

## **8. DISADVANTAGED BUSINESS ENTERPRISE (DBE) – ENHANCED REVIEW MODULE**

### **BASIC REQUIREMENT**

Recipients must comply with 49 CFR part 26 to ensure nondiscrimination in the award and administration of US Department of Transportation (US DOT)-assisted contracts. Recipients also must create a level playing field on which DBEs can compete fairly for US DOT-assisted contracts.

### **USE OF THIS MODULE**

This enhanced review module (ERM) questionnaire presents recommended questions for a DBE enhanced review. Based on the scope of the approved ERM, all or a selection of the questions of this module will be conducted. The actual questions asked and the items sampled and observations made will be determined during the scoping meeting. The Federal Transit Administration (FTA) regional civil rights officer (RCRO) and/or headquarters may ask the reviewer to develop a unique scope of work for the ERM. Additional questions may be asked and additional sampling and observations may be performed as directed by the FTA. The scope, questionnaire, sampling, and observations will be subject to final review and approval by the respective RCRO, Office of Civil Rights, and the Office of Transit Safety and Oversight (TSO).

### **QUESTIONS TO BE EXAMINED**

1. Has the recipient implemented corrective actions from the final report of a DBE or Unified Certification Program (UCP) review?
2. Did the recipient submit a current DBE program for approval?
3. How does the recipient integrate and manage support functions required to administer the DBE program?
4. Are the semiannual Uniform Reports of DBE Awards or Commitments and Payments completed accurately?
5. Has the recipient implemented steps to meet the maximum feasible portion of its overall goal race-neutrally?
6. When including a DBE goal in a solicitation, is the recipient ensuring that the contract is only awarded to a bidder that meets the goal or makes good faith efforts to meet the goal?
7. Do the recipient's prime contracts and subcontracts include required contract provisions?
8. Does the recipient monitor the performance of contractors and enforce contractual requirements consistent with its approved DBE program?
9. What steps has the recipient taken to address overconcentration of DBEs in certain types of work?
10. Does the recipient implement DBE certification standards and procedures in accordance with the DBE regulation?

### **INFORMATION NEEDED FROM RECIPIENT**

#### **Pre-site Visit Request**

- Most recent DBE program, if not uploaded to TrAMS
- Current organizational chart which includes the DBELO
- DBELO job description
- Documentation of implementation of small business element measures

- Status of DBE or UCP compliance review corrective action implementation
- UCP Memorandum of Understanding or similar document or additional certification operating document

**Recipient Follow-up**

- Documented implementation of race-neutral measures
- Procedures to assess the existence of overconcentration
- Source documents for most recent Fiscal Year’s semi-annual reports
- Overconcentration analysis

**DBEERM1. Has the recipient implemented corrective actions from the final report of a DBE or UCP review?**

**BASIC REQUIREMENT**

Recipients must implement all corrective actions from DBE and or UCP reviews.

**APPLICABILITY**

Recipients that had compliance reviews.

**DETAILED EXPLANATION FOR REVIEWER**

As part of its project oversight functions, FTA periodically conducts DBE and UCP reviews of selected recipients. If a review has been conducted, confer with the FTA regional office and the FTA headquarters Subject Matter Expert (SME) on what follow-up activities are appropriate during this ERM. The reviewer may be requested to validate the implementation of corrective actions for closed deficiencies, follow up on deficiencies that remain open, or a combination of both.

**INDICATORS OF COMPLIANCE**

- a. *List the DBE and or UCP reviews conducted and the date of the final report.*

Review Response

- b. *What is the status of any corrective actions from the final report of the DBE and/or UCP review(s)?*

Review Response

Corrective Action	Status

**INSTRUCTIONS FOR REVIEWER**

Discuss the status of corrective actions with the RCRO and the FTA Office of Civil Rights. Obtain direction from the RCRO for the level of follow-up to be done as part of this review. Once directed, review responses

to determine if they address the open corrective actions. On site, discuss with the recipient and review evidence of implementation of the corrective actions.

### **POTENTIAL DEFICIENCY DETERMINATION**

If there are outstanding or ongoing review deficiencies from a past DBE and/or UCP review that relate to baseline and ERM review questions of the Comprehensive Review, the deficiencies will be made under the appropriate deficiency code of the Comprehensive Review or ERM. If there are outstanding or ongoing DBE review deficiencies that are beyond the scope of the baseline Comprehensive Review or ERM, confer with the FTA regional office and the FTA Office of Civil Rights to make the following deficiency.

DEFICIENCY CODE DBEERM1-1: Outstanding DBE specialty review deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the RCRO and FTA Office of Civil Rights documentation of corrective actions and evidence of implementation.

### **GOVERNING DIRECTIVES**

49 CFR 26.109 (c)

“(c) *Cooperation.* All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment)”.

---

---

### **DBEERM2. Did the recipient submit a current DBE program for approval?**

#### **BASIC REQUIREMENT**

Refer to question DBE1 in the baseline review.

#### **APPLICABILITY**

Refer to question DBE1 in the baseline review.

#### **DETAILED EXPLANATION FOR REVIEWER**

Refer to question DBE1 in the baseline review.

#### **INDICATORS OF COMPLIANCE**

- a. *If the recipient submitted a DBE program that has FTA approval, has the recipient made significant updates or revisions? If so, has the updated or revised DBE program been submitted for FTA approval?*

Review Response

- b. *Is the current DBE Program Plan reflective of how the DBE program is implemented by the recipient and does it serve as an effective tool for program implementation?*

Review Response

### **INSTRUCTIONS FOR REVIEWER**

Obtain the most recent DBE Program Plan from the recipient and confirm that it is the same document obtained from TrAMS during the initial review of the baseline questions. If different, follow up with the regional office and confirm that the update was not submitted. Follow up with the recipient, either prior to or during, the site visit to ascertain the need for changes to the DBE Program Plan submitted and approved by FTA. Inquire as to why the updated program was not provided to FTA.

