to the DSBO. The Executive Director, Tamela Lee, is supported by a supervisor and five coordinators in the downtown certification unit and a supervisor and four coordinators in the airport office. CDOT’s EO Center Director, Debra Gallegos, is supported by an EO supervisor and four specialists with certification responsibility.

## **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. There is a rebuttable presumption that members of the designated groups identified in §26.67 are socially and economically disadvantaged [49 C.F.R § 26.61].
2. If you have a well-founded reason to question the individual’s claim of membership in that group, you must require that that individual present additional evidence that he or she is a member of the group [49 C.F.R § 26.63].
3. You must apply current Small Business Administration (SBA) business size standards found in 13 CFR § 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts [49 C.F.R § 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 C.F.R § 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 C.F.R. § 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 C.F.R. § 26.71].

7. Other rules affecting certification include commercially useful functions guidance, evaluating the eligibility of a firm on the basis of present circumstances, and ensure that only organized for-profit firms may be eligible DBEs [49 C.F.R. § 26.73].
8. You and all other DOT recipients in your state must participate in a Unified Certification Program. You must maintain and make available a directory identifying all firms eligible to participate as DBEs in your program [49 C.F.R. § § 26.31, 26.11 ].
9. You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program [49 C.F.R. § 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 C.F.R. § § 26.84, 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 C.F.R. § § 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 C.F.R. § §26.101 – 26.109].

## **Methodology**

The FTA Office of Civil Rights commenced this Compliance Review by speaking with CO UCP representatives, scheduling the site visit, and reviewing available information from FTA's TEAM System and other sources.

FTA then transmitted a formal correspondence detailing the agenda for the Compliance Review and identifying the necessary CO UCP attendees. This correspondence notified CO UCP of the planned site visit, requested preliminary documents, and informed CO UCP of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed CO UCP of staff and other parties that would potentially be interviewed.

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 CO UCP Certifying Member and the review team.

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

At the end of the review, an exit conference was held with the CO UCP Certifying Member 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 CO UCP Certifying Member.

Following the site visit, a draft report was compiled and transmitted to the CO UCP for comments.

On December 4, 2012, the CO UCP responded they would offer no additional comments since there were no findings of deficiency; but CO UCP would take into consideration FTA's advisory comments. Subsequently this report is now finalized and the compliance review is closed.

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

Rebecca Tanrath  
FTA Office of Civil Rights  
123000 W. Dakota Avenue  
Suite 310  
Lakewood, CO 80228-2585  
Rebecca.Tanrath@dot.gov

**Colorado Department of Transportation:**

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification >1 year	Integrity Wire, Inc.	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
Initial Certification Denial	Daley Land Surveying, Inc.	Y	Y	Y	N/A	Y/Y	N/A	Y	N/A
Appeal Initial Certification Denial	Coolhaus WORKS, LLC	Y	Y	Y	N/A	Y/Y	N/A	Y	Y
SBA Denial	JE Hurley Construction, Inc.	N	Y	Y	N/A	Y/Y	Y	Y	Y
SBA Denial	C & D Electric	N	Y	Y	N/A	Y/Y	Y	Y	N/A
SBA Approval	ANC Research & Development, LLC	N	N	N	N/A	N	Y*	N/A	N/A
SBA Approval	Gika, Inc.	N	Y	Y	N/A	Y/Y	Y	N/A	N/A
Removal	Timbering Resources, Inc.	Y	Y	Y	Y	Y/Y	N/A	Y	N/A
Removal	Azteca Design, Inc.	N	Y	Y	Y	Y/Y	Y	Y	N/A
Removal Appeal	Construction Materials Transport, LLC	Y	Y	Y	Y	Y/Y	N/A	Y	Y
Recertification	Colorado CustomWare, Inc.	Y	Y	Y	Y	Y/Y	N	N/A	N/A

\*No documents required, ANC corporation followed 49 CFR Part 26.73 requirements.

