

FTA

FEDERAL TRANSIT ADMINISTRATION

Minnesota Unified Certification Program Final Report

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Federal Transit Administration

PREPARED BY
Milligan & Company, LLC



U.S. Department of Transportation
Federal Transit Administration

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SECTION 1 - GENERAL INFORMATION

Hosting Grant Recipient: Metropolitan Council
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City/State: Minneapolis, Minnesota 55411

Executive Official: Tom Weaver
Regional Administrator

On Site Liaison: Wanda Kirkpatrick
Director-EDEO
651-602-1085

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Site visit Dates: July 28-29, 2009

Compliance Review Team
Members: Benjamin Sumpter, Lead Reviewer
Rene Moore

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 Minnesota Unified Certification Program (MnUCP) 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. These regulations define the components that must be addressed and incorporated in MnUCP’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 Minnesota Unified Certification Program (MnUCP) is necessary.

The primary purpose of the compliance review is to determine the extent to which the Minnesota Unified Certification Program (MnUCP) 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 Minnesota 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 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 MnUCP is honoring the Unified Certification Program agreement submitted to the Secretary of Transportation;
- examine the required certification procedures and standards of the MnUCP 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 MnUCP 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.

Minnesota Unified Certification Program

The Minnesota Unified Certification Program (MnUCP) was conditionally approved on October 21, 2004 and after several revisions was ultimately approved by U.S. Department of Transportation (USDOT) on April 25, 2005. The MnUCP is comprised of three certifying agencies: Minnesota Department of Transportation (MnDOT), Metropolitan Council (Met Council), and Metropolitan Airport Commission (MAC).

The proposed Office of Civil Rights organizational chart for MnDOT consists of a Project Team Leader, a DBE Supervisor-vacant, four DBE Contract Administrators, a DBE Specialist, and a Targeted Group Business Administrator. The Office of Diversity and Equal Opportunity (EO) for Met Council consists of the Director, two Senior Administrative Assistants, two EO Consultants, and two Senior EO Consultants. The MAC Human Resources Office of Diversity includes a Director, a Manager of Diversity & Equal Opportunity, and a Contract & EEO Specialist responsible for AC/DBE program administration.

The three certifying agencies are responsible for the determinations of the MnUCP. Applicants can apply to any of the three certifying agencies in the MnUCP, however; applications may be reassigned based on case load or type of work performed by the applicant. Applications are processed by individual specialists in the certifying agencies then a memo is drafted recommending certification, denial, removals, or work code additions. The memo is forwarded to the Certification Action Committee (CAC), which consists of representatives from the certifying agencies. The committee members discuss the specifics of each case and vote regarding a determination. If there is a tie vote, the applicant firm is approved. The determinations of the CAC constitute actions of the MnUCP.

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 Unified Certification Program websites and other sources. Subsequent to this review, potential dates for the site visit were coordinated.

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

Subsequent to the entrance conference, a review was conducted of the MnUCP agreement and other documents submitted to the review team by the MnUCP representative. Interviews were then conducted with MnUCP Certifying Member regarding DBE program certification standards and certification procedures. These interviews included the member with the responsibility of certifying on behalf of all the members. 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 MnUCP 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 MnUCP Certifying Member.

Following the site visit, this draft report was compiled.

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

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Suite 3142
Seattle, WA 98174-1002
206-220-4462
Chris.MacNeith@dot.gov

Minnesota 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	Joos Electric Company	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Initial Certification <1 year	Icon Services Corporation	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Initial Certification <1 year	Sing & Associates, Inc.	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Initial Certification >1 year	E-Con Placer	Y	Y	Y	N	Y/Y	N/A	N/A	N/A
Initial Certification Denial	Dirty Old Dog, LLC	Y	Y	Y	Y	Y/Y	N/A	Y	N/A
Initial Certification Appeal	Eagle Trucking, Inc.	Y	Y	Y	N/A	Y/Y	N/A	Y	Y
SBA Approval	Symbiot, Inc.	Y	Y	Y	N	Y/Y	N	N/A	N/A
Removal	Pettis & Assoc.	Y	Y	Y	N	Y/Y	N/A	Y	N/A
Recertification	KM Chng, Inc.	Y	Y	Y	N	Y/Y	N	N/A	N/A