Compare processes and procedures defined in the recipient's DBE Program Plan to the actual implemented practices of the recipient. At a minimum analyze the following areas:

- DBE Liaison Officer and Resources
- DBE Policy Statement Distribution
- Prompt Payment
- Semi-Annual Reporting
- Monitoring
- Determining Meeting Goals
- DBE Financial Institutions
- Overconcentration
- Small Business Programs/Business Development Programs
- Required Contract Provisions
- Certification

In addition, refer to question DBE1 in the baseline review.

#### **POTENTIAL DEFICIENCY DETERMINATION**

The recipient is deficient if it made significant updates or revisions to its DBE Program Plan and has not submitted the revised program to FTA for review. The recipient is deficient if it is implementing its program in a significantly different manner than described in its currently-approved DBE Program Plan. Work with the RCRO to determine if the difference in program implementation should be categorized as significantly different from the current DBE Program Plan.

DEFICIENCY CODE DBEERM2-1: Significant changes to DBE program

SUGGESTED CORRECTIVE ACTION: The recipient must submit its revised DBE Program Plan in TrAMS and notify the FTA RCRO once completed.

#### **GOVERNING DIRECTIVE**

49 CFR 26.21

“(b) (2) You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.”

“(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.”

In addition, refer to question DBE1 in the baseline review.



**DBEERM3. How does the recipient integrate and manage support functions required to administer the DBE program?**

**BASIC REQUIREMENT**

Recipients must have adequate staff to implement the program.

**APPLICABILITY**

Recipients that meet the DBE threshold

**DETAILED EXPLANATION FOR REVIEWER**

In a Notice of Proposed Rulemaking for the DBE regulation, USDOT noted that, “In times of budget stringency, it may be tempting to cut back on staff and other resources needed for certification, program oversight, and other key DBE program functions. This sentence emphasizes that it is a requirement of Federal law that the DBE program be adequately staffed to ensure compliance with Part 26.”

To be implemented correctly and effectively, the DBE program requires integration of several recipient functions, such as procurement, financial, legal, contract administration, public relations, and project management. Many of the strategies included in the DBE Program Plan are to be implemented by functions in the agency other than the DBE, or similar, office. In addition, elements of the DBE program should be reflected in other agency policies. For instance, the small business element should be reflected in procurement policies, and prompt payment and return of retention polices described in the DBE Program Plan should be reflected in procurement, project management, and payment policies. Additionally, enforcement actions described in the DBE Program Plan should be understood by contract administration and legal offices that may have to carry them out.

Special emphasis in this area may be necessary when the recipient is part of a city, county, or state government, especially when those entities are also operating a local minority- or woman-owned (M/W) business program in addition to a DBE program.

In addition, refer to question DBE2 in the baseline review.

**INDICATORS OF COMPLIANCE**

- a. *Does the DBELO appear to have adequate staff to administer the DBE program? What are the positions and responsibilities?*

Review Response

- b. *Describe the resources utilized in the management of the DBE program in terms of personnel, responsibility, and experience. Does the recipient provide technical training to employees? (To answer the questions, please complete the following table.)*

Review Response

<i>Responsibility</i>	<i>Number of Staff</i>	<i>Number of Staff with Less Than Three Years' Experience in Their Position</i>	<i>Staff Vacancies</i>	<i>Type/Frequency and Method of Training for Responsibilities</i>

c. *Are DBE program responsibilities delegated to various functions or departments?*

- i. *Who or what department reviews DBE activity at the project level?*
- ii. *How is this communicated to the DBE Liaison Officer (DBELO)?*

Review Response

d. *How does the recipient ensure that the personnel and/or departments integral to the implementation of the DBE program actually perform those roles?*

Review Response

e. *How does the DBELO coordinate with the agency's procurement representatives on issues such as contract goal-setting, race-neutral measures, inclusion of required contract clauses, and contract administration?*

Review Response

f. *If the recipient is a city, county, or state, how does the DBELO interface with staff from applicable offices regarding the DBE program, DBE complaints, and/or DBE bid protests?*

Review Response

g. *If the recipient is a state DOT, how does the DBELO interface with its subrecipients?*

Review Response

**INSTRUCTIONS FOR REVIEWER**

Review the current DBE Program Plan for roles outside of the DBELO identified as participating in DBE program implementation. In addition, interview each of the recipient representatives that are noted as having implementation roles in the DBE program.

In addition, refer to question DBE2 in the baseline review.

## POTENTIAL DEFICIENCY DETERMINATION

The recipient may be deficient if there is a staffing problem or a coordination problem among personnel and/or departments integral to the implementation of the DBE program. Consult with the FTA RCRO prior to making this deficiency.

DEFICIENCY CODE DBEERM3-1: Inadequate coordination of staff to administer DBE program

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO evidence of corrective actions taken to apply adequate resources to implement the DBE program.

## GOVERNING DIRECTIVE

49 CFR 26.21(b)(2)

“...You must also have adequate staff to administer the program in compliance with this part.”

---

---

### DBEERM4. Are the semiannual Uniform Reports of DBE Awards or Commitments and Payments completed accurately?

#### BASIC REQUIREMENT

Uniform Reports of DBE Awards or Commitments and Payments must include all required information.

#### APPLICABILITY

Recipients that meet the DBE threshold

#### DETAILED EXPLANATION FOR REVIEWER

Recipients of FTA funds are expected to keep accurate data regarding contracts awarded and paid with FTA dollars and report on such per the instructions for completing the Uniform Report of DBE Awards or Commitments and Payments. See Appendix B to 49 CFR part 26.

Beginning with the Uniform Report due June 1, 2015, the reporting format was revised. The report now captures contract and subcontract award information in sections A and B, payments made during the reporting period in a new section C, and payments made on completed contracts in section D. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.

Section A is examined during the baseline Comprehensive Review.

In Section B, for the amounts in items 11(A) – 16(F), the recipient is to further break down the DBE data from Section A by total dollar amount and number of contracts going to each ethnic and gender group. This includes all DBEs awarded prime contracts and awarded or committed subcontracts as indicated in 8(C) – (D) and 9(C) – (D) of the Uniform Report. The TOTALS value on line 17 should equal the values in 10(C) and (D).