**City and County of Denver**

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification <1 year	Jackson Transportation, LLC	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Initial Certification <1 year	Carreon Trucking	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Initial Certification >1 year	Colon-Collwan, LLC	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
Initial Certification >1 year	A-1 Lawn & Landscaping, Inc.	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
Appeal Initial Denial	J&K Trucking	Y	Y	Y	N/A	Y/Y	N/A	Y	Y
Removal	Purple Sage Design, Inc.	Y	Y	Y	N	Y/Y	N/A	Y	N/A
Removal	Bella Via Pipe & Supply	*N	Y	Y	Y	Y/Y	N/A	Y	N/A
Removal	Steve Hayes dba American Trucking	*N	Y	Y	Y	Y/Y	N/A	Y	N/A
Appeal Removal	Fresh Aire	Y	Y	Y	Y	Y/Y	N/A	Y	Y

\*Prior to 2003 Uniform Application Form

## SECTION 6 – ISSUES AND RECOMMENDATIONS

### 1. **Burden of Proof**

Basic Requirement: (49 C.F.R. § 26.61) There is a rebuttable presumption 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 the UCP 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 CO UCP plan, revised in 2009, indicates the UCP will follow all certification procedures and standards of 49 C.F.R. § 26 and § 23. The files reviewed during the compliance review supported that CO UCP followed 49 C.F.R. §26.61 regarding burden of proof allocation.

### 2. **Group Membership**

Basic Requirement: (49 C.F.R. § 26.63) If a UCP has a well-founded reason to question the individual's claim of membership in that group, it must require the individual to present additional evidence that he or she is a member of the group. It must provide the individual a written explanation of its reasons for questioning his or her group membership and written request for additional information. It must also take special care to ensure that it does not impose a disproportionate burden on members of any particular designated group.

Discussion: During this UCP Compliance Review, an advisory comment was made regarding the requirement for group membership. The review team interviewed each certifying entity separately concerning their interpretation and implementation of the DBE regulations. In response to the review teams question of how group memberships were determined, the representative for DSBO indicated that birth certificates or naturalization papers may be requested if there was a question concerning an individual's group membership. Section 26.63(a)(1)-(3), as amended in 2003, requires that a UCP must provide the individual a written explanation of its reason(s) for questioning his or her group membership.

Recommended Action: CO UCP must establish a procedure that ensures written explanations are provided to all applicants whose group membership has been questioned.

### 3. **Business Size**

Basic Requirement: (49 C.F.R. § 26.65) A UCP must apply current SBA business size standard(s) found in 13 C.F.R. § 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 CO UCP plan indicates that it utilizes the North American Industry Classification System (“NAICS”) codes to determine if an applicant firm meets the requirements of 13 C.F.R. §121 for the appropriate type(s) of work the firm seeks to perform in DOT-assisted contracts. The CO UCP was also aware of the adjustment to the DOT DBE business size standard from \$20.41 million to \$22.41 million.

#### **4. Social and Economic Disadvantage**

##### **A) Presumption of Disadvantage**

Basic Requirement: (49 C.F.R. § 26.67 (a)(1)) There is the rebuttable presumption 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. It 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. Section 26.61 (c) states a UCP must presume members of groups identified in § 26.67(a) are socially disadvantaged. This means they do not have the burden of proving to the UCP that they are socially and economically disadvantaged. Section 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 signed, notarized statement of disadvantage.

##### **B) Personal Net Worth**

Basic Requirement: (49 C.F.R. § 26.67 (a)(2)) A UCP must require that each individual owner of a firm whose ownership and control are relied upon for DBE certification certify that he or she has a personal net worth that does not exceed \$750,000.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement for Personal Net Worth (“PNW”) statements. Representatives from both certifying agencies indicated personal financial statements are required from individuals claiming to be socially and economically disadvantaged and make up at least 51% of the ownership in the applicant firm. The review team also analyzed certification determinations by the CO UCP and found adequate personal financial statements within

the files. It appeared that CO UCP performed an accurate analysis of the personal financial statements to ensure that an individual's personal net worth was below \$750,000—excluding equity in the individual's primary residence and the applicant business.

### C) Individual determinations of social and economic disadvantage

Basic Requirement: (49 C.F.R. § 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 is 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 disadvantaged. The UCP must make a case-by-case determination of whether each individual whose ownership and control is 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 regulations. Both certifying entities indicated they had experience evaluating applicants seeking social and economic disadvantaged status on an individual basis. The review team examined one file from CDOT where the applicant sought social and economic disadvantage on an individual basis. The firm of J.E. Hurley Construction, Inc. requested certification as a DBE due to the majority owner being [REDACTED]. CDOT subsequently denied the application, not based on Appendix E, but based on ownership issues. (See section 10 DOT/SBA MOU for more information on this file).

## 5. Ownership

Basic Requirement: (49 C.F.R. § 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. 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 CO UCP certifiers are appropriately allocating ownership percentages of socially and economically disadvantaged owners for certification.

## 6. Control

Basic Requirement: (49 C.F.R. § 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 conducted and files reviewed indicated that the certifiers of the CO UCP had a strong grasp of the regulatory requirements concerning socially and economically disadvantaged individuals controlling the applicant firm. Several of the denials of certification were based on an applicant's lack of control.

