



SunLine Transit Agency
July 24, 2024
11:10 a.m. – 11:30 a.m.

AGENDA

BOARD OPERATIONS COMMITTEE

Wellness Room
32-505 Harry Oliver Trail
Thousand Palms, CA 92276

NOTICE TO THE PUBLIC

SunLine has discontinued its COVID-19 Emergency Declaration and has returned its Board and Board Committee meetings to live and in-person attendance at the location noted above. These meetings are no longer available for viewing, attendance, or comment by two-way audiovisual platform, two-way telephonic service, webcasting, or streaming video broadcast. SunLine may prepare audio or video recordings of Board meetings. In accordance with the Brown Act and California Public Records Act, these recordings are subject to public inspection for a period for thirty (30) days after the meeting.

In compliance with the Brown Act, agenda materials distributed 72 hours or less prior to the meeting, which are public records relating to open session agenda items, will be available for inspection by members of the public prior to or at the meeting at SunLine Transit Agency's Administration Building, 32505 Harry Oliver Trail, Thousand Palms, CA 92276 and on the Agency's website, www.sunline.org.

In compliance with the Americans with Disabilities Act, Government Code Section 54954.2, and the Federal Transit Administration Title VI, please contact the Clerk of the Board at (760) 343-3456 if special assistance is needed to participate in a Board meeting, including accessibility and translation services. Notification of at least 72 hours prior to the meeting time will assist staff in assuring reasonable arrangements can be made to provide assistance at the meeting.

ITEM

RECOMMENDATION

1. CALL TO ORDER
2. FLAG SALUTE
3. ROLL CALL
4. PRESENTATIONS

<u>ITEM</u>	<u>RECOMMENDATION</u>
5. FINALIZATION OF AGENDA	
6. PUBLIC COMMENTS	RECEIVE COMMENTS
NON AGENDA ITEMS Members of the public may address the Committee regarding any item within the subject matter jurisdiction of the Committee; however, no action may be taken on off-agenda items unless authorized. Comments shall be limited to matters not listed on the agenda. Members of the public may comment on any matter listed on the agenda at the time that the Board considers that matter. Comments may be limited to 3 minutes in length.	
7. COMMITTEE MEMBER COMMENTS	RECEIVE COMMENTS
8. REVISED DRUG & ALCOHOL POLICY NO. B-010394 (Staff: Bryan Valenzuela, Chief Safety Officer)	APPROVE (PAGE 3-48)
9. REGULATION AND PROHIBITION OF PASSENGER CONDUCT ORDINANCE 2024-01 (Staff: Bryan Valenzuela, Chief Safety Officer)	APPROVE (PAGE 49-61)
10. APPROVE DISADVANTAGED BUSINESS ENTERPRISE (DBE) PARTICIPATION GOAL AND DBE PROGRAM UPDATE (Staff: Tina Hamel, Chief Administrative Officer)	APPROVE (PAGE 62-314)
11. ADJOURN	

SunLine Transit Agency

DATE: July 24, 2024 **ACTION**

TO: Board Operations Committee
Board of Directors

FROM: Bryan Valenzuela, Chief Safety Officer

RE: Revised Drug & Alcohol Policy No. B-010394

Recommendation

Recommend that the Board of Directors approve the updates made to SunLine Transit Agency's Drug and Alcohol Policy No. B-010394.

Background

SunLine Transit Agency has recently updated its Drug & Alcohol Policy to align with Assembly Bill 2188 (AB 2188), which amended the California Fair Employment and Housing Act. This amendment prohibits discrimination against applicants or employees for:

1. Using cannabis outside of work and away from the workplace.
2. Failing employer-required drug tests that screen for nonpsychoactive cannabis metabolites.

It's important to note that these requirements apply exclusively to Non-Safety Sensitive personnel. The revisions made to the policy to reflect these updates are summarized below:

1. Definition Changes:
 - The definition of "Drugs" now includes 6-AM Analyte (Heroin Specific), Hydrocodone/Hydromorphone, and Oxycodone/Oxymorphone.
2. Additional Policy Changes:
 - Inclusion of Safety Officers as safety-sensitive positions.
 - Amendment to section 9.0 "Drugs (or the metabolites) Tested For" to specify:
 - a. The Agency will test DOT-regulated employees for the following drugs and their metabolites, as listed within Title 49 CFR Part 40.85, which has been incorporated into this Policy as written and revised: 6-AM Analyte (Heroin Specific), Hydrocodone/Hydromorphone,

Oxycodone/Oxymorphone, Marijuana, Cocaine, Amphetamines, Phencyclidine, and Opioids.

- b. The Agency will test non-DOT-regulated employees for the following drugs and their metabolites, which has been incorporated into this Policy as written and revised: 6-AM Analyte (Heroin Specific), Amphetamine, Barbiturates, Benzodiazepines, Cocaine, Methadone (Dolophine), Methamphetamine, Methaqualone (Quaalude), Opioids – 4, Phencyclidine, Propoxyphene MTB (Darvon/Darvocet).

These updates ensure compliance with AB 2188 and aim to maintain a safe and fair workplace environment for all SunLine Transit Agency employees.

Financial Impact

No financial impact

Attachments:

- [Item 8a](#) – Redlined Copy of Drug and Alcohol Policy No. B-010394
- [Item 8b](#) – Drug and Alcohol Policy No. B-010394 (Redlined Changes Accepted)

DRUG & ALCOHOL POLICY

1.0 POLICY STATEMENT

SunLine Transit Agency (SunLine) is dedicated to providing safe, dependable and efficient transportation services to our passengers and the citizens of the Coachella Valley. Agency employees are our most valuable resource, and it is our goal to provide a healthy and satisfying, working environment that promotes personal opportunities for growth. We also recognize that our employees' use of illegal drugs and misuse of alcohol poses a significant risk to public safety, reduces productivity in the workplace, and negatively affects the employee's health and well being. In view of this, the Agency has adopted this policy that is designed to

1. Create a work environment free from the adverse effects of drug abuse and alcohol misuse;
2. Deter and detect employee's use of illegal drugs and misuse of alcohol;
3. Prohibit the unlawful manufacture, distribution, dispensing, possession, or use of controlled substances;
4. Encourage employees to seek professional assistance anytime personal problems, including drug or alcohol dependency, adversely affect their ability to safely perform their assigned duties; and
5. Discipline employees who violate the policy, up to and including termination.

1.1 Proper Application of the Policy

SunLine Transit Agency is dedicated to assuring fair and equitable application of this substance abuse policy. Therefore, supervisors/managers are required to use and apply all aspects of this policy in an unbiased and impartial manner. Any supervisor/manager who knowingly disregards the requirements of this policy, or who is found to deliberately misuse the policy in regard to subordinates, shall be subject to disciplinary action, up to and including termination.

1.2 Policy Amendments

Amendments that represent major management policy change will be approved by the SunLine Board of Directors. The CEO/General Manager may issue amendments, which are required because of changes in Federal or State law or regulation. All amendments require the review of SunLine Counsel for legal sufficiency.

2.0 PURPOSE

The purpose of this policy is to assure worker fitness for duty and to protect our employees, passengers, and the public from the safety and health risks posed by the misuse of alcohol and use of prohibited drugs. This policy is intended to comply with all applicable state and Federal regulations governing workplace anti-drug use and alcohol misuse programs. They include DOT 49 CFR Part 40, as amended ("Procedures for Transportation Workplace Drug and Alcohol Testing Programs"); FTA 49 CFR Part 655, as amended ("Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations"); DOT 49 CFR Part 29 (Drug-Free Workplace Act of 1988); and CA Govt. Code Section 8350 et seq. ("Drug Free Workplace Act of 1990"). This policy incorporates the requirements of the above regulations for safety-sensitive employees and others when so noted. **Policies indicated in bold text represent SunLine Transit Agency authority.** Requirements of the Drug-Free Workplace Act of 1988 (DFWA) are entered in *Italics*.

3.0 APPLICABILITY

Unless otherwise noted in specific provisions, this policy applies to all employees (including contract employees) regardless of their functions. The application of this policy to non-safety-sensitive employees comes under the Agency's own authority. Visitors, invitees, and vendors also are prohibited from entering the premises and/or from conducting any work on behalf of the Agency when illegal substances are present in their system, or the odor of alcohol is present on their breath. This policy applies to off site lunch periods or other authorized breaks when an employee is scheduled to return to work or is on-call.

Contractors that provide safety-sensitive work for the Agency (e.g. transporting vehicles for maintenance purposes) are not covered by this policy; but they are required to provide proof to STA that they have a drug and alcohol testing program that complies with the minimum requirements of Part 40 and Part 655.

4.0 PRE-EMPTION OF STATE AND LOCAL LAWS

If any conflict occurs between this policy, State and local laws and any requirement of Federal regulations, the Federal regulations prevail. However, Federal regulations do not pre-empt provisions of State criminal laws that impose sanctions for reckless conduct attributed to prohibited drug use or alcohol misuse, whether the provisions apply specifically to transportation employees, employers, or the public in general.

5.0 DEFINITIONS

The definitions in this policy are intended to track those described in the Federal Regulations specified in Section 2.0.

Adulterated Specimen: A specimen that has been altered, as evidenced by test results showing either a substance that is not a normal constituent for that type of specimen or showing an abnormal concentration of an endogenous substance.

Alcohol Use: The drinking or swallowing of any beverage, liquid mixture or preparation (including any medication) containing alcohol. For purposes of this policy, alcohol is alcohol regardless of source.

Alcohol Screening Device (ASD): A breath or saliva device, other than an EBT, that is approved by the National Highway Traffic Safety Administration (NHTSA) and appears on ODAPC's Web page for "Approved Screening Devices to Measure Alcohol in Bodily Fluids" because it conforms to the model specifications from NHTSA

Breath Alcohol Technician (BAT): An individual who instructs and assists employees or applicants in the alcohol testing process and operates an Evidential Breath Testing (EBT) device.

Canceled Test: A drug or alcohol test that has a problem identified that cannot be or has not been corrected, or which Part 40 requires to be canceled. A canceled test is neither a positive nor a negative test.

Collection Site: A place designated by the Agency where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs, and/or measure for alcohol by an evidential breath testing device.

Collector: A person who instructs and assists individuals at a collection site, who receives and makes an initial inspection of the specimen provided by the individual, and who initiates and completes the Custody and Control Form (CCF).

Covered Employee: A person, including a volunteer, applicant / transferee, or contract employee, who performs or is required to perform a safety-sensitive function for the Agency.

Designated Employer Representative: An employee or employees authorized by the Agency to take immediate action(s) to remove employees from safety-sensitive duties, or cause employees to be removed from these covered duties, following a positive test, test refusal, or other policy violations.

DHHS: Department of Health and Human Services.