In Section C, the recipient is to include information on contracts that are currently in progress. This information may come from a different source (contract administration) than the information for the previous lines (which often is provided by procurement).

In Section D, for lines 19-21, the recipient is to include information for actual payments on contracts that were completed (or ended) during the applicable reporting period. This information may come from a different source (contract administration) than the information in Sections A and B (which often is provided by procurement).

## **INDICATORS OF COMPLIANCE**

- a. *Does a review of FTA information and selected FTA-funded procurements indicate that the recipient is completing the reports accurately?*

Review Response

## **INSTRUCTIONS FOR REVIEWER**

Request and examine source documents (i.e. spreadsheets) from the recipient to verify information contained in the last four submitted Uniform Reports. Review the reports in conjunction with the correct reporting form. For example, reports submitted prior to June 1, 2015 will not include the new Section C. Reconcile spreadsheets or other source information with the most recent Uniform Report to ensure that Sections B, C, and D (Section A is reviewed in the baseline review) are completed correctly and that only the Federal share was reported.

## **POTENTIAL DEFICIENCY DETERMINATIONS**

Refer to question DBE5 in the baseline review.

## **GOVERNING DIRECTIVES**

49 CFR PART 26 APPENDIX B "INSTRUCTIONS FOR COMPLETING THE UNIFORM REPORT OF DBE AWARDS/COMMITMENTS AND PAYMENTS"

### *SECTION B: BREAKDOWN BY ETHNICITY & GENDER OF CONTRACTS AWARDED TO DBES THIS PERIOD*

Lines 11-17. Further breakdown the contracting activity with DBE involvement. The Total Dollar Amount to DBEs in 17(C) should equal the Total Dollar Amount to DBEs in 10(C). Likewise, the total number of contracts to DBEs in 17(F) should equal the Total Number of Contracts to DBEs in 10(D).

Line 16: The "Non-Minority" category is reserved for any firms whose owners are not members of the presumptively disadvantaged groups already listed, but who are either "women" OR eligible for the DBE program on an individual basis. All DBE firms must be certified by the Unified Certification Program to be counted in this report.

### *SECTION C: PAYMENTS ON ONGOING CONTRACTS*

Line 18(A-E). Submit information on contracts that are currently in progress. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.

18(A). Provide the total dollar amount paid to all firms performing work on contracts.

18(B). Provide the total number of contracts where work was performed during the reporting period.

18(C). From the total number of contracts provided in 18(A) provide the total number of contracts that are currently being performed by DBE firms for which payments have been made.

18(D). From the total dollar amount paid to all firms in 18(A) provide the total dollar value paid to DBE firms currently performing work during this period.

18(E). Provide the total number of DBE firms that received payment during this reporting period. For example, while 3 contracts may be active during this period, one DBE firm may be providing supplies or services on all three contracts. This field should only list the number of DBE firms performing work.



18(F). Of all payments made during this period, calculate the percentage going to DBEs. Divide the total dollar value to DBEs in item 18(D) by the total dollars of all payments in 18(B). Round percentage to the nearest tenth.

*SECTION D: ACTUAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD*

This section should provide information only on contracts that are closed during this period. All dollar amounts are to reflect the entire Federal share of such contracts, and should be rounded to the nearest dollar.

19(A). Provide the total number of contracts completed during this reporting period that used Race Conscious measures. Race Conscious contracts are those with contract goals or another race conscious measure.

19(B). Provide the total dollar value of prime contracts completed this reporting period that had race conscious measures.

19(C). From the total dollar value of prime contracts completed this period in 19(B), provide the total dollar amount of dollars awarded or committed to DBE firms in order to meet the contract goals. This applies only to Race Conscious contracts.

19(D). Provide the actual total DBE participation in dollars on the race conscious contracts completed this reporting period.

19(E). Of all the contracts completed this reporting period using Race Conscious measures, calculate the percentage of DBE participation. Divide the total dollar amount to DBEs in item 19(D) by the total dollar value provided in 19(B) to derive this percentage. Round to the nearest tenth.

20(A)-20(E). Items 21(A)-21(E) are derived in the same manner as items 19(A)-19(E), except these figures should be based on contracts completed using Race Neutral measures.

20(C). This field is closed.

21(A)-21(D). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above.

21(C). This field is closed.

21(E). Calculate the overall percentage of dollars to DBEs on completed contracts. Divide the Total DBE participation dollar value in 21(D) by the Total Dollar Value of Contracts Completed in 21(B) to derive this percentage. Round to the nearest tenth.

---

---

**DBEERM5. Has the recipient implemented steps to meet the maximum feasible portion of its overall goal race-neutrally?**

**BASIC REQUIREMENT**

Recipients are to meet the maximum feasible portion of their overall goal by using race-neutral means of facilitating DBE participation.

**APPLICABILITY**

Recipients that meet the DBE threshold

## DETAILED EXPLANATION FOR REVIEWER

Refer to question DBE8 in the baseline review.

## INDICATORS OF COMPLIANCE

- a. *What are the specific race-neutral measures used to help meet the overall goal?*

Review Response

- b. *How often does the recipient assess the effectiveness of its race-neutral measures?*

Review Response

- c. *What efforts has the recipient taken to improve its race-neutral measures?*

Review Response

## INSTRUCTIONS FOR REVIEWER

Refer to question DBE8 in the baseline review.

## POTENTIAL DEFICIENCY DETERMINATIONS

Refer to question DBE8 in the baseline review.

## GOVERNING DIRECTIVES

Refer to question DBE8 in the baseline review.

---

---

**DBEERM6. When including a DBE goal in a solicitation, is the recipient ensuring that the contract is only awarded to a bidder that meets the goal or makes good faith efforts to meet the goal?**

### BASIC REQUIREMENT

Refer to question DBE9 in the baseline review. If a recipient determines that a bidder did not make good faith efforts, a reconsideration hearing must be offered.