Metropolitan Council

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification <1 year	Nguyen Architects, Inc.	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Initial Certification <1 year	Bussell Companies, Inc.	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Initial Certification <1 year	Lighten Up, LLC	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Initial Certification >1 year	Vedi & Associates, Inc.	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
Initial Certification >1 year	Paragon Restoration II, Inc.	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
Initial Certification Denial	Joan's Minority Owned Supplier	Y	Y	Y	N/A	Y/Y	N/A	Y	Y
Removal	B.R.A.I.N.	Y	Y	Y	Y	Y/Y	N/A	Y	N/A
Removal	Brick It Your Way	Y	Y	Y	N*	Y/Y	N/A	Y	N/A
Removal	Priority Manufacturing, Inc.	Y	Y	Y	N*	Y/Y	N/A	Y	N/A
Removal	JNL Construction Resource, Inc.	Y	Y	Y	N*	Y/N	N/A	Y	N/A
Removal	Kasdan Communication, Inc.	Y	Y	Y	N*	Y/Y	N/A	Y	N/A
Recertification	Jacobsen/Daniels Associates, Inc.	Y	Y	Y	Y	Y/Y	N	N/A	N/A

*Removed for failure to submit No Change Affidavit

Metropolitan Airports Commission

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification <1 year	Woody's Rebar Company, Inc.	Y	N*	Y	N/A	Y/Y	N/A	N/A	N/A
Initial Certification <1 year	Lynwood & Sons Construction	Y	N*	Y	N/A	Y/N	N/A	N/A	N/A
Initial Certification >1 year	Nadeau Excavating	Y	N*	Y	N	Y/Y	N/A	N/A	N/A
SBA Approval	Flowsense, LLC	N**	Y	N	N	N/N	Y	N/A	N/A
Removal	ECMC	N**	N	Y	N	Y/Y	Y	N	N/A
Removal	Moltron Enterprises, Inc.	Y	Y	Y	N	Y/Y	N/A	Y	N/A
Recertification	Mtec Electric	Y	N	Y	Y	Y/Y	N	N/A	N/A
Recertification	CAD Concepts, Inc.	Y	N*	Y	Y	Y/Y	N	N/A	N/A
Recertification	Rani Engineering, Inc.	Y	Y	Y	Y	Y/Y	N	N/A	N/A
Recertification	Total Insulation, Inc.	Y	Y	Y	N	N/N	N	N/A	N/A

*Notation in file that onsite was conducted but no copy of on-site in file

**SBA Firm

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 Minnesota Unified Certification Program (MnUCP) Plan, revised September 8, 2003, indicates in Section 4.2B that the Committee must rebuttably presume that members of the designated groups identified in Section 4.5(a)(1) of the UCP are socially and economically disadvantaged. These requirements are consistent with 49 CFT Part 26.61 and 26.67.

See Section 4, Social and Economic Disadvantaged, of this report regarding MnUCP's application of these certification standards.

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, an **advisory comment** was made with the requirement for Group Membership. MnUCP Program Plan states in Section 4.3A if the Committee has reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, it shall require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group. This language is consistent with the 1999 version of 49 CFR Part 26.63(a). The regulation as amended 2003 expanded this section into part 26.63(a)(1)-(3) as noted in the basic requirement above. The review team did not, however, find that the MnUCP required proof of group membership in the certification files reviewed.

See Section 4, Social and Economic Disadvantaged, of this report regarding group membership narrative.

Recommended Action: Update the MnUCP Program Plan to include the accurate citation of the regulation as amended in 2003 for part 26.63.