Disabling Damage: Damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs, including damage to motor vehicles that could have been driven, but would have been further damaged if so driven. "Disabling damage" does not include:

- Damage which can be remedied temporarily at the scene of the accident without special tools or parts.
- Tire disablement without other damage even if no spare tire is available.
- Headlamp or taillight damage.
- Damage to turn signals, horn, or windshield wipers, which makes them inoperable.

DOT: U.S. Department of Transportation.

Drugs: ~~The drugs for which tests are required under this part and DOT agency regulations are marijuana, cocaine, amphetamines, phencyclidine (PCP), and opioids.~~

The drugs for which tests are required by DOT agency regulations are 6-AM Analyte (Heroin Specific), Hydrocodone/Hydromorphone, Oxycodone/Oxymorphone, marijuana, cocaine, amphetamines, phencyclidine (PCP), and opioids.

Drug Abuse: Use of any illegal drug or controlled substance without a valid prescription, misuse of legally prescribed drugs, or use of illegally obtained prescription drugs. This includes use of prescription drugs legally prescribed to another Individual or simply having any detectable amount of an illegal drug within your bodily system.

Evidential Breath Testing (EBT) Device: A device that is approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath at the .02 and .04 alcohol concentrations, and appears on ODAPC's Web page for "Approved Evidential Breath Measurement Devices" because it conforms with the model specifications available from NHTSA.

FTA: Federal Transit Administration; an agency in the U.S. Department of Transportation.

Invalid Drug Test: The result reported by an HHS-certified laboratory in accordance with the criteria established by HHS Mandatory Guidelines when a positive, negative, adulterated, or substituted result cannot be established for a specific drug or specimen validity test.

Medical Prescriptions: A medication prescription written by a physician which indicates the employee's name, date, substance, dosage (quantity or amount to be taken), and period of authorization. It is a violation of this policy to use any controlled substance that is inconsistent with the prescription. Please note that the legality of a prescribed medication is based on U.S. federal law; for example, a prescription for "medical marijuana" under California code is not recognized by the DOT/FTA.

Medical Review Officer (MRO): A licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory drug test results, who has knowledge of substance abuse disorders, and has the appropriate medical training to interpret and evaluate medical explanations for certain drug test results.

Positive Alcohol Test: The presence of alcohol in the body at a blood alcohol concentration (BAC) of 0.04 or greater as measured by an EBT device.

Positive Drug Test: The result reported by an HHS-certified laboratory when a specimen contains a drug or drug metabolite equal to or greater than the cutoff concentration.

Public Transportation Vehicles: Vehicles used for public transportation or ancillary services. They include buses, electric buses, vans, automobiles, rail cars, trolley cars, trolley buses or vessels, non-revenue commercial motor vehicles, and vehicles used by armed security personnel.

Refusal to Test: Includes circumstances or behaviors such as:

- Failure to appear or reporting late for any test (except pre-employment for the newly hired) requested by the agency.
- Failure to remain at the testing site until the testing process is completed,
- Failure to provide a urine, breath, or saliva specimen as required by DOT Part 40.
- Failure to permit the direct observation or monitoring of specimen collection when it is required under Title 49 CFR Part 40.
- Failure to provide a sufficient amount of urine or breathe specimen without a valid medical explanation.
- Failure or refusal to take a second test when required.

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- Failure to undergo a medical evaluation when required.
 - Failure to cooperate with the testing process. (Examples: refusal to empty pockets when requested, failure to wash hands after being directed to do so by the collector, or behaving in a confrontational manner that disrupts the collection process).
 - In alcohol testing, refusal to sign the Alcohol Test Form.
 - For an observed collection, failure to follow the observer's instructions to raise clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if employee is wearing any type of prosthetic or other device that could be used to interfere with the collection process.
 - Possession or wearing of a prosthetic or other device that could be used to interfere with the collection process.
 - Admitting adulteration or substitution to the collector or the MRO.
 - Leaving the scene of an accident without just cause prior to submitting to a test.
 - If the MRO reports a verified adulterated or substituted test result.

Note: A refusal to test carries the same consequences as a positive test result.

Split specimen: In drug testing, a part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second DHHS-certified laboratory for testing upon employee request following a verified positive or a verified adulterated or substituted test result from the primary specimen.

Substance Abuse Professional (SAP): A person who evaluates employees who have violated a DOT drug and alcohol regulation and makes recommendation concerning education, treatment, follow-up testing, and aftercare. Any SAP obtained must meet the Part 40 qualification requirements PRIOR to use with any Return to Duty process.

Substituted Specimen: A specimen with creatinine and specific gravity values that are so diminished or so divergent that they are not consistent with normal human urine.

6.0 EDUCATION AND TRAINING

The education and ongoing awareness component of this policy will include display of posters, distribution to all covered employees and representatives of employee organizations of the drug and alcohol policy and other informational

materials, and periodic information seminars. Each employee will be required to sign an acknowledgment form that he/she received a copy of the policy.

As required by FTA regulations, the Agency will provide to all safety-sensitive employees a minimum of 60 minutes of training on the effects and consequences of prohibited drug use on personal health, safety, and the work environment, and on the signs and symptoms that may indicate prohibited drug use.

Supervisors or Agency officials who may make reasonable suspicion referrals shall receive an additional 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use, and at least 60 minutes on the physical, behavioral, speech and performance indicators of probable alcohol misuse.

7.0 CONTACT PERSONS

Any questions about this policy or any aspect of the SunLine's drug and alcohol-free program should be referred to:

Title: Drug and Alcohol Program Manager
Address: 32505 Harry Oliver Trail
Thousand Palms, CA 92276
Telephone Number: (760) 343-3456
Fax Number: (760) 343-4547

8.0 COVERED EMPLOYEES

As a condition of employment, all safety sensitive employees are required to submit to drug and alcohol tests administered in accordance with Title 49 CFR Parts 40 and 655. (**Non- safety-sensitive employees are covered under this Policy under the Agency's own authority.**) A refusal to submit to a test as directed will carry the same consequences as a positive test result as stated in this policy. (Please refer to Section 5.0 - DEFINITIONS for specific circumstances or behaviors that are considered refusal to test.)

As defined by the FTA, safety-sensitive employees include those who perform, or may be called upon to perform, any of the following safety-sensitive functions:

1. Operating a revenue service vehicle, even when it is not in revenue service;
2. Operating a non-revenue service vehicle which is required to be operated by a Commercial Driver's License (CDL) holder;

3. Controlling dispatch or movement of a revenue service vehicle;
4. Maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service;
5. Carrying a firearm for security purposes;

The Agency has determined that the job classifications listed below are considered safety-sensitive for the purposes of this policy.

- Training Supervisor
- Transportation Supervisor
- Maintenance Supervisor
- Dispatcher
- **Safety Officers**
- Bus Operator
- Mechanic
- Utility Worker
- Contracted transit services personnel

Company, Non-DOT regulated positions are:

- **Operators of any company vehicle not requiring a Commercial Driver License to operate**
- **Operators of company machinery or equipment**
- **Any employee deemed by the Agency to be working in a potentially hazardous work environment.**

9.0 DRUGS (OR THEIR METABOLITES) TESTED FOR

~~The agency will test for the following drugs and their metabolites, as listed within Title 49 CFR Part 40.85, which has been incorporated into this Policy as written and revised: Marijuana, Cocaine, Amphetamines, Phencyclidine, and Opioids. This Policy shall apply to all DOT Regulated employees as well as **Non-DOT Regulated employees.**~~

The agency will test DOT- regulated employees for the following drugs and their metabolites, as listed within Title 49 CFR Part 40.85, which has been incorporated into this Policy as written and revised:6-AM Analyte (Heroin Specific), Hydrocodone/Hydromorphone, Oxycodone/Oxymorphone, Marijuana, Cocaine, Amphetamines, Phencyclidine, and Opioids.

The agency will test non-DOT-regulated employees for the following drugs and their metabolites, which has been incorporated into this Policy as written and revised: 6-AM Analyte (Heroin Specific), Amphetamine, Barbiturates, Benzodiazepines, Cocaine, Methadone (Dolophine), Methamphetamine, Methaqualone (Quaalude), Opioids – 4, Phencyclidine, Propoxyphene MTB (Darvon/Darvocet).

10.0 PROHIBITED CONDUCT/BEHAVIORS

*Under the Drug-Free Workplace Act of 1988, employees are prohibited from the unlawful manufacture, distribution, sale, dispensation, possession, or use of controlled substances in the workplace. **Under its own authority, SunLine Transit also prohibits such activities in Agency vehicles, when the employee is in uniform whether on or off duty, or while on Agency business.** Employees are required to notify management in writing of any criminal drug statute conviction he/she received for a violation occurring in the workplace, no later than five (5) calendar days after such a conviction.*

Violation of this policy or failure to notify the agency of such shall subject the employee to disciplinary action, up to and including termination.

*Within 10 calendar days of receiving such notice, Sunline shall provide written notification of the conviction to the FTA. Within 30 days of receiving notice of the conviction, Sunline shall take appropriate disciplinary action, up to and including termination of the employee, or require the employee to participate and successfully complete a drug rehabilitation program. **Law enforcement shall be notified, as appropriate, where criminal activity is suspected.***

10.1 Illegal Drugs

Any drug found within the employee's bodily system that, if possessed, would otherwise violate any Federal, State or Local law. This includes, but is not limited to those prohibited drugs referred to in Section 9.0. These drugs are illegal and employees are prohibited from consuming any of them at all times, on or off duty. Employees may be tested for illegal drugs anytime they are on duty or while on compensable work time.

10.2 Prescription or Over-the-Counter Medications

Under Agency policy, the appropriate use of legally prescribed drugs and non-prescription medications is not prohibited. However, safety-sensitive

employees must notify the Human Resources Department prior to performing any “safety-sensitive” job for the Agency, and may not perform any safety function if their medication carries a warning label that mental functioning, motor skills or judgment may be adversely affected, unless the medication is being used in accordance with the instructions of a physician who has provided a written determination that the substance will not adversely affect the employee's ability to safely perform safety-sensitive duties. It is the employee's responsibility to determine from his or her physician or practitioner whether or not the substance may impair job performance. Failure to immediately report the use of impairing drugs or failure to provide a valid evidence of medical authorization will result in disciplinary action, up to and including termination.

A prescription is considered valid only if it is in writing and indicates the employee's name, date, the name of the substance, quantity or amount to be taken, and the period of authorization. Controlled substances obtained legally outside the United States are not considered valid medical prescriptions under this policy. It is a violation of this policy to use any controlled substance in a manner that is inconsistent with the prescription or is being used in violation of any Federal, State or Local law (i.e.: using another’s prescribed medications or medications from a foreign country).

10.3 Alcohol

Safety-sensitive employees are prohibited from consuming alcohol in any form under the following circumstances:

- While performing safety-sensitive functions;
- Within four (4) hours prior to performing safety-sensitive functions;
- While they are on call; or
- Within eight (8) hours following an accident requiring a post-accident alcohol test, unless the test was completed within 8 hours, whichever occurs first.