### APPLICABILITY

Recipients that meet the DBE threshold

### DETAILED EXPLANATION FOR REVIEWER

Good faith efforts include documented steps the bidding/offering firm made **prior to the bid due date** to find DBEs in order to meet the contract goal. This means that the bidder must, in order to be responsible and/or responsive, show that it took all necessary and reasonable steps to achieve a DBE goal. It is up to the recipient to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. If the recipient determines that the apparent successful bidder/offeror failed to demonstrate good faith efforts, it must provide the bidder/offeror an opportunity for administrative reconsideration.

The decision on reconsideration must be made by an official who did not take part in the original determination that the bidder failed to meet the goal or make adequate good faith efforts to do so. This official should be identified in the recipient's DBE program plan. The bidder must have an opportunity to

meet in person with the reconsideration official. The recipient is to send a written decision on their reconsideration, explaining the basis for finding that the bidder did or did not make adequate good faith efforts to meet the contract DBE goal.

#### **INDICATORS OF COMPLIANCE**

- a. *Since the last Comprehensive Review, has the recipient had to implement its administrative reconsideration process? If yes, how was the administrative reconsideration process implemented?*

Review Response

- b. *If administrative reconsideration was held, was the reconsideration official involved in the process of initially determining whether contract goals are met?*

Review Response

#### **INSTRUCTIONS FOR REVIEWER**

During review of the procurement area, examine up to six awards made to firms that did not meet the DBE contract goal and document the good faith efforts review completed by the recipient. Special emphasis should be given when a firm requests reconsideration. Review procurement documents to verify that the bidder was provided an opportunity for a hearing, that the reconsideration official did not participate in making the initial determination that the bidder did not satisfy the good faith effort requirements, and they are named in the DBE program plan. Verify if the recipient sent a written decision on their reconsideration, explaining the basis for finding that the bidder did or did not make adequate good faith efforts to meet the contract DBE goal.

#### **POTENTIAL DEFICIENCY DETERMINATION**

The recipient is deficient if it did not offer an opportunity for reconsideration when it determined that the apparent awardee did not make good faith efforts, if the reconsideration official participated in the initial good faith effort determination, or if the recipient did not send a written decision on their reconsideration.

DEFICIENCY CODE DBEERM6-1: Inadequate good faith effort consideration

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO implemented procedures for good faith efforts determination, to include the reconsideration process.

#### **GOVERNING DIRECTIVES**

49 CFR 26.53 (d)

"If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

(1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

(2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so."

---

---

**DBEERM7. Do the recipient's prime contracts and subcontracts include required contract provisions?**

**BASIC REQUIREMENT**

Each contract the recipient signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include non-discrimination assurances. In addition to the potential remedies included in the nondiscrimination clause, many recipients noted in their DBE Program Plan legal or administrative remedies that they would include in contract documents.

**APPLICABILITY**

Recipients that meet the DBE threshold

**DETAILED EXPLANATION FOR REVIEWER**

Each contract the recipient signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following nondiscrimination assurance:

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

Note that with the updated DBE regulation, which became effective November 3, 2014, this clause was revised to the following:

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

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

**INDICATORS OF COMPLIANCE**

- a. *How are DBE nondiscrimination requirements included in prime contracts and in the subcontracts each prime contractor signs?*

Review Response

- b. *How are legal or administrative remedies noted in the recipient's DBE Program Plan included in prime contracts?*

Review Response

**INSTRUCTIONS FOR REVIEWER**

Obtain a sample of procurement files to determine if required provisions are included. The assurance must be verbatim in the program plan, subrecipient agreements, prime contracts, and subcontracts. Determine if remedies provisions noted in the recipient's DBE Program Plan for inclusion in contract documents are included in a review of procurements. During the site visit and in concert with the file review in the procurement area, examine procurement files for the inclusion of the appropriate nondiscrimination clause. Request a sample of subcontract files for inclusion of flow down DBE requirements.

#### **POTENTIAL DEFICIENCY DETERMINATIONS**

The recipient is deficient if it has not included the nondiscrimination assurance clause (verbatim) in its program plan, prime contracts and/or has not required the prime to include the clause in their subcontracts.

DEFICIENCY CODE DBEERM7-1: Inadequate incorporation of DBE nondiscrimination assurance clause

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO implemented procedures for including the correct nondiscrimination clause in contracts and provide evidence of implementation in the next procurement.

The recipient is deficient if it states in its DBE Program Plan that it would include specific remedy provisions in its contract documents, but a review of procurements shows it has not.

DEFICIENCY CODE DBEERM7-2: Inadequate incorporation of DBE remedies

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO implemented procedures for including the applicable remedy provisions in the next procurement.

#### **GOVERNING DIRECTIVES**

##### 49 CFR 26.13

“(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include contract assurances.”

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

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

##### 49 CFR 26.37

“(a) You must implement appropriate mechanisms to ensure compliance with the part's requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state and local law). You must set forth these mechanisms in your DBE program.”

---

---

**DBEERM8. Does the recipient monitor the performance of contractors and enforce contractual requirements consistent with its approved DBE program?**

**BASIC REQUIREMENT**

Recipients that meet the DBE threshold

**APPLICABILITY**

Refer to question DBE12 of the baseline Comprehensive Review.

**DETAILED EXPLANATION FOR REVIEWER**

Refer to question DBE12 of the baseline Comprehensive Review.

**INDICATORS OF COMPLIANCE**

- a. *If the DBE department outsources monitoring activities, how and when is the DBE department notified of irregularities on ongoing projects?*

Review Response

- b. *How and how often do prime contractors submit DBE participation reports? Who is responsible for reviewing and approving the participation reports?*

Review Response

- c. *How does the recipient assess successful completion of work for release of retentions, if retention is withheld?*

Review Response

**INSTRUCTIONS FOR REVIEWER**

Refer to question DBE12 in the baseline review.

**POTENTIAL DEFICIENCY DETERMINATIONS**

The recipient is deficient if it does not have documentation of monitoring contractors and subrecipients and enforcing contract requirements to ensure that DBE commitments are met.

DEFICIENCY CODE DBE12-1: Insufficient documentation of monitoring DBE compliance of contractors and/or subrecipients

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO documentation that it has updated the DBE program to reflect current monitoring procedures for contractors and subrecipients along with evidence of implementation.