The regulation requires that you 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 that its socially and economically disadvantaged owners are able to control the firm with respect to the requested type of work. The CO UCP plan includes a process for these types of additions to DBEs work codes. The plan states that any firm may request modification and/or additions to their approved work designation codes by making a written request to the certifying partner. The request must include the equipment and experience indicating the firm's ability to perform the particular work type. In addition, the firm must submit documentation of past contracts on which the firm has performed the specific type of work. The CO UCP has a standardize form which DBEs must complete in order to change to their work code.

The review team examined two files where the DBE requested expansion of their work codes. Timberline Resources, Inc. request for an expansion of their management consulting designation to environmental consulting was denied by CDOT due to lack of control in environmental services. Construction Materials Transport, LLC was previously certified by CDOT in the areas of building and roadway construction. They requested for CDOT to add concrete supplier services to their certification. Upon review by CDOT, it was determined that the firm had independence issues with another firm rendering the firm ineligible for continued DBE certification. The firm's certification was subsequently removed in accordance with § 26.87.

## 7. Other rules affecting certification

Basic Requirement: (49 C.F.R. § 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. Regulatory language in 49 C.F.R. § 26.73 (1999) contained provisions for assessing eligibility of Indian tribes, Alaska Native Corporations and Native Hawaiian organizations. The 2003 amended DBE regulations included a separate



evaluation process for an Alaska Native Corporations (“ANCs”) seeking DBE certification.

The review team examined a file from an ANC applicant seeking certification as a Disadvantage Business Enterprise. ANC Research & Development, LLC was previously certified by the Small Business Administration (“SBA”) in the 8(a) Business Development program. CDOT determined that the applicant met the requirements for the majority of Settlement Common Stock required in Title 43, Chapter 33 and requirements of 49 C.F.R. § 26.73(i) (1999) and was certified as a DBE.

## **8. UCP Requirements**

### **A) UCP Agreement**

Basic Requirements: (49 C.F.R. § 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, no deficiencies were found regarding the CO UCP Agreement. The CO UCP Executive Committee approved amendment of the program plan on or about June 2009. The UCP Plan was ratified by the forty-nine (49) members of the UCP in June 2009.

### **B) UCP Directory**

Basic Requirements: (49 C.F.R. § § 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 CO UCP Plan-Data Requirements indicates that it shall maintain a unified DBE directory containing all firms certified by the UCP as specified in 49 C.F.R. § 26.31(2007). The CO UCP directory is maintained by CDOT and contains all required data as prescribed in the DBE regulations.

## **9. UCP Procedures**

### **A) On-site Visits**

Basic Requirements: (49 C.F.R. § 26.83(c)) UCPs must perform an on-site visit to the offices of the firm. It must interview the principal officers of the firm and review their resumes and/or work histories. The UCP must also perform an on-site visit if the applicant firm is working on a job site in its jurisdiction or local area at the time of the eligibility investigation.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirement for on-site visits. The CO UCP has a standardized on-site form used by both certifying entities. CDOT indicated during the interview that the applicant responses are

recorded on an electronic device. They will also go to the work site if the applicant is active at a project site; however, they mentioned that most of the applicants are not yet involved in construction work at the time of certification eligibility review. The DSBO also records interview responses electronically and will have responses transcribed for the file if a denial of certification is recommended. The DSBO representative indicated during the interview with the review team that they sometimes visit job sites if there are questions about the firm's eligibility. The review team reminded the DSBO representative that § 26.83 requires that on-site visits are performed on job sites if the firm is working at the time of the eligibility investigation in its jurisdiction or local area.

#### B) Uniform Application

Basic Requirements: (49 C.F.R. § 26.83 (i)) UCPs must use the application form provided in Appendix F of the regulations without change or revision. However, the UCP may provide in its DBE Program Plan, with the approval of the concerned operating administration, a supplemental form or other materials that requests 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 requirements to use the Uniform Application Form were in the 2003 amendment to 49 C.F.R. § 26 (2003). The CO UCP utilizes the appropriate certification application form for determining eligibility in the DBE program and had no supplemental form as part of their process.

#### C) Annual Updates

Basic Requirements: (49 C.F.R. § 26.83) Once the UCP has certified a DBE, it shall remain certified for a period of at least three years. 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 CO UCP certification process includes a Statement of Findings and Facts form. This form is completed by the certification specialist thoroughly addressing each of the eligibility requirements. A firm certified by the CO UCP is certified for a period of three years. During the three year term, the DBE must submit a Change Affidavit to the CO UCP for continued eligibility. The DBE is required to complete an Eligibility Affidavit and a personal financial statement after the third year of certification.