If an employee on call discloses alcohol consumption when called for duty, the Agency may require the employee to report to the collection site for alcohol testing to determine ability to perform a safety-sensitive function. If the employee tests below 0.02, he or she may be required to report to work

In addition, the Agency under its own authority prohibits possession and/or use of alcoholic beverages by any employee while on compensable work time, or while on Agency property or while operating any Agency vehicles-regardless of whether the employee is on or off duty. The Agency may perform an alcohol or drug test anytime an employee is on duty. An alcohol test is considered positive if the employee's alcohol concentration rate, as measured by an evidential breath testing device, is at 0.04 or

greater.

11.0 TYPES OF TESTING

11.1 Pre-Employment Testing

All safety sensitive candidates issued a conditional offer for employment or any employee transferring from a non-safety-sensitive to a safety-sensitive position will be required to undergo pre-employment drug and Breath alcohol tests at a time and place designated by the Agency.

Additionally, any safety-sensitive employee who has not performed any safety-sensitive function for at least 90 days and has been out of the random pool during that time will also be required to submit to a new Pre-Employment test prior to being allowed to perform any safety-sensitive work.

Pre-employment alcohol testing for non-safety sensitive positions is optional and at the discretion of SunLine Transit Agency. Any applicant testing positive during the hiring process will not be hired.

A verified negative drug test result and alcohol test result below 0.02 must be received by the Agency before an employee can start work for the Agency. If a pre-employment test is canceled, the individual will be required to undergo another test and successfully pass these tests with a verified negative result and have an alcohol test result below 0.02. Any MRO verified result of "Positive", "Adulterated", "Substituted" or "Refusal to Test" will immediately disqualify the applicant/employee from further employment with the Agency.

Subject to the candidate's written consent, the Agency will check on the drug and alcohol testing background of candidates and employees being considered for final selection into any safety sensitive position within the Agency, if they previously worked in a safety-sensitive position for a DOT-covered employer in the previous two years. If the individual refuses to provide the written consent, he or she will not be hired into the safety-sensitive position.

If the information obtained from the previous DOT-covered employer(s) indicates a violation of a DOT drug or alcohol testing rule, the employee may not be allowed to perform any safety-sensitive function unless he or she has successfully complied with the return-to-duty requirements of a D.O.T.-qualified Substance Abuse Professional (SAP) and has been cleared, in writing, by the SAP to resume D.O.T. regulated duties. If the individual has had a positive pre-employment drug or alcohol test, or has refused such a test, he or she will not be hired until and unless the individual has provided a documentation of successful completion of the return-to-duty process, which includes a SAP referral, evaluation and treatment plan.

11.2 Reasonable Suspicion Testing

It is the responsibility of any employee who observes or has knowledge of another employee in a condition which may impair his or her ability to safely and effectively perform his or her duties, or may pose a safety hazard to self or others, to promptly report the incident to his or her supervisor, or any supervisor if the immediate supervisor is not available.

Whenever a supervisor (or other Agency official) has reason to believe that an employee has used a prohibited drug and/or engaged in alcohol misuse, reasonable testing will be conducted. The individual who makes the referral need not be the employee's own supervisor, as long as he or she is a trained supervisor or agency official that received training in detecting the signs and symptoms of drug use and alcohol misuse. The supervisor's or Agency official's observations will be documented and such documentation shall be kept in the employee's confidential drug and alcohol testing file. Such documentation shall describe and document the following:

- a) the date and time observations were made;
- b) specific, contemporaneous and articulable observations concerning the employee's appearance, behavior, speech, body odors and/or performance;
- c) violation of a safety rule, or other unsafe work incident; and/or
- d) other physical, behavioral, speech, body odors or performance indicators of drug or alcohol use.

Suspicion is not considered reasonable, and thus not a basis for testing, if it is based solely on the observations and reports of third parties, a violation of a safety rule, or occurrence of an unsafe work incident. However, such suspicion may be a basis for further investigation, or for action to protect the safety of patrons, such as ordering the employee to stop work.

Once a supervisor or Agency official has made a reasonable suspicion determination, he or she must remove the employee from performing any safety-sensitive functions, transport the employee to the testing site immediately, and arrange for the employee's transportation to their home. The employee will remain out of service and on paid status while awaiting test results, unless the employee is suspended for any additional purposes concurrent with the waiting for the test results. If all test results are negative, the employee will be immediately returned to work. If the alcohol test result is positive, or the drug test result is non-negative (positive, adulterated, or substituted), the employee will be placed on unpaid status pending disciplinary action. Non-safety-sensitive employees will be tested in situations after an on-the-job injury or a reasonable suspicion situation has occurred, when the employee's performance or behavior may have

contributed to the job injury or may jeopardize employee health & safety.

FTA rule requires that a reasonable suspicion alcohol test be conducted only if the reasonable suspicion observation is made just before, during, or just after the employee's performance of safety-sensitive function. **However, under the Agency's own authority, a reasonable suspicion alcohol test may be performed any time the employee is on duty.** If the alcohol test is not conducted within two hours, the reason for the delay must be documented and kept in the employee's reasonable suspicion test file. All attempts to complete the alcohol test must cease after eight hours and the reason(s) for the inability to test documented.

11.3 Post –Accident Testing

Any employee operating a public transportation vehicle **or any other Agency-owned vehicle** at the time of an accident shall be required to submit to drug and alcohol tests as soon as practicable after the accident. For purposes of this policy, "accident" is defined as an accident involving a public transportation vehicle **or any other Agency-owned vehicle** where the result is:

- An individual dies;
- An individual suffers a bodily injury and immediately receives medical treatment away from the scene;
- The vehicle (if bus, electric bus, van, or automobile) or any other vehicle(s) involved in the accident suffers a disabling damage as a result of the accident and is transported away from the scene by a tow truck or other vehicle.

Any property damage to any vehicle involved in the accident that will result in professional repair, on or off Agency property.

11.3.1 Fatal Accidents

Whenever there is a loss of human life, any surviving covered employee operating the vehicle **or any other Agency owned vehicle or equipment**, at the time of the accident must be tested immediately and must report the accident to his or her supervisor. All other covered employees whose performance could have contributed to the accident must be tested. **Failure to immediately report the accident is grounds for discipline, up to and including termination.**

11.3.2 Non-Fatal Accidents

Following non-fatal accidents, the employee operating the vehicle at the time of the accident shall be tested unless his/her performance can be completely discounted as a contributing factor to the accident. Any other safety-sensitive employee whose performance could have contributed to the accident also shall

be tested.

11.3.3 Other Post-Accident Testing Requirements

Employees involved in an accident that requires testing must remain readily available for testing, including notifying the Agency of their location if they leave the scene of the accident before testing to obtain emergency medical care, or to obtain assistance in responding to the accident. They will be considered to have refused to submit to testing if they fail to do so and **will be terminated from employment.**

Employees are prohibited from using alcohol for eight hours following an accident or until the post-accident testing is completed, whichever occurs first. Every effort will be made to conduct alcohol testing within two hours after the accident. In the event the alcohol test is delayed beyond two hours, the Agency will prepare and maintain a record stating the reason(s) for the delay. If an alcohol test is not administered within eight hours following the accident, the Agency will cease all efforts to administer the test and document the reason for the inability. In the event a drug test is not administered within 32 hours from the time of the accident, the Agency will cease all attempts to administer the drug test. This requirement should not be construed to delay the necessary medical attention for injured people following the accident.

If the Agency is unable to perform post-accident tests within the required period of compliance, the Agency will use the post-accident test results administered by State or local law enforcement personnel under their own authority, provided the test results are obtained by the Agency.

After the accident, the employee will be removed from service, but remain on paid status during the testing period and while awaiting test result, unless the employee is suspended for any additional purposes concurrent with the waiting of the test results. If all test results are negative, the employee will be immediately returned to work. If the alcohol test result is positive or the drug test result is non-negative (positive, adulterated, or substituted), the employee will be placed on unpaid status pending disciplinary action.

11.4 Random Testing

Safety-sensitive employees are required to undergo random drug and alcohol tests to deter use of prohibited drugs and misuse of alcohol. The random selection will be conducted using a scientifically valid method, such as a random number table or a computer-based random number generator, which gives each covered employee an equal chance of being selected every time a selection is made. As is the nature of the random method, it is possible that some employees will be selected several times in one year, and other employees not for several years. Management does not have any discretion on who will be selected.

Every effort will be made by the Agency to spread random testing reasonably throughout the calendar year, the testing period, all days of the week, and all hours when safety-sensitive functions are performed. The testing dates and times are unannounced and employees are required to immediately and directly proceed to the designated collection site following notification.

Random alcohol tests are authorized by the FTA only during, just before, or just

after the employee's performance of a safety-sensitive duty.

The Agency will conduct random drug and alcohol tests at a minimum annual percentage of covered employees as required by the FTA.. The rates are subject to change on an annual basis, depending on the industry-wide positive rate determined by the FTA from the annual MIS reports submitted by covered employers.

11.5 Return-To-Duty Testing

Sunline Transit has a "zero tolerance" policy, which means that an employee who violates the policy by testing positive for drugs or alcohol or refuses a required test is terminated after the first offense. However, in the event an employee who was previously terminated is returned to work by an authority outside of the agency, he or she will be subject to return to duty testing. This means, an employee who has refused a required test, has a verified positive, adulterated or substituted drug test result, or tests for alcohol at 0.04 BrAC or greater, shall not be allowed to return to safety-sensitive duties until after he or she has completed the return-to-duty process. This includes evaluation by a SAP, successful completion of the rehabilitation, treatment or education program outlined by the SAP, and obtaining a verified negative return-to-duty drug test and/or alcohol test under 0.04 BrAC. All return to duty tests shall be conducted under direct observation.

11.6 Follow-Up Testing

In addition to the Return-to Duty test described in Section 11.5, an employee who previously tested positive, or refused to take a required test, shall be subject to follow-up testing for drugs and/or alcohol, as prescribed by the SAP, for a minimum period of 12 months to a maximum of five years, As mandated by the DOT (Title 49 CFR, Part 40), the employee shall undergo at least six follow-up tests during the first 12 months of his or her return to work. Although they are both unannounced, follow-up testing is apart and separate from random testing. All follow-up tests shall be conducted under direct observation. The duration and frequency of testing will be designated by the SAP, but the actual follow-up

testing dates will be decided by the employee's manager or supervisor. **The employee is responsible for payment of all costs associated with follow-up testing.**

11.7 Drug & Alcohol Testing Procedures

All DOT drug and alcohol tests required under this policy will be administered in accordance with the "Procedures for Transportation Workplace Drug and Alcohol Testing Programs" (Title 49 CFR Part 40), as amended.