The recipient is deficient if it does not assess successful completion of work for release of retentions, if retention is withheld.

DEFICIENCY CODE DBEERM8-1: Issues in return of retainage process

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO documentation that it has updated its DBE program to include a monitoring process and/or

evidence of how it has implemented the monitoring process to ensure that it can assess successful completion of work for release of retentions, if retention is withheld.

### **GOVERNING DIRECTIVES**

#### 49 CFR 26.29 (b), (c), and (d)

“(b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. You must use one of the following methods to comply with this requirement:

(1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.

(2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.

(3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.

(c) For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.”

(d) Your DBE program must provide appropriate means to enforce the requirements of this section. These means may include appropriate penalties for failure to comply, the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.”

#### 49 CFR 26.37 (b)

“Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (*e.g.*, as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. This mechanism must include a written certification that you have reviewed contracting records and monitored work sites in your state for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of contract performance for other purposes (*e.g.*, close-out reviews for a contract).”

---

---

### **DBEERM9. What steps has the recipient taken to address overconcentration of DBEs in certain types of work?**

#### **BASIC REQUIREMENT**

Recipients must devise appropriate measures to address overconcentration.

#### **APPLICABILITY**

Recipients that meet the DBE threshold

## **DETAILED EXPLANATION FOR REVIEWER**

If the recipient determines that DBE firms are so over concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, they must devise appropriate measures to address this overconcentration.

These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which it has been determined that non-DBEs are unduly burdened. Recipients may also consider varying their use of contract goals, to the extent consistent with 49 CFR 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

Recipients must obtain the approval of the concerned US DOT operating administration for determinations of overconcentration and the measures devised to address it. Once approved, the measures become part of a recipient's DBE program.

## **INDICATORS OF COMPLIANCE**

- a. *How and how often does the recipient perform analyses to determine if overconcentration exists?*

Review Response

- b. *Did the recipient obtain approval from FTA for any determination it made of overconcentration?*

Review Response

- c. *If applicable, what steps were implemented to mitigate overconcentration?*

Review Response

## **INSTRUCTIONS FOR REVIEWER**

Review the recipient's approved DBE program in TrAMS for a description of how overconcentration is addressed. Discuss with the RCRO if the FTA received and/or approved the recipient's determination of overconcentration.

In order to determine if overconcentration exists, recipients should have procedures in place to analyze awards to DBEs and the overall impact on non-DBEs that perform in those work areas. Discuss during the site visit any overconcentration identified. Obtain information that the recipient has implemented its procedures to assess the existence of overconcentration and implemented procedures detailed in its program to address such.

## **POTENTIAL DEFICIENCY DETERMINATION**

The recipient is deficient if it has not taken any steps to analyze DBE achievements in order to conduct an overconcentration analysis. The recipient is deficient if it has not obtained approval from FTA for its determination of overconcentration. The recipient is deficient if it has identified overconcentration, but has not taken steps to mitigate it.

DEFICIENCY CODE DBEERM9-1: Overconcentration analysis incomplete

**SUGGESTED CORRECTIVE ACTION:** The recipient must submit to the FTA RCRO steps to analyze DBE achievements in order to conduct an overconcentration analysis.

The recipient must submit its determination of overconcentration to the FTA RCRO for approval.



The recipient must submit to the FTA RCRO steps implemented to mitigate overconcentration, if identified.

## **GOVERNING DIRECTIVES**

### 49 CFR 26.33

“(a) If you determine that DBE firms are so over concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, you must devise appropriate measures to address this overconcentration.

(b) These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. You may also consider varying your use of contract goals, to the extent consistent with §26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

(c) You must obtain the approval of the concerned DOT operating administration for your determination of overconcentration and the measures you devise to address it. Once approved, the measures become part of your DBE program.”

---

---

## **DBEERM10. Does the recipient implement DBE certification standards and procedures in accordance with the DBE regulation?**

### **BASIC REQUIREMENT**

All US DOT recipients must participate in a Unified Certification Program (UCP) within their state. Recipients that make certification decisions within the UCP must follow the certification standards and procedures as defined in 49 CFR part 26, subparts D and E.

### **APPLICABILITY**

If recipients certify DBEs as a part of their state’s UCP, is it using the correct forms, evaluating personal net worth of the owner(s), conducting site visits, and entering complete information into the UCP directory?

### **DETAILED EXPLANATION FOR REVIEWER**

The regulation requires that all US DOT recipients participate in a UCP within their state. Even if a recipient does not certify DBEs, it is required to be signatory to its state’s UCP agreement. Any recipient that meets the minimum threshold requirements for a DBE program must ensure that only firms certified as eligible DBEs, consistent with the standards of Subpart D, participate as DBEs in their program.

UCPs are required to check the US DOT Departmental Office of Civil Rights (DOCR) DBE Appeals and Denials website at least once every month to determine whether any applying firm or one that was already certified by the UCP is on the list. Additionally, information on denials and decisions of ineligibility must be entered into DOCR DBE Appeals and Denials website.

Refer to question DBE13 in the baseline review.

### **INDICATORS OF COMPLIANCE**

- a. *What certifying authorities make up the recipient’s state’s UCP? How is certification responsibility divided among the UCP certifying members?*

Review Response

- b. *Is the recipient a participant in its state UCP? Does the recipient have a signed Memorandum of Understanding (MOU) with the UCP?*

Review Response

- c. *How often does the UCP convene as a group to discuss certification processes, changes to procedures, or issues?*

Review Response

- d. *What is the UCP's process to remove a firm from the UCP directory? Are non-certifying authorities contacted?*

Review Response

- e. *Does the recipient ensure that it or another representative of the UCP reviews the DOCR DBE Appeals and Denials website to determine whether any firm that is applying for certification or that has already been certified by their UCP has been denied?*

Review Response

- f. *How does the recipient verify the accuracy of the Personal Net Worth (PNW) form by analyzing documents such as: financial statements of all business entities related to the applicant, applicant's business and personal income tax returns and related schedules, personal property and equipment lease documents, promissory notes or financing instruments, and trust agreements?*