### 10. DOT / SBA MOU

Basic Requirements: (49 C.F.R. § § 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 the UCPs own application forms and packages.

Discussion: During this UCP Compliance Review, no deficiency was found with processing SBA certified firms. The CO UCP plan discusses applications submitted under the USDOT/SBA Memorandum of Understanding (“MOU”). The plan notes that the MOU requires acceptance of SBA applications and supporting documents from firms eligible to participate in the SBA’s 8(a) and SDB programs in lieu of submitting the Uniform Certification Application. The MOU allows certifying entities to request supplemental information directly from these firms, so that information necessary to make an eligibility determination as with other applications exists in the file. Several of CDOT’s certification files reviewed by the review team were SBA 8(a) firms. The files reviewed contained the SBA application, supporting documentation and record of the on-site visit.

The CO UCP Plan states that Colorado’s UCP partners understand the MOU does not mandate reciprocity and that because of differences in eligibility standards, certifying entities have the authority to reach independent eligibility determinations. Section 26.84(d) states that a firm must be certified unless you determine based on the on-site review and information obtained in connection with it, that the firm does not meet the eligibility requirements of Subpart D of this part.

The applicant firm JE Hurley Construction, Inc. was certified by the SBA as an 8(a) firm in June 2008. The applicant was not a member of a presumably disadvantaged group and sought DBE certification with CDOT based on an individual showing of social and economic eligibility due to [REDACTED]. CDOT denied the firm DBE certification based on the § 26.69(c) requirement for a real, substantial and continuing ownership, (f) contributions of expertise; and (h) gifts or transfers without adequate consideration. The on-site visit questionnaire did discuss background information of how ownership was acquired. The denial letter referenced, “you (owner) indicated that ownership was based upon expertise brought to the firm by the owners”; however, it was unclear from the denial letter if this information was gathered from or in connection with the on-site visit to support the denial. The applicant firm appealed the decision to the US DOT, but subsequently withdrew the appeal prior to US DOT review and the file was administratively closed. CDOT is reminded to reference the source of the information in its denial letters when a firm is SBA certified.

## **11. Denials of Certification**

### **A) Initial Request Denials**

Basic Requirement: (49 C.F.R. § 26.86) When a UCP denies a DBE certification request, the UCP must provide the applicant 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. The CO UCP “Statement of

Finding and Facts” form and denial letter in the UCP files outlined the reasons for denial based on the DBE regulations.

Section 26.86 requires that when a UCP denies DBE certification to a firm certified by the SBA, they must notify the SBA in writing. The notification must include the reason for denial. CDOT denied JE Hurley Construction, Inc.’s DBE certification request and correctly followed the process of § 26.86 by providing the SBA written notification of the reasons for denial.

#### B) Removing Existing Certification

**Basic Requirement:** (49 C.F.R. § 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 explaining the reasons for the proposed determination.

**Discussion:** During this UCP Compliance Review, deficiencies were found with the requirements for removing existing certification. The review team examined three removal files from CDOT and four from DSBO. Discrepancies were found with the City and County of Denver-DSBO removal process. Their current process consists of a letter sent to DBEs requesting that delinquent information is forwarded to the office by a particular date or the DSBO will begin proceedings to revoke certification. If the information is not received by the prescribed date, another letter is sent notifying the DBE that its certification has been revoked and includes information for appealing to the US DOT. DSBO did not properly notify the DBE of its intent to revoke certification nor did it inform the DBE of its right to an informal hearing (i.e., a removal proceeding).

Separation of functions require that decisions in a removal proceeding be made by an office and personnel that did not participate in any actions leading to or seeking to implement the proposal to remove the firm’s eligibility. Both CDOT and DSBO contracted with separate attorneys to conduct their informal hearing process. DSBO sends out SBE revocation letters for their local program simultaneously with their DBE revocation letters, if applicable. SBE firms are given an opportunity for a hearing by contacting the director.

The review team advised the DSBO representative that DBE firms must be given due process by affording them an opportunity to an informal hearing prior to removing their certification.

**Closed Finding:** Subsequent the review, DSBO revised its letter to revoke DBE certification so that it includes an opportunity for an informal hearing.

#### C) Appeals to the DOT

**Basic Requirement:** (49 CFR § 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 CO UCP had denials that were appealed to the USDOT.