Throughout the testing process, the privacy of the employee will be protected and the integrity and validity of the process will be maintained. The drug testing procedure will include a split specimen collection method and a Federal Custody and Control Form will be used for all D.O.T. regulated tests, while a Forensic Custody & Control Form will be used for all non-regulated employees. Each form will have a unique identification number to ensure that the correct test result is attributed to the correct employee. An initial screening test using an immunoassay technique will be performed. If the specimen is positive for one or more of the drugs tested, then a confirmation test will be performed using the state-of-the-art gas chromatography/mass spectrometry (GC/MS) or Liquid Chromatography/Mass Spectrometry (LC/MS) analysis. If the test is confirmed positive, the MRO will conduct a verification process, which includes giving the employee an opportunity to provide a valid medical explanation for the positive test result.

Additionally, the laboratory may conduct analyses to determine if a urine specimen has been adulterated, tampered with, or diluted. If the MRO reports a "negative-dilute", "Invalid Result" or "Rejected for Testing" test result, the employee will be required to take a second test and depending on the level of the creatinine detected, the recollection may or may not be directly observed

Should the employee decline to take a test as directed by the Designated Employee Representative (DER) or DAPM, this constitutes a refusal to test under DOT agency regulations.

11.7.1 Procedures for Negative Dilute Testing

Negative Dilute Specimen Testing: All SunLine Transit Agency employees that produce negative-dilute urine specimens will be immediately retested using a second sample. Depending on the level of creatinine reported by the laboratory, the MRO may direct the recollection to be conducted under direct observation.,

Should the second test result in another negative dilute, the test will be considered a negative and no additional testing under DOT/FTA authority will be

required unless directed to do so by the MRO

11.7.2 Procedure for Alcohol Testing

Tests for alcohol concentration will be conducted using an alcohol screening device or an evidential breath testing (EBT) device. If the screen test is at 0.02 BAC or greater, a confirmatory test will be conducted using only an EBT. A DOT Alcohol Testing Form will be used and a unique sequential number will be assigned to each test.

Detailed drug and alcohol specimen collection procedures are outlined within Title 49 CFR Part 40, Subparts E, L and M and are available upon request from the Contact Persons identified in section 7.0 of this policy.

12.0 DIRECTLY-OBSERVED URINE SPECIMEN COLLECTION

Under the following circumstances, the employee will be directed to undergo an immediate urine specimen collection under same-sex direct observation with no advance notice:

- If the laboratory reported to the MRO that a specimen is invalid and there was no adequate medical explanation for the result;
- If the MRO reported that the original positive, adulterated, or substituted test result had to be canceled because the split specimen tested could not be performed;
- If the drug test is a return-to-duty or a follow-up test;
- If the MRO reported a negative-dilute test result from the initial test with a creatinine level between 2 - 5 mg/dL;
- If the collector observes employee conduct that clearly indicates an attempt to tamper with a specimen;
- If the temperature on the original specimen was out of range; or
- If the original specimen appeared to have been tampered with;

The collector shall be the same gender as the employee. If a same sex collector is not available, a same sex observer may be used. The observer is responsible for ensuring that the specimen goes from the employee's body into the collection container. If the employee declines to allow a directly observed collection when required under this policy, it is considered a refusal to test.

13.0 MONITORED URINE SPECIMEN COLLECTION

Under those circumstances when a multi-stall restroom has to be used for urine

specimen collection and the facility cannot be adequately secured, the collector will conduct a monitored collection. The monitor shall be the same gender as the employee, unless the monitor is a medical professional. The monitor will not watch the employee void into the collection container. However, if the monitor hears sounds or observes attempts to tamper with a specimen, an additional collection under direct observation will be ordered. If the employee declines to permit a collection authorized to be monitored, it is considered a refusal to test.

14.0 SPLIT SPECIMEN TESTING

After notification by the MRO of a positive drug test or refusal to test because of adulteration or substitution, the employee has 72 hours to request from the MRO (verbally or in writing) a test of the split specimen. It should be noted, however, that there is no split specimen testing authorized by the DOT for an invalid drug test result.

Following the employee's timely request, the MRO shall send a written request to the primary laboratory to forward the split specimen to a second DHHS-certified laboratory for testing without regard to the cut-off concentration. If the second laboratory fails to reconfirm the substance detected in the primary specimen or the adulterant identified, or if the split specimen is unavailable for testing, the test shall be canceled. The MRO shall report the cancellation and the reasons for it to the DOT, the Agency, and the employee. In the case of the split specimen being unavailable, the employee shall be directed, with no advance notice, to submit another specimen under direct observation.

All costs related to split specimen testing will be paid by the employee or the applicant. The individual shall be reimbursed if the second test invalidates the original test or if the test was canceled.

15.0 CONSEQUENCES / DISCIPLINE

Following a BrAC of 0.02 or greater, but less than 0.04, the employee will be immediately removed from safety-sensitive duties until the start of their next regularly scheduled duty period (but for not less than eight hours) unless a retest results in the employee's alcohol concentration being less than 0.02.

Any safety-sensitive employee who has a verified positive drug test result, an alcohol concentration of 0.04 BrAC or above, or refuses to submit to a drug or alcohol test (including adulteration or substitution) shall be:

1. Immediately removed from safety-sensitive duty;
2. Referred to a SAP for evaluation, education or treatment

Under the Agency’s own authority, non-safety-sensitive employees also may be removed from duty, referred to a substance abuse counselor, and be subject to discipline, up to and including termination.

FTA regulations allow individual employers to determine the discipline to be imposed on employees who violate the DOT/FTA regulations or Agency policy. The Agency’s discipline policy is as follows:

- A. A first positive drug test result, test refusal, or alcohol test result of 0.04 BrAC or greater will result in immediate termination.**
- B. Other policy violations (e.g., failure to report the use of impairing medications, or failure to immediately report an accident) will subject the employee to disciplinary action, up to and including termination.**

16.0 REFERRAL EVALUATION AND TREATMENT

If an employee (including an applicant) tests positive for drugs or alcohol or refuses to submit to a test when required, the Agency shall advise the individual of the resources available for evaluating and resolving problems associated with prohibited drug use and alcohol misuse and document such referral. He or she shall be given the name, address and phone number of Substance Abuse Professionals (SAPs) acceptable to the Agency and a list of community hot line numbers. **The individual will be responsible for any costs associated with the SAP evaluation and recommendation(s).**

17.0 VOLUNTARY REHABILITATION

SunLine employees are encouraged to voluntarily seek professional help directly from a substance abuse counselor before any substance use or dependence affects job performance. An employee who has a drug and/or alcohol abuse problem and has not been selected for testing or is not involved in a disciplinary proceeding may voluntarily refer himself or herself to a substance abuse counselor for evaluation and treatment recommendations. Confidentiality, job security and promotional opportunities will be protected. However, if the employee reports his or her substance abuse directly to an Agency employee or supervisor, instead of a substance abuse counselor directly, the Agency will require that a “Reasonable Suspicion” drug & breath alcohol test be immediately performed, in accordance with Section 11.2 of this Policy.

The employee may be eligible for sick leave, disability benefits, or vacation while undergoing rehabilitation or treatment. The cost of any treatment or rehabilitation services over and above those offered by the Agency will be the responsibility of the employee.

18.0 CONFIDENTIALITY AND ACCESS TO FACILITIES AND RECORDS

Employees have a right to examine their own drug and alcohol testing records, and have access to any pertinent data such as EBT calibration or drug testing laboratory certification. They also have a right to obtain a copy of their own drug and/or alcohol testing results by submitting a written request to any of the Designated Employer Representative identified In Section 7.0 of this policy.

The Agency will do everything possible to safeguard the confidentiality of drug and alcohol testing records and protect the privacy of the individuals tested. Individual test results or medical information will be released to third parties (e.g. previous employers, unions) only with the employee's specific written consent, or to those parties authorized by the DOT or FTA to receive such information without the employee's consent. Specific written consent applies only to a particular piece of information released to a particular person or organization at a particular time. Blanket releases are specifically prohibited by DOT.

The employee's written consent is not required in administrative or legal proceedings such as:

- A lawsuit, grievance, or administrative proceeding brought by, or on behalf of the employee, or
- A criminal or civil action resulting from an employee's performance of safety-sensitive duties where the alcohol or drug test information is deemed relevant.

Access to Agency facilities and drug and alcohol program records also must be provided, without the employee's consent to DOT or FTA agency representatives; the National Transportation Safety Board as part of an accident investigation; a Federal, State or local agency with regulatory authority over the Agency, or State or grantee required to certify FTA compliance with 49 CFR Parts 40 and 655. Except as outlined in DOT Section 40.355, and with the specific consent of the Agency, the Agency's TPA may receive and maintain records concerning the Agency's DOT drug and alcohol testing programs, without the employee's consent.

19.0 JOINT UNION-MANAGEMENT REVIEW ADVISORY COMMITTEE

- A. At the direction of Management, two representatives from the Union and two from Management, shall meet periodically to provide input regarding the Agency's Substance Abuse Program.
- B. The purpose of this meeting is to provide a channel of communication whereby participants can give input and make recommendations to the General Manager regarding the Substance Abuse Policy.

The consequences specified in Section 15.0 of the SunLine Transit Agency Drug and Alcohol Policy regarding a positive test or test refusal is not subject to arbitration.

DRUG & ALCOHOL POLICY

1.0 POLICY STATEMENT

SunLine Transit Agency (SunLine) is dedicated to providing safe, dependable and efficient transportation services to our passengers and the citizens of the Coachella Valley. Agency employees are our most valuable resource, and it is our goal to provide a healthy and satisfying, working environment that promotes personal opportunities for growth. We also recognize that our employees' use of illegal drugs and misuse of alcohol poses a significant risk to public safety, reduces productivity in the workplace, and negatively affects the employee's health and well being. In view of this, the Agency has adopted this policy that is designed to

1. Create a work environment free from the adverse effects of drug abuse and alcohol misuse;
2. Deter and detect employee's use of illegal drugs and misuse of alcohol;
3. Prohibit the unlawful manufacture, distribution, dispensing, possession, or use of controlled substances;
4. Encourage employees to seek professional assistance anytime personal problems, including drug or alcohol dependency, adversely affect their ability to safely perform their assigned duties; and
5. Discipline employees who violate the policy, up to and including termination.

1.1 Proper Application of the Policy

SunLine Transit Agency is dedicated to assuring fair and equitable application of this substance abuse policy. Therefore, supervisors/managers are required to use and apply all aspects of this policy in an unbiased and impartial manner. Any supervisor/manager who knowingly disregards the requirements of this policy, or who is found to deliberately misuse the policy in regard to subordinates, shall be subject to disciplinary action, up to and including termination.

1.2 Policy Amendments

Amendments that represent major management policy change will be approved by the SunLine Board of Directors. The CEO/General Manager may issue amendments, which are required because of changes in Federal or State law or regulation. All amendments require the review of SunLine Counsel for legal sufficiency.