3. Business Size

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

Discussion: During this UCP Compliance Review, **no deficiencies** were found with the requirement of business size. The MnUCP 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. The MnUCP was also aware of the adjustment to the DOT DBE business size standard from \$20.41 million to \$22.41 million.

The Metropolitan Airport Commission (MAC) also reviews files for compliance with 49 CFR Part 23, Airport Concessionaire Disadvantaged Business Enterprise (ACDBE) certification. While ACDBE files were not the subject of this review, MAC was aware of the correct business size standards found in 49 CFR Part 23.33.

4. Social and Economic Disadvantage

A) Presumption of Social Disadvantage

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

Discussion: During this UCP Compliance Review, **deficiencies** were found with the requirement for presumption of disadvantage. Part 26.61 (c) states you must presume members of groups identified in Part 26.67(a) are socially disadvantaged. This means they do not have the burden of proving to you (UCPs) that they are socially disadvantaged. Part 26.67 (a)(1) requires the applicant to submit a signed, notarized certification that the disadvantaged owner is socially and economically disadvantaged. This notarized Affidavit of Certification is part of the Uniform Certification Application found in Appendix F of the DBE regulations.

In addition to the Affidavit of Certification, MnUCP require applicants to complete and notarize a *Statement of Social and Economic Disadvantage* form. The form states in the *Determination of Social Disadvantage* section, “In considering whether an individual applying for DBE status has experienced social disadvantaged based upon the effects of discrimination, the individual shall take into account whether they have held themselves out to be a member of a disadvantaged group, has acted as a member of a community of

disadvantaged persons, and would be identified by persons in the population at large as belonging to the disadvantaged group.” The applicant then certifies they have experienced social disadvantaged based on discrimination because of gender, race, ethnicity or other. The instructions also require the applicant to detail in a narrative how each proprietor in their own words has experienced social and economic disadvantage as outlined in 49 CFR Part 26.

The review team questioned if MnUCP had received approval to supplement the Uniform Application Form. Representatives from MnDOT indicated they received approval from “DOT” to do a narrative statement. The purpose of the narrative statement was in response to a challenge of the DBE program in Sherbrooke Turf v. MnDOT. The narrative statement was incorporated by MnDOT as per DOT guidance and was adopted by the MnUCP.

Guidance was sought subsequent the compliance review from Robert Ashby of USDOT. Mr. Ashby concluded that requiring a separate narrative in the application package was a violation of the DBE regulations and is to be removed from the MnUCP application process immediately.

Corrective Action and Schedule: Upon receipt of the final report, MnUCP must submit to FTA’s Office of Civil Rights evidence that the Statement of Social and Economic Disadvantaged form was removed from the MnUCP application package.

MnUCP Response: The MnUCP submitted an updated UCP Program Plan that removed all reference to the abovementioned narrative. **This deficiency is now closed.**

B) Personal Net Worth

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

Discussion: During this UCP Compliance Review, **advisory comments** were made with the requirement for Personal Net Worth (PNW) statements. The review team analyzed certification determinations by the MnUCP and found the personal financial statements in the files reviewed. It appeared that MnUCP performed accurate analysis of the personal financial statements to ensure that individuals’ personal net worth were below \$750,000 minus equity in the individuals’ primary residence and the applicant business. There were, however inconsistencies with applicants including their primary residence in the PNW forms. Files examined by the review team revealed that applicants were not given clear guidance on completing the PNW form, especially regarding what real estate should be included in the form.

Recommended Action:

- 1) The MnUCP should discuss including instructions for the applicant regarding what

- assets and liabilities to include in the Personal Net Worth form.
- 2) Revise the MnUCP Program Plan Section 4.5A(1)(i) and 4.5B(5) excluding requiring a personal net worth from DBE airport concessionaires. Part 23 as amended in 2005 requires PNW from DBE airport concessionaire applicants.
 - 3) Revise the MnUCP Program Plan Section 4.5A(1)(ii) referencing Alaska Natives and Alaska Native Corporation submitting personal net worth information. This section was removed in the 2003 amended DBE regulations.