Review Response

- g. *Prior to certification, how does the recipient verify DBE firm ownership and control when:*

- *verifying that proof of investment and capitalization to the firm is contained in the record?*
- *ensuring that disadvantaged owners share in the risk and are entitled to the profits and loss commensurate with their ownership interest?*
- *determining whether a potential DBE is an independent business by scrutinizing relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources?*
- *considering whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm?*

- *examining the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm?*
- *considering factors such as the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice?*

Review Response

- h. Have there been issues identified with DBE certifications of the recipient? Does a search of DOCR DBE Appeals and Denials database show a pattern of the recipient's certification decisions being reversed or remanded to the recipient by US DOT?*

Review Response

- i. Does the recipient obtain annual affidavits from each certified DBE affirming that the DBE continues to meet the eligibility criteria of the regulation?*

Review Response

- j. Does the recipient notify DBEs when they have not submitted their annual affidavits on time and determine whether the firm is unwilling to cooperate under §26.109(c)?*

Review Response

- k. Do denial decisions explain the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the decision?*

Review Response

- l. For firms deemed not to be eligible DBEs, were applicable certification denial and decertification (removal of eligibility) procedures followed?*

Review Response

- m. For decertifications, does the recipient provide written notice to the firm proposing to find it ineligible, setting forth the reasons for the proposed determination?*

Review Response

- n. *Do ineligibility notices offer the firms an opportunity for an informal hearing, at which they could respond to the reasons for the proposed removal of eligibility in-person and provide information and arguments concerning why it should remain certified?*

Review Response

- o. *If a hearing was held for an ineligibility decision, was a complete verbatim record of the proceeding maintained?*

Review Response

- p. *If there was a decision to remove a firm's eligibility, did the recipient ensure separation of functions of personnel as specified in §26.87(e)?*

Review Response

- q. *Was the decision to remove a firm's eligibility based on one of the grounds specified in §26.87(f)?*

Review Response

- r. *If decertifications occurred, was there a final written notice provided to the firm explaining the decision and reasons for it, specifically referencing the evidence in the record that supports each reason for the decision?*

Review Response

- s. *Do notices of ineligibility inform the firm of the consequences of the decision and the availability of an appeal to U.S. DOT under §26.89?*

Review Response

- t. *Does the recipient report complete denials and ineligibility determination information to the DOCR's Ineligibility Determination Online database?*

Review Response

- u. *If the recipient accepts a DBE certified out of state without further procedures:*

- *Did it verify a copy of the firm's certification notice from the home state (State A)? See §26.85(b)*

- *Did it verify that a valid certification was obtained from State A before certifying the firm? See §26.85(b)*

Review Response

v. *For an out-of-state DBE, if the recipient chooses not to accept the DBE's home state original certification pursuant to §26.85(c), did it receive all of the supporting documentation such as:*

- *Affidavits of no changes; see §26.83(j))*
- *Notices of Changes; see §26.83(i)*
- *Notices and correspondence with the home state concerning status of application, and status as an applicant in other states;*
- *Evidence of decertification from other states;*
- *A letter of appeal from the firm; and*
- *Sworn affidavit indicating that all information is complete.*
- *If the on-site review is more than three years old, the sworn affidavit should verify that the information in the on-site report is true and correct.*

Review Response

w. *If the recipient denied an out-of-state firm:*

- *Did it specify an appropriate good cause reason per §26.85(d)?*
- *Did it provide the firm with notice, stating the specific reasons why the firm did not meet the requirements?*
- *Along with the notice, did it provide an opportunity for the firm to respond in writing or to request an in-person meeting with the recipient?*
- *If a meeting was requested, did the recipient schedule the meeting within 30 days of receiving the firm's request?*
- *Did the recipient issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later?*

Review Response

### **INSTRUCTIONS FOR REVIEWER**

Review information on the recipient's website and the state's UCP about DBE certification in the state. Review the UCP's memorandum of understanding (or similar document) to assess that the recipient is a

signatory and for a description of how the UCP operates. Review available records of UCP meetings or correspondence to certifying and non-certifying members.

It is important that there is a mechanism for all recipients within a UCP to be made aware of a firm's eligibility removal. Review information (e.g., files, correspondence, records of hearings, UCP directory changes) on DBEs that were decertified (i.e. found to be no longer eligible).

Review any documentation that the DOCR database is being checked each month.

Review three initial DBE certification files to confirm that the certification procedures are in place.

Search the DOCR Appeals database for the recipient to assess frequency of reversed or remanded determinations by the recipient. Review information provided by the FTA regional office and OTrak pertaining to:

- DBE certification deficiencies in the most recent Comprehensive Review
- DBE certification deficiencies in a DBE or UCP review conducted in the past three years
- DBE certification deficiencies in the current annual assessment in OTrak
- Protests or complaints received by FTA related to DBE certification issues

Examine a sample of three annual affidavits for DBE firms that have performed work during the past three years and record the dates that these were submitted. Review the process the recipient implements to obtain annual affidavits.

Obtain a listing of DBEs denied and removed by the recipient within the past two years. Review two DBE denials and two removals to confirm that the certification procedures are in place. Search the DOCR DBE Appeals and Denials database to verify that the appropriate entries have been made for the reviewed firms.

Review the recipient's process for interstate certifications. Review two applications and files of DBEs from out of state to determine how they were processed. Review information (e.g., files, correspondence, UCP directory).

In addition, refer to question DBE13 in the baseline review.

## **POTENTIAL DEFICIENCY DETERMINATIONS**

The recipient is deficient if it does not participate in the UCP in its state.

DEFICIENCY CODE DBEERM10-1: Recipient not participating in UCP

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO evidence that it is participating in its state's UCP.

The recipient is deficient if it does not check the DOCR website monthly.

DEFICIENCY CODE DBEERM10-2: DOCR website not checked for denials

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO procedures for ensuring that the UCP is checking the DOCR website monthly for certification denials.