2.0 PURPOSE

The purpose of this policy is to assure worker fitness for duty and to protect our employees, passengers, and the public from the safety and health risks posed by the misuse of alcohol and use of prohibited drugs. This policy is intended to comply with all applicable state and Federal regulations governing workplace anti-drug use and alcohol misuse programs. They include DOT 49 CFR Part 40, as amended ("Procedures for Transportation Workplace Drug and Alcohol Testing Programs"); FTA 49 CFR Part 655, as amended ("Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations"); DOT 49 CFR Part 29 (Drug-Free Workplace Act of 1988); and CA Govt. Code Section 8350 et seq. ("Drug Free Workplace Act of 1990"). This policy incorporates the requirements of the above regulations for safety-sensitive employees and others when so noted. **Policies indicated in bold text represent SunLine Transit Agency authority.** Requirements of the Drug-Free Workplace Act of 1988 (DFWA) are entered in *Italics*.

3.0 APPLICABILITY

Unless otherwise noted in specific provisions, this policy applies to all employees (including contract employees) regardless of their functions. The application of this policy to non-safety-sensitive employees comes under the Agency's own authority. Visitors, invitees, and vendors also are prohibited from entering the premises and/or from conducting any work on behalf of the Agency when illegal substances are present in their system, or the odor of alcohol is present on their breath. This policy applies to off site lunch periods or other authorized breaks when an employee is scheduled to return to work or is on-call.

Contractors that provide safety-sensitive work for the Agency (e.g. transporting vehicles for maintenance purposes) are not covered by this policy; but they are required to provide proof to STA that they have a drug and alcohol testing program that complies with the minimum requirements of Part 40 and Part 655.

4.0 PRE-EMPTION OF STATE AND LOCAL LAWS

If any conflict occurs between this policy, State and local laws and any requirement of Federal regulations, the Federal regulations prevail. However, Federal regulations do not pre-empt provisions of State criminal laws that impose sanctions for reckless conduct attributed to prohibited drug use or alcohol misuse, whether the provisions apply specifically to transportation employees, employers, or the public in general.

5.0 DEFINITIONS

The definitions in this policy are intended to track those described in the Federal Regulations specified in Section 2.0.

Adulterated Specimen: A specimen that has been altered, as evidenced by test results showing either a substance that is not a normal constituent for that type of specimen or showing an abnormal concentration of an endogenous substance.

Alcohol Use: The drinking or swallowing of any beverage, liquid mixture or preparation (including any medication) containing alcohol. For purposes of this policy, alcohol is alcohol regardless of source.

Alcohol Screening Device (ASD): A breath or saliva device, other than an EBT, that is approved by the National Highway Traffic Safety Administration (NHTSA) and appears on ODAPC's Web page for "Approved Screening Devices to Measure Alcohol in Bodily Fluids" because it conforms to the model specifications from NHTSA

Breath Alcohol Technician (BAT): An individual who instructs and assists employees or applicants in the alcohol testing process and operates an Evidential Breath Testing (EBT) device.

Canceled Test: A drug or alcohol test that has a problem identified that cannot be or has not been corrected, or which Part 40 requires to be canceled. A canceled test is neither a positive nor a negative test.

Collection Site: A place designated by the Agency where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs, and/or measure for alcohol by an evidential breath testing device.

Collector: A person who instructs and assists individuals at a collection site, who receives and makes an initial inspection of the specimen provided by the individual, and who initiates and completes the Custody and Control Form (CCF).

Covered Employee: A person, including a volunteer, applicant / transferee, or contract employee, who performs or is required to perform a safety-sensitive function for the Agency.

Designated Employer Representative: An employee or employees authorized by the Agency to take immediate action(s) to remove employees from safety-sensitive duties, or cause employees to be removed from these covered duties, following a positive test, test refusal, or other policy violations.

DHHS: Department of Health and Human Services.

Disabling Damage: Damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs, including damage to motor vehicles that could have been driven, but would have been further damaged if so driven. "Disabling damage" does not include:

- Damage which can be remedied temporarily at the scene of the accident without special tools or parts.
- Tire disablement without other damage even if no spare tire is available.
- Headlamp or taillight damage.
- Damage to turn signals, horn, or windshield wipers, which makes them inoperable.

DOT: U.S. Department of Transportation.

Drugs: The drugs for which tests are required by DOT agency regulations are 6-AM Analyte (Heroin Specific), Hydrocodone/Hydromorphone, Oxycodone/Oxymorphone, marijuana, cocaine, amphetamines, phencyclidine (PCP), and opioids.

Drug Abuse: Use of any illegal drug or controlled substance without a valid prescription, misuse of legally prescribed drugs, or use of illegally obtained prescription drugs. This includes use of prescription drugs legally prescribed to another Individual or simply having any detectable amount of an illegal drug within your bodily system.

Evidential Breath Testing (EBT) Device: A device that is approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath at the .02 and .04 alcohol concentrations, and appears on ODAPC's Web page for "Approved Evidential Breath Measurement Devices" because it conforms with the model specifications available from NHTSA.

FTA: Federal Transit Administration; an agency in the U.S. Department of Transportation.

Invalid Drug Test: The result reported by an HHS-certified laboratory in accordance with the criteria established by HHS Mandatory Guidelines when a positive, negative, adulterated, or substituted result cannot be established for a specific drug or specimen validity test.

Medical Prescriptions: A medication prescription written by a physician which indicates the employee's name, date, substance, dosage (quantity or amount to be taken), and period of authorization. It is a violation of this policy to use any controlled substance that is inconsistent with the prescription. Please note that the legality of a prescribed medication is based on U.S. federal law; for example, a prescription for "medical marijuana" under California code is not recognized by the DOT/FTA.

Medical Review Officer (MRO): A licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory drug test results, who has knowledge of substance abuse disorders, and has the appropriate medical training to interpret and evaluate medical explanations for certain drug test results.

Positive Alcohol Test: The presence of alcohol in the body at a blood alcohol concentration (BAC) of 0.04 or greater as measured by an EBT device.

Positive Drug Test: The result reported by an HHS-certified laboratory when a specimen contains a drug or drug metabolite equal to or greater than the cutoff concentration.

Public Transportation Vehicles: Vehicles used for public transportation or ancillary services. They include buses, electric buses, vans, automobiles, rail cars, trolley cars, trolley buses or vessels, non-revenue commercial motor vehicles, and vehicles used by armed security personnel.

Refusal to Test: Includes circumstances or behaviors such as:

- Failure to appear or reporting late for any test (except pre-employment for the newly hired) requested by the agency.
- Failure to remain at the testing site until the testing process is completed,
- Failure to provide a urine, breath, or saliva specimen as required by DOT Part 40.
- Failure to permit the direct observation or monitoring of specimen collection when it is required under Title 49 CFR Part 40.
- Failure to provide a sufficient amount of urine or breathe specimen without a valid medical explanation.
- Failure or refusal to take a second test when required.

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- Failure to undergo a medical evaluation when required.
 - Failure to cooperate with the testing process. (Examples: refusal to empty pockets when requested, failure to wash hands after being directed to do so by the collector, or behaving in a confrontational manner that disrupts the collection process).
 - In alcohol testing, refusal to sign the Alcohol Test Form.
 - For an observed collection, failure to follow the observer's instructions to raise clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if employee is wearing any type of prosthetic or other device that could be used to interfere with the collection process.
 - Possession or wearing of a prosthetic or other device that could be used to interfere with the collection process.
 - Admitting adulteration or substitution to the collector or the MRO.
 - Leaving the scene of an accident without just cause prior to submitting to a test.
 - If the MRO reports a verified adulterated or substituted test result.

Note: A refusal to test carries the same consequences as a positive test result.

Split specimen: In drug testing, a part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second DHHS-certified laboratory for testing upon employee request following a verified positive or a verified adulterated or substituted test result from the primary specimen.

Substance Abuse Professional (SAP): A person who evaluates employees who have violated a DOT drug and alcohol regulation and makes recommendation concerning education, treatment, follow-up testing, and aftercare. Any SAP obtained must meet the Part 40 qualification requirements PRIOR to use with any Return to Duty process.

Substituted Specimen: A specimen with creatinine and specific gravity values that are so diminished or so divergent that they are not consistent with normal human urine.

6.0 EDUCATION AND TRAINING

The education and ongoing awareness component of this policy will include display of posters, distribution to all covered employees and representatives of employee organizations of the drug and alcohol policy and other informational

materials, and periodic information seminars. Each employee will be required to sign an acknowledgment form that he/she received a copy of the policy.

As required by FTA regulations, the Agency will provide to all safety-sensitive employees a minimum of 60 minutes of training on the effects and consequences of prohibited drug use on personal health, safety, and the work environment, and on the signs and symptoms that may indicate prohibited drug use.

Supervisors or Agency officials who may make reasonable suspicion referrals shall receive an additional 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use, and at least 60 minutes on the physical, behavioral, speech and performance indicators of probable alcohol misuse.

7.0 CONTACT PERSONS

Any questions about this policy or any aspect of the SunLine's drug and alcohol-free program should be referred to:

Title: Drug and Alcohol Program Manager
Address: 32505 Harry Oliver Trail
Thousand Palms, CA 92276
Telephone Number: (760) 343-3456
Fax Number: (760) 343-4547

8.0 COVERED EMPLOYEES

As a condition of employment, all safety sensitive employees are required to submit to drug and alcohol tests administered in accordance with Title 49 CFR Parts 40 and 655. (**Non- safety-sensitive employees are covered under this Policy under the Agency's own authority.**) A refusal to submit to a test as directed will carry the same consequences as a positive test result as stated in this policy. (Please refer to Section 5.0 - DEFINITIONS for specific circumstances or behaviors that are considered refusal to test.)

As defined by the FTA, safety-sensitive employees include those who perform, or may be called upon to perform, any of the following safety-sensitive functions:

1. Operating a revenue service vehicle, even when it is not in revenue service;
2. Operating a non-revenue service vehicle which is required to be operated by a Commercial Driver's License (CDL) holder;

3. Controlling dispatch or movement of a revenue service vehicle;
4. Maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service;
5. Carrying a firearm for security purposes;

The Agency has determined that the job classifications listed below are considered safety-sensitive for the purposes of this policy.

- Training Supervisor
- Transportation Supervisor
- Maintenance Supervisor
- Dispatcher
- Safety Officers
- Bus Operator
- Mechanic
- Utility Worker
- Contracted transit services personnel

Company, Non-DOT regulated positions are:

- **Operators of any company vehicle not requiring a Commercial Driver License to operate**
- **Operators of company machinery or equipment**
- **Any employee deemed by the Agency to be working in a potentially hazardous work environment.**

9.0 DRUGS (OR THEIR METABOLITES) TESTED FOR

The agency will test DOT- regulated employees for the following drugs and their metabolites, as listed within Title 49 CFR Part 40.85, which has been incorporated into this Policy as written and revised: 6-AM Analyte (Heroin Specific), Hydrocodone/Hydromorphone, Oxycodone/Oxymorphone, Marijuana, Cocaine, Amphetamines, Phencyclidine, and Opioids.