C) Individual determinations of social and economic disadvantage

Basic Requirement: (49 CFR Part 26.67 (d)) Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged may apply for DBE certification. UCPs must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged.

Discussion: During the UCP Compliance Review, an **advisory comment** was made 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 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 regulations.

Several certifying members of the MnUCP had experience with certification determinations on an individual basis. Eagle Trucking, a MnDOT file, was reviewed by the Certification Action Committee (CAC) in 2008. The applicant was a disabled veteran seeking social and economic disadvantage on an individual basis. The CAC minutes from May 14, 2008, outlined discussions about the firm's eligibility. The committee voted to deny the firm's application for DBE certification. The applicant, through their attorney, subsequently appealed the denial to the USDOT. The USDOT upheld the determination rendered by the MnUCP Certification Action Committee.

The MnUCP Program Plan amended September 8, 2003 outlined in Appendix A – Individual Determination procedures. These procedures listed in the Program Plan for Economic Disadvantage (B)(2) requires individuals claiming economic disadvantage to submit separate financial information for his or her spouse. The 2003 amended DBE regulations removed section (B)(2) in Appendix E, concerning spousal financial information for individual determinations of social and economic disadvantage. The review team found no evidence that the MnUCP routinely required spousal financial information for individual determinations.

Recommended Action: The MnUCP will remove the requirement in their Program Plan for individual claiming disadvantage on an individual basis to also submit spousal financial information.

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 MnUCP 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, **advisory comments** were made in the areas of control. The interviews conducted and files reviewed indicated that the certifiers of the MnUCP 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 certifiers in the MnUCP generate a memo in the certification file that outlines the applicant firm's background and supportive evidence for approval or denial.

The review team examined the file of ECMC, Inc., a DBE firm recommended for certification by MAC. The file memo included guidance from Mr. Robert (Bob) Ashby concerning interpretation of 49 CFR Part 26.71(h) with licensing requirements for disadvantage individuals. The state licensing language must specifically state the owner must hold a license in the particular field. The review team did not find evidence in the files reviewed of noncompliance with this section, however; based on some of the discussions during the review it is suggested that the MnUCP ensure that all certifying members have the same interpretation of regulations regarding licensing.

The review team inquired about the MnUCP's process for adding work codes to an existing firms' certification. The classification of work codes has been an area of interest and the USDOT has provided additional guidance through the Official Questions and Answers. The MnUCP certifying agencies were interviewed separately to discuss their certification process. Additional work code designations are brought before the CAC for

approval and on-sites visits may be necessary. The review team suggested that a process be included in the Program Plan to ensure consistency in evaluation of adding work code classifications to DBE's certification profile.

Recommended Action:

- 1) The MnUCP should have discussions to ensure accurate interpretation of Part 26.71(h) regarding licensing.
- 2) Include procedures for adding work code classifications to DBEs certification profile.

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, an **advisory comment** was made with other rules affecting certification. The DBE regulations in Part 26.73 initially included provisions for evaluating eligibility of Indian tribes, Alaska Native Corporations and Native Hawaiian organizations in the 1999 issuance. The 2003 amended DBE regulations included a separate evaluation process for an Alaska Native Corporations (ANCs) seeking DBE certification. The MnUCP Program Plan referenced the outdated process of 1999 for evaluating ANCs for DBE certification. The review team did not review any files of ANC applicants seeking certification as Disadvantage Business Enterprises.

Recommended Action: MnUCP to remove old 1999 language of 26.73 and replace with Part 26.73(i) amended 2003 language regarding Alaska Native Corporation.