The recipient is deficient if it is not processing initial certification elements such as evaluation of the PNW, verification of ownership and control in accordance with the 49 CFR part 26, or if USDOT has identified issues with the recipient's initial certification process.

DEFICIENCY CODE DBEERM10-3: DBE initial certifications not adequate

**SUGGESTED CORRECTIVE ACTION:** The recipient must submit to the FTA RCRO procedures for ensuring that the initial certification decisions are made in compliance with 49 CFR part 26.

The recipient is deficient if it is not obtaining and reviewing annual affidavits of no change or making appropriate 'unwilling to cooperate' determinations.

DEFICIENCY CODE DBEERM10-4: DBE annual affidavit process not adequate

**SUGGESTED CORRECTIVE ACTION:** The recipient must submit to the FTA RCRO procedures for ensuring that the process for evaluating annual affidavits for no change is in compliance with 49 CFR part 26.

The recipient is deficient if its denials do not specifically reference supporting evidence.

DEFICIENCY CODE DBEERM10-5: DBE certification denials not adequate

**SUGGESTED CORRECTIVE ACTION:** The recipient must submit to the FTA RCRO procedures for ensuring that the process for processing denials is in compliance with 49 CFR part 26.

The recipient is deficient if the process it uses for removing a DBE's eligibility does not include providing a written notice of intent, the opportunity for an informal hearing at which a record of the proceedings was maintained, separation of functions, conformance with appropriate grounds, a final written notice, and provision of information on appeals to USDOT.

DEFICIENCY CODE DBEERM10-6: DBE certification removals not adequate

**SUGGESTED CORRECTIVE ACTION:** The recipient must submit to the FTA RCRO procedures for ensuring that the process for removing DBE eligibility is in compliance with 49 CFR part 26.

The recipient is deficient if it does not report complete denial and ineligibility information in DOCR DBE Appeals and Denials database.

DEFICIENCY CODE DBEERM10-7: Information entered into USDOT DBE database inadequate

**SUGGESTED CORRECTIVE ACTION:** The recipient must submit to the FTA RCRO procedures for ensuring that information on denials and removals is entered correctly to the DOCR DBE Appeals and Denials database in compliance with 49 CFR part 26.

The recipient is deficient if it is not making interstate DBE certification decisions in accordance with 49 CFR 26.85.

DEFICIENCY CODE DBEERM10-8: Interstate DBE certification determination deficiencies

**SUGGESTED CORRECTIVE ACTION:** The recipient must submit to the FTA RCRO procedures for ensuring that it is making determinations for interstate certification applications in compliance with 49 CFR 26.85.

## **GOVERNING DIRECTIVES**

49 CFR part 26.67

“(a) (2)(i) You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed \$1.32 million.

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

(iii) In determining an individual's net worth, you must observe the following requirements:

(A) Exclude an individual's ownership interest in the applicant firm;

(B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(C) Do not use a contingent liability to reduce an individual's net worth.

(D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(iv) Notwithstanding any provision of Federal or State law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under §26.89 of this part or to any other State to which the individual's firm has applied for certification under §26.85 of this part.

(b) *Rebuttal of presumption of disadvantage.* (1) An individual's presumption of economic disadvantage may be rebutted in two ways.

(i) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

*Example to paragraph (b)(1)(i):* An individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than \$1.32 million. However, the person's assets collectively (e.g., high income level, a very expensive house, a yacht, extensive real or personal property holdings) may lead a reasonable person to conclude that he or she is not economically disadvantaged. The recipient may rebut the individual's presumption of economic disadvantage under these circumstances, as provided in this section, even though the individual's PNW is less than \$1.32 million.

(ii)(A) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination, as a certifying agency, you may consider factors that include, but are not limited to, the following:



(1) Whether the average adjusted gross income of the owner over the most recent three year period exceeds \$350,000;

(2) Whether the income was unusual and not likely to occur in the future;

(3) Whether the earnings were offset by losses;

(4) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;

(5) Other evidence that income is not indicative of lack of economic disadvantage; and

(6) Whether the total fair market value of the owner's assets exceed \$6 million.

(B) You must have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of §26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage, so long as his or her PNW remains above that amount.

(c) *Transfers within two years.* (1) Except as set forth in paragraph (c)(2) of this section, recipients must attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of recipient's review of the firm's annual affidavit, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients must not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.”

49 CFR 26.69

“(c) (3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

(e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan....

(h)(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is—

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that—

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.”

#### 49 CFR 26.71

“(a) In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

(b) Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

(3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

(4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

(c) A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in §26.69(j)(2).

(d) The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the

firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

(h) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

(i)(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

(j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(k)(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

(l) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any

capacity, there is a rebuttable presumption of control by the non-disadvantaged individual unless the disadvantaged individual now owning the firm demonstrates to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

(m) In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

(n) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You must not require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(1) The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available NAICS code for that type of work. If you choose, you may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. If your Directory does not list types of work for any firm in a manner consistent with this paragraph (a)(1), you must update the Directory entry for that firm to meet the requirements of this paragraph (a)(1) by August 28, 2011.

(2) Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

(3) If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

(4) A certifier is not precluded from changing a certification classification or description if there is a factual basis in the record. However, certifiers must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality,

advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.”

49 CFR 26.81(a)

“You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).”

49 CFR 26.83(j)

“If you are a DBE, you must provide to the recipient, 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 or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts (e.g., submission of Federal tax returns). If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under §26.109(c).”

49 CFR 26.85

(a) This section applies with respect to any firm that is currently certified in its home state.

(b) When a firm currently certified in its home state (“State A”) applies to another State (“State B”) for DBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures.

(1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.

(2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A's electronic directory or obtaining written confirmation from State A.

(c) In any situation in which State B chooses not to accept State A's certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your firm's certification. This includes affidavits of no change (see §26.83(j)) and any notices of changes (see §26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A's UCP or any other recipient concerning your application or status as a DBE firm.