The agency will test non-DOT-regulated employees for the following drugs and their metabolites, which has been incorporated into this Policy as written and revised: 6-AM Analyte (Heroin Specific), Amphetamine, Barbiturates, Benzodiazepines, Cocaine, Methadone (Dolophine), Methamphetamine, Methaqualone (Quaalude), Opioids – 4, Phencyclidine, Propoxyphene MTB

(Darvon/Darvocet).

10.0 PROHIBITED CONDUCT/BEHAVIORS

Under the Drug-Free Workplace Act of 1988, employees are prohibited from the unlawful manufacture, distribution, sale, dispensation, possession, or use of controlled substances in the workplace. Under its own authority, SunLine Transit also prohibits such activities in Agency vehicles, when the employee is in uniform whether on or off duty, or while on Agency business. Employees are required to notify management in writing of any criminal drug statute conviction he/she received for a violation occurring in the workplace, no later than five (5) calendar days after such a conviction.

Violation of this policy or failure to notify the agency of such shall subject the employee to disciplinary action, up to and including termination.

Within 10 calendar days of receiving such notice, Sunline shall provide written notification of the conviction to the FTA. Within 30 days of receiving notice of the conviction, Sunline shall take appropriate disciplinary action, up to and including termination of the employee, or require the employee to participate and successfully complete a drug rehabilitation program. Law enforcement shall be notified, as appropriate, where criminal activity is suspected.

10.1 Illegal Drugs

Any drug found within the employee's bodily system that, if possessed, would otherwise violate any Federal, State or Local law. This includes, but is not limited to those prohibited drugs referred to in Section 9.0. These drugs are illegal and employees are prohibited from consuming any of them at all times, on or off duty. Employees may be tested for illegal drugs anytime they are on duty or while on compensable work time.

10.2 Prescription or Over-the-Counter Medications

Under Agency policy, the appropriate use of legally prescribed drugs and non-prescription medications is not prohibited. However, safety-sensitive employees must notify the Human Resources Department prior to performing any "safety-sensitive" job for the Agency, and may not perform any safety function if their medication carries a warning label that mental functioning, motor skills or judgment may be adversely affected, unless the medication is being used in accordance with the instructions of a physician who has provided a written determination that the substance will not adversely affect the employee's ability to safely perform safety-sensitive duties. It is the employee's responsibility to determine from his or her physician or practitioner whether or not the substance may impair job performance. Failure to immediately report the use of impairing drugs or failure to provide a valid evidence of medical authorization will result in disciplinary action, up to and including termination.

A prescription is considered valid only if it is in writing and indicates the employee's name, date, the name of the substance, quantity or amount to be taken, and the period of authorization. Controlled substances obtained legally outside the United States are not considered valid medical prescriptions under this policy. It is a violation of this policy to use any controlled substance in a manner that is inconsistent with the prescription or is being used in violation of any Federal, State or Local law (i.e.: using another's prescribed medications or medications from a foreign country).

10.3 Alcohol

Safety-sensitive employees are prohibited from consuming alcohol in any form under the following circumstances:

- While performing safety-sensitive functions;
- Within four (4) hours prior to performing safety-sensitive functions;
- While they are on call; or
- Within eight (8) hours following an accident requiring a post-accident alcohol test, unless the test was completed within 8 hours, whichever occurs first.

If an employee on call discloses alcohol consumption when called for duty, the Agency may require the employee to report to the collection site for alcohol testing to determine ability to perform a safety-sensitive function. If the employee tests below 0.02, he or she may be required to report to work

In addition, the Agency under its own authority prohibits possession and/or use of alcoholic beverages by any employee while on compensable work time, or while on Agency property or while operating any Agency vehicles-regardless of whether the employee is on or off duty. The Agency may perform an alcohol or drug test anytime an employee is on duty. An alcohol test is considered positive if the employee's alcohol concentration rate, as measured by an evidential breath testing device, is at 0.04 or greater.

11.0 TYPES OF TESTING

11.1 Pre-Employment Testing

All safety sensitive candidates issued a conditional offer for employment or any employee transferring from a non-safety-sensitive to a safety-sensitive position will be required to undergo pre-employment drug and Breath alcohol tests at a time and place designated by the Agency.

Additionally, any safety-sensitive employee who has not performed any safety-

sensitive function for at least 90 days and has been out of the random pool during that time will also be required to submit to a new Pre-Employment test prior to being allowed to perform any safety-sensitive work.

Pre-employment alcohol testing for non-safety sensitive positions is optional and at the discretion of SunLine Transit Agency. Any applicant testing positive during the hiring process will not be hired.

A verified negative drug test result and alcohol test result below 0.02 must be received by the Agency before an employee can start work for the Agency. If a pre-employment test is canceled, the individual will be required to undergo another test and successfully pass these tests with a verified negative result and have an alcohol test result below 0.02. Any MRO verified result of "Positive", "Adulterated", "Substituted" or "Refusal to Test" will immediately disqualify the applicant/employee from further employment with the Agency.

Subject to the candidate's written consent, the Agency will check on the drug and alcohol testing background of candidates and employees being considered for final selection into any safety sensitive position within the Agency, if they previously worked in a safety-sensitive position for a DOT-covered employer in the previous two years. If the individual refuses to provide the written consent, he or she will not be hired into the safety-sensitive position.

If the information obtained from the previous DOT-covered employer(s) indicates a violation of a DOT drug or alcohol testing rule, the employee may not be allowed to perform any safety-sensitive function unless he or she has successfully complied with the return-to-duty requirements of a D.O.T.-qualified Substance Abuse Professional (SAP) and has been cleared, in writing, by the SAP to resume D.O.T. regulated duties. If the individual has had a positive pre-employment drug or alcohol test, or has refused such a test, he or she will not be hired until and unless the individual has provided a documentation of successful completion of the return-to-duty process, which includes a SAP referral, evaluation and treatment plan.

11.2 Reasonable Suspicion Testing

It is the responsibility of any employee who observes or has knowledge of another employee in a condition which may impair his or her ability to safely and effectively perform his or her duties, or may pose a safety hazard to self or others, to promptly report the incident to his or her supervisor, or any supervisor if the immediate supervisor is not available.

Whenever a supervisor (or other Agency official) has reason to believe that an employee has used a prohibited drug and/or engaged in alcohol misuse, reasonable testing will be conducted. The individual who makes the referral need not be the employee's own supervisor, as long as he or she is a trained

supervisor or agency official that received training in detecting the signs and symptoms of drug use and alcohol misuse. The supervisor's or Agency official's observations will be documented and such documentation shall be kept in the employee's confidential drug and alcohol testing file. Such documentation shall describe and document the following:

- a) the date and time observations were made;
- b) specific, contemporaneous and articulable observations concerning the employee's appearance, behavior, speech, body odors and/or performance;
- c) violation of a safety rule, or other unsafe work incident; and/or
- d) other physical, behavioral, speech, body odors or performance indicators of drug or alcohol use.

Suspicion is not considered reasonable, and thus not a basis for testing, if it is based solely on the observations and reports of third parties, a violation of a safety rule, or occurrence of an unsafe work incident. However, such suspicion may be a basis for further investigation, or for action to protect the safety of patrons, such as ordering the employee to stop work.

Once a supervisor or Agency official has made a reasonable suspicion determination, he or she must remove the employee from performing any safety-sensitive functions, transport the employee to the testing site immediately, and arrange for the employee's transportation to their home. The employee will remain out of service and on paid status while awaiting test results, unless the employee is suspended for any additional purposes concurrent with the waiting for the test results. If all test results are negative, the employee will be immediately returned to work. If the alcohol test result is positive, or the drug test result is non-negative (positive, adulterated, or substituted), the employee will be placed on unpaid status pending disciplinary action. Non-safety-sensitive employees will be tested in situations after an on-the-job injury or a reasonable suspicion situation has occurred, when the employee's performance or behavior may have contributed to the job injury or may jeopardize employee health & safety.

FTA rule requires that a reasonable suspicion alcohol test be conducted only if the reasonable suspicion observation is made just before, during, or just after the employee's performance of safety-sensitive function. **However, under the Agency's own authority, a reasonable suspicion alcohol test may be performed any time the employee is on duty.** If the alcohol test is not conducted within two hours, the reason for the delay must be documented and kept in the employee's reasonable suspicion test file. All attempts to complete the alcohol test must cease after eight hours and the reason(s) for the inability to test documented.

11.3 Post –Accident Testing

Any employee operating a public transportation vehicle **or any other Agency-owned vehicle** at the time of an accident shall be required to submit to drug and alcohol tests as soon as practicable after the accident. For purposes of this policy, "accident" is defined as an accident involving a public transportation vehicle **or any other Agency-owned vehicle** where the result is:

- An individual dies;
- An individual suffers a bodily injury and immediately receives medical treatment away from the scene;
- The vehicle (if bus, electric bus, van, or automobile) or any other vehicle(s) involved in the accident suffers a disabling damage as a result of the accident and is transported away from the scene by a tow truck or other vehicle.

Any property damage to any vehicle involved in the accident that will result in professional repair, on or off Agency property.

11.3.1 Fatal Accidents

Whenever there is a loss of human life, any surviving covered employee operating the vehicle **or any other Agency owned vehicle or equipment**, at the time of the accident must be tested immediately and must report the accident to his or her supervisor. All other covered employees whose performance could have contributed to the accident must be tested. **Failure to immediately report the accident is grounds for discipline, up to and including termination.**

11.3.2 Non-Fatal Accidents

Following non-fatal accidents, the employee operating the vehicle at the time of the accident shall be tested unless his/her performance can be completely discounted as a contributing factor to the accident. Any other safety-sensitive employee whose performance could have contributed to the accident also shall be tested.

11.3.3 Other Post-Accident Testing Requirements

Employees involved in an accident that requires testing must remain readily available for testing, including notifying the Agency of their location if they leave the scene of the accident before testing to obtain emergency medical care, or to obtain assistance in responding to the accident. They will be considered to have refused to submit to testing if they fail to do so and **will be terminated from employment.**

Employees are prohibited from using alcohol for eight hours following an accident or until the post-accident testing is completed, whichever occurs first. Every effort will be made to conduct alcohol testing within two hours after the accident. In the event the alcohol test is delayed beyond two hours, the Agency will prepare and maintain a record stating the reason(s) for the delay. If an alcohol test is not administered within eight hours following the accident, the Agency will cease all efforts to administer the test and document the reason for the inability. In the event a drug test is not administered within 32 hours from the time of the accident, the Agency will cease all attempts to administer the drug test. This requirement should not be construed to delay the necessary medical attention for injured people following the accident.

If the Agency is unable to perform post-accident tests within the required period of compliance, the Agency will use the post-accident test results administered by State or local law enforcement personnel under their own authority, provided the test results are obtained by the Agency.