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 MnUCP Agreement. The Commission establishing the MnUCP sent out Memorandum of Agreements (MOA) to approximately forty-five (45) DOT recipients for signature. Three recipients declined to sign the MOA, namely Anoka County Transit-Demand Response, Dakota Area Resources and Transportation for Seniors (DARTS), and North Suburban Lines, Inc. Three other recipients were non-responsive to the Commission's request for a MOA signature, namely City of Mankato (Airport & Transit), International Falls Airport, and Moorhead-Metropolitan Transit.

The review team and FTA representative, Ryan Inman recommended that the MnUCP reach out to the recipients who declined, were non-responsive and any new to DOT funding for MOA signature in the MnUCP.

Recommended Action: MnUCP will investigate if there are any DOT recipients eligible to participate in the MnUCP and require signature of the MOA.

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 MnUCP Program Plan indicates that it shall maintain a Unified DBE directory containing all firms certified by the Committee as specified in 49 CFR Part 26.31. The MnUCP UCP directory is maintained by MnDOT and linked with Metropolitan Council and Metropolitan Airports Commission.

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, **deficiencies** were found with the requirements for on-site visits. The MnUCP Program Plan and DBE regulations require that an on-site visit is conducted for applicants seeking DBE certification. The MnUCP has a uniform on-site visit form that all the certifying agencies are to use when conducting on-site visits.

The review team examined ten (10) certification files from Metropolitan Airport Commission (MAC) (See Section 5-Scope and Methodology of this report.) Six of the ten files reviewed did not have a copy of an on-site visit. Of these six files, four had information in the memo to the CAC that an on-site visit was conducted and two files had no record that an on-site visit was conducted because no memo was in the file. The review team sought clarification from MAC representatives as to the status of the on-site visits in the files reviewed. The MAC representatives indicated that they periodically use the MnUCP on-site visit form as a “guide” when conducting the interviews. The results of the interview are made part of the memo to the CAC. The MnUCP on-site visit form has a section where the applicants interviewed and interviewer sign to attest the accuracy of the statements documented on the form, which is not consistently completed by MAC

certification representatives. Additionally, if MAC receives a request for a copy of the on-site visit from an out-of-state UCP, MAC will forward a copy of the memo given to the CAC if no on-site form is present in the file. This is inconsistent with the other MnUCP certifiers' on-site review process and with the DBE regulations for a record that an on-site visit was conducted.

Corrective Action and Schedule: Within 90 days of the issuance of the final report, MnUCP must submit to FTA's Office of Civil Rights evidence (on-site dates) and assurance (statement of fact) that records of on-site reviews are in all files completed by Metropolitan Airport Commission.

MnUCP Response: MnUCP submitted Exhibit C, which describes all on-site dates and notices of no change. **This deficiency is closed.**

B) Uniform Application

Basic Requirements: (49 CFR Part 26.83 (i)) UCPs must use the application form provided in Appendix F of the regulations without change or revision. However, you may 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 requirements to use the Uniform Application Form were in the 2003 amendment to 49 CFR Part 26. The MnUCP utilizes the appropriate certification application form for determining eligibility in the DBE program. MnDOT indicated that they received guidance from "DOT" that they were to incorporate a narrative statement as a supplement to the Uniform Application Form. This was as a result of their DBE program being challenged in the court decision of Sherbrooke Turf v. MnDOT. No record of DOT approval to supplement the MnUCP was available to the review team. See discussion and findings in Section 4 – Social and Economic Disadvantage of this report.

C) Annual Updates

Basic Requirements: (49CFR Part 26.83) Once you have 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, **deficiencies** were found with the requirement for annual updates. The MnUCP Program Plan as amended in September 8, 2003 states that certification with the MnUCP is valid for a period of three years. The Plan included an amendment made by motions of the committee members expanding the certification term to five years. The MnUCP has a uniform Affidavit of DBE Eligibility the DBE is to complete annually as part of continued compliance in the program. The DBE has to complete the MnUCP Recertification Application at the end of the five year term.