The USDOT upheld the determinations of CDOT and DSBO in the files reviewed by the review team.

## **12. Compliance and Enforcement**

### A) DBE Enforcement Actions

Basic Requirement: (49 C.F.R. § 26.107) The Department may initiate suspension or debarment proceeding against a DBE pursuant to 49 C.F.R. § 29 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.

Discussion: During this DBE Compliance Review, no deficiencies were found with DBE Enforcement Actions. The CO UCP indicated that there had been no suspension or debarment actions regarding certification of any DBE firms during fiscal years 2007 and 2008.

### B) Confidentiality

Basic Requirement: (49 C.F.R. § 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 CO UCP. The Department issued additional guidance concerning confidentiality in the Official Questions & Answers. Under the DOT DBE regulation, a recipient or UCP is prohibited from disclosing to any third party, without the submitter's written consent, a personal net worth statement or supporting documentation. UCPs are likewise prohibited from disclosing confidential business information, including applications for DBE certification and supporting information. These prohibitions apply even in the face of a request under a state freedom of information or open records law. The CO UCP had no open records request for fiscal years 2007 and 2008.

### C) Cooperation

Basic Requirement: (49 C.F.R. § 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, an advisory comment was made regarding cooperation. The Department's Guidance in the 2008 updated Questions & Answers emphasized 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 CO UCP

established an Executive Committee to address issues pertaining to the administration of the UCP.

The “Third Party Challenges” section of the CO UCP plan notes that the UCP shall accept signed written complaints from any person, including Colorado UCP partners, alleging that a currently certified firm is ineligible. The review team advised that the 2008 Question & Answers states that appeals from UCP members would not be addressed by the US DOT.

Recommend Action: It was recommended that the CO UCP revise the “Third Party Challenge” process to include that challenge appeals from UCP members will not extend beyond the state level.

## 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	AC	Request supporting documentation when appropriate	All request for supporting group membership documentation must be in writing	
3. Business Size	26.65	ND			
4. Social and Economic Disadvantage	26.67				
a) Presumption of Disadvantage		ND			
b) Personal Net Worth		ND			
c) Individual determination		ND			
5. Ownership	26.69	ND			
6. Control	26.71	ND			
7. Other Certification Rules	26.73	ND			
8. UCP Requirements					
a) UCP agreement	26.81	ND			
b) UCP directory	26.31	ND			
9. UCP Procedures					
a) on-site visits	26.83	ND		Visit job sites if active and within jurisdiction or local area	
b) Uniform Application		ND			
c) Annual Updates		ND			

<b>Requirement of 49 CFR Part 26</b>	<b>Ref.</b>	<b>Site visit Finding</b>	<b>Description of Deficiencies</b>	<b>Corrective Action(s)</b>	<b>Response Days/Date</b>
10. DOT/SBA MOU	26.84 – 26.85	ND		Clearly document reasons for denying SBA firm	
11. Denials					
a) Initial Request	26.86	ND			
b) Remove Existing	26.87	D	No due process given to DSBO firms prior to removal	DSBO provided revised letter offering an informal hearing subsequent the review	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	AC	Third Party Challengers do not include UCP members	Revise plan to advise that challenges from UCP members are settled at state level	

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
Debra Gallegos	CDOT	EO Center Director	303-757-9969	<a href="mailto:Debra.gallegos@dot.state.co.us">Debra.gallegos@dot.state.co.us</a>
Greg Diehl	CDOT	EO Supervisor	303-757-9599	<a href="mailto:Greg.diehl@dot.state.co.us">Greg.diehl@dot.state.co.us</a>
Tamela Lee	City/County of Denver-DSBO	Director	720-913-1999	<a href="mailto:Tamela.lee@denvergov.org">Tamela.lee@denvergov.org</a>
Ken Harden	RTD	Director	303-628-9000	<a href="mailto:Ken.harden@rtd-denver.com">Ken.harden@rtd-denver.com</a>
<b>Conference Call FTA</b>				
Ryan Inman	FTA	HQ Office of Civil Rights	202-366-5017	<a href="mailto:Ryan.Inman@dot.gov">Ryan.Inman@dot.gov</a>
<b>Milligan &amp; Co LLC:</b>				
Benjamin Sumpter	Milligan	Lead Reviewer	215-496-9100	<a href="mailto:bsumpter@milligancpa.com">bsumpter@milligancpa.com</a>
Renee Moore	Milligan	Reviewer	215-496-9100	<a href="mailto:rmoore@milligancpa.com">rmoore@milligancpa.com</a>