After the accident, the employee will be removed from service, but remain on paid status during the testing period and while awaiting test result, unless the employee is suspended for any additional purposes concurrent with the waiting of the test results. If all test results are negative, the employee will be immediately returned to work. If the alcohol test result is positive or the drug test result is non-negative (positive, adulterated, or substituted), the employee will be placed on unpaid status pending disciplinary action.

11.4 Random Testing

Safety-sensitive employees are required to undergo random drug and alcohol tests to deter use of prohibited drugs and misuse of alcohol. The random selection will be conducted using a scientifically valid method, such as a random number table or a computer-based random number generator, which gives each covered employee an equal chance of being selected every time a selection is made. As is the nature of the random method, it is possible that some employees will be selected several times in one year, and other employees not for several years. Management does not have any discretion on who will be selected.

Every effort will be made by the Agency to spread random testing reasonably throughout the calendar year, the testing period, all days of the week, and all hours when safety-sensitive functions are performed. The testing dates and times are unannounced and employees are required to immediately and directly proceed to the designated collection site following notification.

Random alcohol tests are authorized by the FTA only during, just before, or just

after the employee's performance of a safety-sensitive duty.

The Agency will conduct random drug and alcohol tests at a minimum annual percentage of covered employees as required by the FTA.. The rates are subject to change on an annual basis, depending on the industry-wide positive rate determined by the FTA from the annual MIS reports submitted by covered employers.

11.5 Return-To-Duty Testing

Sunline Transit has a "zero tolerance" policy, which means that an employee who violates the policy by testing positive for drugs or alcohol or refuses a required test is terminated after the first offense. However, in the event an employee who was previously terminated is returned to work by an authority outside of the agency, he or she will be subject to return to duty testing. This means, an employee who has refused a required test, has a verified positive, adulterated or substituted drug test result, or tests for alcohol at 0.04 BrAC or greater, shall not be allowed to return to safety-sensitive duties until after he or she has completed the return-to-duty process. This includes evaluation by a SAP, successful completion of the rehabilitation, treatment or education program outlined by the SAP, and obtaining a verified negative return-to-duty drug test and/or alcohol test under 0.04 BrAC. All return to duty tests shall be conducted under direct observation.

11.6 Follow-Up Testing

In addition to the Return-to Duty test described in Section 11.5, an employee who previously tested positive, or refused to take a required test, shall be subject to follow-up testing for drugs and/or alcohol, as prescribed by the SAP, for a minimum period of 12 months to a maximum of five years, As mandated by the DOT (Title 49 CFR, Part 40), the employee shall undergo at least six follow-up tests during the first 12 months of his or her return to work. Although they are both unannounced, follow-up testing is apart and separate from random testing. All follow-up tests shall be conducted under direct observation. The duration and frequency of testing will be designated by the SAP, but the actual follow-up

testing dates will be decided by the employee's manager or supervisor. **The employee is responsible for payment of all costs associated with follow-up testing.**

11.7 Drug & Alcohol Testing Procedures

All DOT drug and alcohol tests required under this policy will be administered in accordance with the "Procedures for Transportation Workplace Drug and Alcohol Testing Programs" (Title 49 CFR Part 40), as amended.

Throughout the testing process, the privacy of the employee will be protected and the integrity and validity of the process will be maintained. The drug testing procedure will include a split specimen collection method and a Federal Custody and Control Form will be used for all D.O.T. regulated tests, while a Forensic Custody & Control Form will be used for all non-regulated employees. Each form will have a unique identification number to ensure that the correct test result is attributed to the correct employee. An initial screening test using an immunoassay technique will be performed. If the specimen is positive for one or more of the drugs tested, then a confirmation test will be performed using the state-of-the-art gas chromatography/mass spectrometry (GC/MS) or Liquid Chromatography/Mass Spectrometry (LC/MS) analysis. If the test is confirmed positive, the MRO will conduct a verification process, which includes giving the employee an opportunity to provide a valid medical explanation for the positive test result.

Additionally, the laboratory may conduct analyses to determine if a urine specimen has been adulterated, tampered with, or diluted. If the MRO reports a "negative-dilute", "Invalid Result" or "Rejected for Testing" test result, the employee will be required to take a second test and depending on the level of the creatinine detected, the recollection may or may not be directly observed

Should the employee decline to take a test as directed by the Designated Employee Representative (DER) or DAPM, this constitutes a refusal to test under DOT agency regulations.

11.7.1 Procedures for Negative Dilute Testing

Negative Dilute Specimen Testing: All SunLine Transit Agency employees that produce negative-dilute urine specimens will be immediately retested using a second sample. Depending on the level of creatinine reported by the laboratory, the MRO may direct the recollection to be conducted under direct observation.,

Should the second test result in another negative dilute, the test will be considered a negative and no additional testing under DOT/FTA authority will be

required unless directed to do so by the MRO

11.7.2 Procedure for Alcohol Testing

Tests for alcohol concentration will be conducted using an alcohol screening device or an evidential breath testing (EBT) device. If the screen test is at 0.02 BAC or greater, a confirmatory test will be conducted using only an EBT. A DOT Alcohol Testing Form will be used and a unique sequential number will be assigned to each test.

Detailed drug and alcohol specimen collection procedures are outlined within Title 49 CFR Part 40, Subparts E, L and M and are available upon request from the Contact Persons identified in section 7.0 of this policy.

12.0 DIRECTLY-OBSERVED URINE SPECIMEN COLLECTION

Under the following circumstances, the employee will be directed to undergo an immediate urine specimen collection under same-sex direct observation with no advance notice:

- If the laboratory reported to the MRO that a specimen is invalid and there was no adequate medical explanation for the result;
- If the MRO reported that the original positive, adulterated, or substituted test result had to be canceled because the split specimen tested could not be performed;
- If the drug test is a return-to-duty or a follow-up test;
- If the MRO reported a negative-dilute test result from the initial test with a creatinine level between 2 - 5 mg/dL;
- If the collector observes employee conduct that clearly indicates an attempt to tamper with a specimen;
- If the temperature on the original specimen was out of range; or
- If the original specimen appeared to have been tampered with;

The collector shall be the same gender as the employee. If a same sex collector is not available, a same sex observer may be used. The observer is responsible for ensuring that the specimen goes from the employee's body into the collection container. If the employee declines to allow a directly observed collection when required under this policy, it is considered a refusal to test.

13.0 MONITORED URINE SPECIMEN COLLECTION

Under those circumstances when a multi-stall restroom has to be used for urine

specimen collection and the facility cannot be adequately secured, the collector will conduct a monitored collection. The monitor shall be the same gender as the employee, unless the monitor is a medical professional. The monitor will not watch the employee void into the collection container. However, if the monitor hears sounds or observes attempts to tamper with a specimen, an additional collection under direct observation will be ordered. If the employee declines to permit a collection authorized to be monitored, it is considered a refusal to test.

14.0 SPLIT SPECIMEN TESTING

After notification by the MRO of a positive drug test or refusal to test because of adulteration or substitution, the employee has 72 hours to request from the MRO (verbally or in writing) a test of the split specimen. It should be noted, however, that there is no split specimen testing authorized by the DOT for an invalid drug test result.

Following the employee's timely request, the MRO shall send a written request to the primary laboratory to forward the split specimen to a second DHHS-certified laboratory for testing without regard to the cut-off concentration. If the second laboratory fails to reconfirm the substance detected in the primary specimen or the adulterant identified, or if the split specimen is unavailable for testing, the test shall be canceled. The MRO shall report the cancellation and the reasons for it to the DOT, the Agency, and the employee. In the case of the split specimen being unavailable, the employee shall be directed, with no advance notice, to submit another specimen under direct observation.

All costs related to split specimen testing will be paid by the employee or the applicant. The individual shall be reimbursed if the second test invalidates the original test or if the test was canceled.

15.0 CONSEQUENCES / DISCIPLINE

Following a BrAC of 0.02 or greater, but less than 0.04, the employee will be immediately removed from safety-sensitive duties until the start of their next regularly scheduled duty period (but for not less than eight hours) unless a retest results in the employee's alcohol concentration being less than 0.02.

Any safety-sensitive employee who has a verified positive drug test result, an alcohol concentration of 0.04 BrAC or above, or refuses to submit to a drug or alcohol test (including adulteration or substitution) shall be:

1. Immediately removed from safety-sensitive duty;
2. Referred to a SAP for evaluation, education or treatment

Under the Agency’s own authority, non-safety-sensitive employees also may be removed from duty, referred to a substance abuse counselor, and be subject to discipline, up to and including termination.

FTA regulations allow individual employers to determine the discipline to be imposed on employees who violate the DOT/FTA regulations or Agency policy. The Agency’s discipline policy is as follows:

- A. A first positive drug test result, test refusal, or alcohol test result of 0.04 BrAC or greater will result in immediate termination.**
- B. Other policy violations (e.g., failure to report the use of impairing medications, or failure to immediately report an accident) will subject the employee to disciplinary action, up to and including termination.**

16.0 REFERRAL EVALUATION AND TREATMENT

If an employee (including an applicant) tests positive for drugs or alcohol or refuses to submit to a test when required, the Agency shall advise the individual of the resources available for evaluating and resolving problems associated with prohibited drug use and alcohol misuse and document such referral. He or she shall be given the name, address and phone number of Substance Abuse Professionals (SAPs) acceptable to the Agency and a list of community hot line numbers. **The individual will be responsible for any costs associated with the SAP evaluation and recommendation(s).**

17.0 VOLUNTARY REHABILITATION

SunLine employees are encouraged to voluntarily seek professional help directly from a substance abuse counselor before any substance use or dependence affects job performance. An employee who has a drug and/or alcohol abuse problem and has not been selected for testing or is not involved in a disciplinary proceeding may voluntarily refer himself or herself to a substance abuse counselor for evaluation and treatment recommendations. Confidentiality, job security and promotional opportunities will be protected. However, if the employee reports his or her substance abuse directly to an Agency employee or supervisor, instead of a substance abuse counselor directly, the Agency will require that a “Reasonable Suspicion” drug & breath alcohol test be immediately performed, in accordance with Section 11.2 of this Policy.

The employee may be eligible for sick leave, disability benefits, or vacation while undergoing rehabilitation or treatment. The cost of any treatment or rehabilitation services over and above those offered by the Agency will be the responsibility of the employee.

18.0 CONFIDENTIALITY AND ACCESS TO FACILITIES AND RECORDS

Employees have a right to examine their own drug and alcohol testing records, and have access to any pertinent data such as EBT calibration or drug testing laboratory certification. They also have a right to obtain a copy of their own drug and/or alcohol testing results by submitting a written request to any of the Designated Employer Representative identified In Section 7.0 of this policy.

The Agency will do everything possible to safeguard the confidentiality of drug and alcohol testing records and protect the privacy of the individuals tested. Individual test results or medical information will be released to third parties (e.g. previous employers, unions) only with the employee's specific written consent, or to those parties authorized by the DOT or FTA to receive such information without the employee's consent. Specific written consent applies only to a particular piece of information released to a particular person or organization at a particular time. Blanket releases are specifically prohibited by DOT.