The review team analyzed thirty-one MnUCP files collectively from the Metropolitan Council, Metropolitan Airport Commission and Minnesota Department of Transportation. Several of the certification files had no evidence that an annual update was collected consistently during the certification term. The MnUCP representatives were made aware of the inconsistent collection of annual updates by the review team. The MnUCP representatives responded that efforts will be taken to improve in this area. The MnUCP representatives also agreed to revise their Affidavit of DBE Eligibility to include a date the DBE completed the form.

The review team also suggested that the MnUCP representatives discuss a unified approach to communicating the certification term on their correspondence to the DBEs. The certification certificates and letters had either an effective date of certification or an expiration of certification date. The MnUCP indicated they would discuss at the next meeting and determined the best approach.

Corrective Action and Schedule: Within 90 days of the issuance of the final report, MnUCP must submit to FTA's Office of Civil Rights a process to ensure that No Change Affidavits are collected annually as required by the DBE regulations.

MnUCP Response: The MnUCP submitted an updated UCP Program Plan which requires all certified DBEs to annually submit an affidavit sworn by the Firm's owner that there have been no changes in the Firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control or any material changes in the information provided in its application forms. MnUCP also provided a log of 2010 No Change Affidavits collected. **This deficiency is closed.**

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, an **advisory comment** was made with processing SBA certified firms. The MnUCP Program Plan outlines a process for SBA (a) and SDB firms that is consistent with the DBE regulations. It states, "When an SBA-certified firm applies for certification pursuant to the DOT/SBA MOU, the UCP Committee must accept the certification application forms and packages submitted by the firm to the SBA for either the 8(a) BD or SDB programs, in lieu of requiring the applicant firm to complete our own application forms and packages."

During the interviews with the MnUCP certification representatives, some of the procedures for processing SBA firms were more streamlined than others. The procedures for MnDOT and Met Council were similar in that the applicant could complete the MnUCP application or submit the SBA package. The MAC files of SBA certified firms reviewed during the compliance review indicated that minimal documentation was collected or maintained in the files.

Recommended Action: The MnUCP Program Plan should, in addition to outlining how SBA certified firms will be processed, include what information and documentation is required to make a determination of eligibility.

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. All certification determinations are made by the MnUCP Certification Action Committee. The committee consists of individuals knowledgeable of the certification process and they have to agree by majority vote on approvals and denials of DBE certification. The denial letters reviewed by the review team were very comprehensive and appropriately addressed the DBE regulations. The MnUCP does not have an appeal process for initial denials of certification.

For 2007 fiscal year, MnDOT had one denial for lack of ownership and control, Met Council had a denial of expanding codes and MAC had none. For 2008 fiscal year, MnDOT had a total of four denials, three due to lack of control and one for not being socially and economically disadvantaged. Met Council and MAC had no denials during the 2008 fiscal year.

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 MnUCP Program Plan describes procedures if there is reasonable cause to believe that the firm is ineligible, the UCP Committee Representative must provide written notice to the firm that the Committee proposes to find the firm ineligible, setting forth the reasons for the proposed determination. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based. At the time the UCP Committee Representative provides this notice, the UCP Committee Representative must also notify the firm that the firm has the opportunity to appear at 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 why it should remain certified, or the firm may elect to present its information and arguments in writing without appearing at a hearing.

The removal process described by the representatives from Metropolitan Council conflicted with their written procedures and DBE regulations. They mentioned to the review team during the interviews that the CAC will vote to remove a firm's certification then Met Council sends out a letter to the firm indicating their certification is removed and gave them an opportunity for a hearing. The review team requested additional removal files from Met Council to determine implementation of the removal process. The files substantiated the process described by Met Council during the interviews. Firms removed were not given due process for an informal hearing prior to removal of their certification.

The hearing process described in MnUCP Program Plan was very thorough and appropriately explained the informal hearing requirements. They also ensured separation of functions during the hearing process by appointing individuals from different departments in their respective agencies.