(2) You must also provide to State B any notices or correspondence from states other than State A relating to your status as an applicant or certified DBE in those states. For example, if you have been denied certification or decertified in State C, or subject to a decertification action there, you must inform State B of this fact and provide all documentation concerning this action to State B.

(3) If you have filed a certification appeal with DOT (see §26.89), you must inform State B of the fact and provide your letter of appeal and DOT's response to State B.

(4) You must submit an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

(i) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by §26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct.

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (see §26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by "State A" or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) Determine whether there is good cause to believe that State A's certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

(i) Evidence that State A's certification was obtained by fraud;

(ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;

(iii) State A's certification was factually erroneous or was inconsistent with the requirements of this part;

(iv) The State law of State B requires a result different from that of the State law of State A.

(v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(3) If, as State B, unless you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms.

(4) If, as State B, you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility, or both. If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the firm's request.

(iii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B's notice. The firm is not otherwise responsible for further demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.

(v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.

(vi) The firm's application for certification is stayed pending the outcome of this process.

(vii) A decision under this paragraph (d)(4) may be appealed to the Departmental Office of Civil Rights under s§26.89 of this part.

(e) As State B, if you have not received from State A a copy of the site visit review report by a date 14 days after you have made a timely request for it, you may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.

(f)(1) As a UCP, when you deny a firm's application, reject the application of a firm certified in State A or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm, in whole or in part, you must make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. You must enter the following information:

- (i) The name of the firm;
- (ii) The name(s) of the firm's owner(s);
- (iii) The type and date of the action;
- (iv) The reason for the action.

(2) As a UCP, you must check the DOCR Online Database at least once every month to determine whether any firm that is applying to you for certification or that you have already certified is on the list.

(3) For any such firm that is on the list, you must promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, you must provide a copy of the decision to the requesting UCP within 7 days of receiving the request. As the UCP receiving the decision, you must then consider the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.”



49 CFR 26.86

“(a) When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

(b) [Reserved]

(c) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your DBE program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm. An applicant's appeal of your decision to the Department pursuant to §26.89 does not extend this period.

(d) When you make an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under §26.89.”

49 CFR 26.87

“(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in §26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, 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. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. 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.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified 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. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

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

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (i.e., an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information relevant to eligibility that has been concealed or misrepresented by the firm;

(4) A change in the certification standards or requirements of the Department since you certified the firm;

(5) Your decision to certify the firm was clearly erroneous;

(6) The firm has failed to cooperate with you (see §26.109(c));

(7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see §26.73(a)(2)); or

(8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.

(h) [Reserved]

(i) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(j) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) Exception: If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(k) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under §26.89."

---

---

## REFERENCES

1. 2 CFR Parts 200 and 1201, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards"
2. 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs"

**USEFUL WEBLINKS**

1. FTA DBE Website
2. Official Questions and Answers for DBE Program Regulation (49 CFR Part 26)

**EXHIBIT 8.1 DBE THREE-YEAR GOAL ATTAINMENT**

*Note: This table is to be completed by the reviewer.*

<b>Fiscal Year 20XX Goal:</b>		<b>1</b>	<b>2</b>	<b>3</b>
<b>Fiscal Year 20XX RC Goal:</b>		<b>1</b>	<b>2</b>	<b>3</b>
	<b>DBE Uniform Report</b>	<b>June 1</b>	<b>Dec. 1</b>	<b>(1+2)</b>
	<b>DBE Uniform Report</b>	<b>June 1</b>	<b>Dec. 1</b>	<b>Totals</b>
A.	Total dollars awarded to DBE Prime Contractors ( <i>Line 8C</i> )			
B.	Total dollars awarded to DBE Subcontractors ( <i>Line 9C</i> )			
C.	Total dollars awarded to DBEs ( <b>A3+B3</b> )			
D.	Total prime contract dollars awarded ( <i>Line 8A</i> )			
E.	Total Race Conscious contracting dollars awarded to DBEs ( <i>Line 9E</i> )			
F.	Annual Percentage of awards using Race Conscious goals ( <b>E3/D3</b> )			
G.	Annual Percentage Awarded ( <b>C3/D3</b> )			
<b>Fiscal Year 20XX Goal:</b>		<b>1</b>	<b>2</b>	<b>3</b>
<b>Fiscal Year 20XX RC Goal:</b>		<b>1</b>	<b>2</b>	<b>3</b>
	<b>DBE Uniform Report</b>	<b>June 1</b>	<b>Dec. 1</b>	<b>(1+2)</b>
	<b>DBE Uniform Report</b>	<b>June 1</b>	<b>Dec. 1</b>	<b>Totals</b>
A.	Total dollars awarded to DBE Prime Contractors ( <i>Line 8C</i> )			
B.	Total dollars awarded to DBE Subcontractors ( <i>Line 9C</i> )			
C.	Total dollars awarded to DBEs ( <b>A3+B3</b> )			
D.	Total prime contract dollars awarded ( <i>Line 8A</i> )			
E.	Total Race Conscious contracting dollars awarded to DBEs ( <i>Line 9E</i> )			

**EXHIBIT 8.1 DBE THREE-YEAR GOAL ATTAINMENT**

*Note: This table is to be completed by the reviewer.*

F.	Annual Percentage of awards using Race Conscious goals (E3/D3)			
G.	Annual Percentage Awarded (C3/D3)			
<b>Fiscal Year 20XX Goal:</b>		<b>1</b>	<b>2</b>	<b>3</b>
<b>Fiscal Year 20XX RC Goal:</b>				<b>(1+2)</b>
	<b>DBE Uniform Report</b>	<b>June 1</b>	<b>Dec. 1</b>	<b>Totals</b>
A.	Total dollars awarded to DBE Prime Contractors (Line 8C)			
B.	Total dollars awarded to DBE Subcontractors (Line 9C)			
C.	Total dollars awarded to DBEs (A3+B3)			
D.	Total prime contract dollars awarded (Line 8A)			
E.	Total Race Conscious contracting dollars awarded to DBEs (Line 9E)			
F.	Annual Percentage of awards using Race Conscious goals (E3/D3)			
G.	Annual Percentage Awarded (C3/D3)			