Corrective Action and Schedule: Within 60 days of the issuance of the final report, MnUCP must submit to FTA's Office of Civil Rights a certification process that ensures the appropriate methods of removing a firm's eligibility is adhered to by all MnUCP certifying members.

MnUCP Response: The MnUCP submitted an updated UCP Program Plan that restates its removals process.

FTA Response: FTA disagrees with the MnUCP response. MnUCP must provide documentation to FTA demonstrating that it has implemented the new written procedures for removing a firm's eligibility and such procedures are adhered to by **all** MnUCP certifying members (i.e., number of reviews/hearings that have been conducted).

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 MnUCP had one denial that was appealed to the USDOT during FY 2007 and 2008, namely Eagle Trucking. The denial was upheld by the USDOT.

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 MnUCP 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 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, an **advisory comment** was made with the confidentiality issues in the MnUCP. 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.

Section 5 – Availability of Confidentiality of Records are outlined in the MnUCP Program Plan. The Committee shall safeguard from disclosure to unauthorized persons information that may reasonably considered as confidential business information, consistent with Minnesota government Data Practices Act, Federal, state, and local law.

Recommended Action: The review team recommended that MnUCP use the language found in 26.109(C) and (D) to alleviate any possible conflicts of Minnesota Government Data Practices Act with DBE regulations.

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's guidance 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 Minnesota Unified Certification Program Commission is established to implement and administer the Minnesota Unified Certification Program. The Commission consists of certifying and non-certifying agencies. Each agency receives one vote to elect a chair.

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	Language in Program Plan outdated with 26.63	Revise procedures to be consistent with 26.63 as amended	
3. Business Size	26.65	ND			
4. Social and Economic Disadvantage a) Presumption of Disadvantage b) Personal Net Worth c) Individual determination	26.67	D AC AC	A supplemental narrative is required for applicants Applicants not consistent in providing all PNW information on form Program Plan includes requirement for spousal financials	Remove supplemental narrative from application process Consider including instructions for applicants on what to include in the PNW forms Revise Plan to exclude requirement for spousal financials	CLOSED
5. Ownership	26.69	ND			

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Response Days/Date
6. Control	26.71	AC	1.MnUCP interpretations of licensing requirement varied 2.No written process for adding work codes	1.MnUCP to discuss interpretation issues and determine clear procedure for evaluating licensing requirements 2.Discuss incorporating written process for adding work codes	
7. Other Certification Rules	26.73	AC	ANC language outdated in Program Plan	Update Plan with 2003 language in 26.73(i)	
8. UCP Requirements a) UCP agreement	26.81	AC	No all DOT recipients signed MOA	Re-evaluate recipients in state and require signature of MOA	
b) UCP directory	26.31	ND			
9. UCP Procedures a) on-site visits	26.83	D	Several MAC files missing on-site visits	Provide evidence that MAC files have on-site visits	CLOSED
b) Uniform Application		ND			
c) Annual Updates		D	Several years of No Change Affidavits missing in files	Create process ensuring No Change Affidavits are consistently collected	CLOSED
10. DOT/SBA MOU	26.84 – 26.85	AC	SBA MOU process not consistent b/w members	Develop process consistent with MnUCP Plan, MOU, and USDOT guidance	
11. Denials a) Initial Request	26.86	ND			
b) Remove Existing	26.87	D	Met Council no due process for firms proposed to be removed	Provide evidence removal procedures of 26.87 followed	60 days
c) Appeals	26.89	ND			

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Response Days/Date
12. Compliance and Enforcement					
a) DBE Enforcement Actions	26.107	ND			
b) Confidentiality	26.109	AC	Reference MN state law	Ensure confidentiality language consistent with DBE regs	
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
MNDOT				
Timothy Perry	MNDOT	Transportation Specialist	651-366-3074	Timothy.perry@dot.state.mn.us
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Milligan & Co LLC:				
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