The employee's written consent is not required in administrative or legal proceedings such as:

- A lawsuit, grievance, or administrative proceeding brought by, or on behalf of the employee, or
- A criminal or civil action resulting from an employee's performance of safety-sensitive duties where the alcohol or drug test information is deemed relevant.

Access to Agency facilities and drug and alcohol program records also must be provided, without the employee's consent to DOT or FTA agency representatives; the National Transportation Safety Board as part of an accident investigation; a Federal, State or local agency with regulatory authority over the Agency, or State or grantee required to certify FTA compliance with 49 CFR Parts 40 and 655. Except as outlined in DOT Section 40.355, and with the specific consent of the Agency, the Agency's TPA may receive and maintain records concerning the Agency's DOT drug and alcohol testing programs, without the employee's consent.

19.0 JOINT UNION-MANAGEMENT REVIEW ADVISORY COMMITTEE

- A. At the direction of Management, two representatives from the Union and two from Management, shall meet periodically to provide input regarding the Agency's Substance Abuse Program.**
- B. The purpose of this meeting is to provide a channel of communication whereby participants can give input and make recommendations to the General Manager regarding the Substance Abuse Policy.**

The consequences specified in Section 15.0 of the SunLine Transit Agency Drug and Alcohol Policy regarding a positive test or test refusal is not subject to arbitration.

SunLine Transit Agency

DATE: July 24, 2024 **ACTION**

TO: Board Operations Committee
Board of Directors

FROM: Bryan Valenzuela, Chief Safety Officer

RE: Regulation and Prohibition of Passenger Conduct Ordinance 2024-01

Recommendation

Recommend that the Board of Directors approve and adopt the Regulation and Prohibition of Passenger Conduct Ordinance 2024-01. There have been no changes to the ordinance since its last discussion at the Board Operations Committee on June 26, 2024.

Background

SunLine Transit Agency is dedicated to providing dependable, efficient, and safe transportation services to the residents of Coachella Valley. In order to safeguard our assets, passengers, and employees, we propose the adoption of Ordinance No. 2024-01.

This ordinance will equip the Agency with the necessary tools to address passenger behavior on the Agency's premises and vehicles, ensuring a high standard of service delivery to our community and prioritizing the safety of both transit passengers and SunLine Transit Agency employees.

Key components of Ordinance No. 2024-01 include:

- Clear guidelines for passenger conduct to ensure safety for all.
- Procedures for suspending riding privileges for individuals who consistently violate the ordinance.
- Consistent methodologies to maintain safe and reliable transportation services throughout the community.

SunLine Transit Agency will implement detailed procedures to enact this ordinance and will provide additional training in de-escalation and conflict resolution for our staff.

Ordinance No. 2024-01 exemplifies our commitment to safety, reinforcing its integral role in our efforts to maintain a secure transportation system.

Financial Impact

No financial impact

Attachment:

- [Item 9a](#) – Regulation and Prohibition of Passenger Conduct Ordinance 2024-01

ORDINANCE NO. 2024-01

**AN URGENCY ORDINANCE OF SUNLINE TRANSIT AGENCY RELATING TO THE
REGULATION AND PROHIBITION OF PASSENGER CONDUCT**

WHEREAS, SunLine Transit Agency (STA) is dedicated to providing safe, dependable and efficient transportation services to passengers and the Coachella Valley community; and

WHEREAS, the County of Riverside and the Coachella Valley cities comprising the joint powers agency known as the STA desire to maintain and operate a safe, secured, efficient and effective public transportation system by establishing a passenger code of conduct; and

WHEREAS, behavior on transit property is governed by California Penal Code section 640 and California Public Utilities Code section 99580; and

WHEREAS, STA personnel and passengers on STA vehicles and at STA property have been subjected to threats of physical harm, disturbances of the peace, and other conduct antithetical to safe and peaceful public transportation; and

WHEREAS, this urgency ordinance is necessary to ensure that the STA may immediately regulate the conduct of all persons conduct who interact with STA property or its services provided and passengers and the public may be refused services or access to facilities as a result of unacceptable conduct as described herein; and

WHEREAS, STA has the authority to regulate and enforce passenger conduct. However, without a passenger code of conduct there is a substantial likelihood that STA will be unable to regulate passenger conduct, which may result in substantial harm, and a threat to public peace, health or safety; and

WHEREAS, STA desires to adopt this ordinance as an urgency ordinance, effective immediately, pursuant to Government Code sections 36934 and 36937.

NOW, THEREFORE, the Board of Directors of STA does ordain as follows:

SECTION 1: ADOPTION OF URGENCY ORDINANCE.

The above recitals are hereby adopted as true and correct and this this urgency ordinance is hereby adopted as attached hereto as Exhibit A.

SECTION 2: SEVERABILITY.

If any section, subsection, sentence, clause or phrase of the ordinance is for any reason held to be invalid or unconstitutional by the decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance of STA. The Board of Directors of STA hereby declares that it would have

passed this ordinance, and each section, subsection, clause, sentence or phrase thereof, irrespective of the fact that any one or more other sections, subsections, clauses, sentences, or phrases may be declared invalid or unconstitutional.

SECTION 3: URGENCY DECLARATION AND EFFECTIVE DATE.

STA finds and declares that the adoption and implementation of this ordinance is necessary to address the danger to public health, safety, and general welfare as set forth in the above recitals, and to immediately provide provisions to implement the Passenger Code of Conduct. The Board of Directors of STA therefore finds and determines that this ordinance be enacted as an urgency ordinance pursuant to Government Code section 36937 and take effect immediately upon adoption by four-fifths of the Board of Directors of STA.

SECTION 4: PUBLICATION.

The Clerk of the Board is authorized and directed to cause a summary of this ordinance to be published and posted in the manner required by Government Code section 36933(c)(1).

APPROVED AND ADOPTED by the Board of Directors of SunLine Transit Agency at a regular meeting held on ____ day of July, 2024.

Nancy Ross
Chairperson of the Board

ATTEST:

Edith Hernandez
Clerk of the Board

APPROVED AS TO FORM:

Catherine Groves
General Counsel

EXHIBIT A

Section 1	Title
Section 2	Purpose
Section 3	Definitions
Section 4	Animals
Section 5	Removal from Vehicle(s), STA Property, and STA Facility
Section 6	Enforcement Procedures
Section 7	Suspension Procedure
Section 8	Non-Compliance with Suspension Order: Trespassing
Section 9	Electronic Surveillance
Section 10	Expressive Activity and Commercial Filming

Section 1 **Title**

This ordinance shall be known as the “Urgency Ordinance of Sunline Transit Agency regulating and prohibiting specified passenger conduct.”

Section 2 **Purpose**

STA is dedicated to providing safe, dependable and efficient transportation services to passengers and the Coachella Valley community. Behavior on transit property is governed by California Penal Code section 640 and California Public Utilities Code Section 99580. The purpose of this ordinance is to define a passenger code of conduct in order to maintain and operate a safe, secured, efficient and effective public transportation system. This ordinance also governs the conduct of all persons who interact with STA property or its services provided. Passengers and the public may be refused services or access to facilities as a result of unacceptable conduct as described herein.

Section 3 **Definitions**

As used in this Ordinance:

- A. “Fare Media” means the methods issued by or on behalf of STA for payment of fare, including passes, cards, transfers, vouchers and mobile ticketing.
- B. “Fare-Required Zone” means (1) the areas in any Vehicle behind the yellow line near the front of the bus, or (2) the areas where any sign indicates fares are required at or beyond the area.
- C. “Graffiti” means any unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, painted, or affixed on the Agency facilities or vehicles.
- D. “Passenger” means a customer of service, and/or visitor to a STA Facility, STA

Property, and/or Vehicle.

- E. "Public Area" means portions of STA facilities that are open for public use for transit or transit related purposes.
- F. "Prohibited Conduct" means any conduct that does not demonstrate respect for safety and welfare of themselves and/or others and/or STA Representatives or that interferes with the orderly provision of STA Transportation Services, including, but not limited to, any of the following:
 - a. a violation of local, state or federal law;
 - b. stalking a passenger and/or STA Representative(s);
 - c. damaging and/or destruction of STA Property and/or STA Facility;
 - d. playing unreasonably loud sound equipment;
 - e. failing to comply with the warning of a STA Representative related to disturbing another person by loud or unreasonable noise;
 - f. physical or verbal mistreatment, including hitting, kicking, gestures, yelling, spitting, threats, intimidation, assaults, slurs, and cursing;
 - g. sexual harassment including the act of or threat of unwanted touching, comments, or gestures, of a sexual nature or because of their gender, sexual orientation, or gender expression or gender identity;
 - h. eating or drinking on Vehicle(s);
 - i. drinking alcoholic beverages or possessing open containers of alcoholic beverages;
 - j. bringing any bag(s) of open or empty aluminum cans, plastic or glass bottles, or any material that has an offensive odor or is leaking any fluids on Vehicle(s);
 - k. failing to wear shoes, a shirt and pants or shorts, or a dress in Vehicle(s), STA Property, and STA Facility;
 - l. wearing a mask, false whiskers, or any personal disguise (whether complete or partial) for the purpose of: (1) evading or escaping discovery, recognition, or identification in the commission of fare evasion and/or any public offense; and/or (2) concealment, flight, or escape, when charged with, arrested for, or convicted of, any public offense;
 - m. refusing to pay a proper fare with cash or accepted Fare Media, including, but not limited to, mobile ticketing;

- n. boarding a Vehicle, without proof of valid Fare Media or without having adequate fare ready and paying fare upon boarding a Vehicle;
- o. falsely representing oneself as eligible for a waiver or a special or reduced fare, obtaining Fare Media by making false or misleading representation;
- p. boarding a Vehicle through a rear door to avoid payment or entering a Vehicle in such a way to bypass or avoid any Fare-Required Zone and fare collection;
- q. refusing to be seated or holding on to a standee pole while the Vehicle is in motion or standing in front of the standee line near the driver's seat;
- r. using cellular phones and audible devices (e.g. portable radio, musical instruments, tape, CD player, TV, laptop, tablet, etc.), unless such equipment is used with head/earphones so that sound is limited to that person only, or with the volume muted. Cellular phones may not be used on speaker phone mode;
- s. causing sounds that are highly disruptive to other individuals on board STA vehicles, using STA facilities or services. For the purpose of this paragraph, "highly disruptive" means: abusive, indecent, profane or drunken conduct. This provision does not apply to persons who cannot comply with this paragraph as a result of a disability, age, or a medical condition;
- t. smoking, including the carrying of lit cigars, cigarettes, and pipes, and vaping or use of any electronic or other smoking device, on a Vehicle(s), STA Property, STA Facility, or outside designated smoking areas at STA Facility;
- u. using any controlled substance and/or paraphernalia in violation of State and Federal law on a Vehicle(s), STA Property, or STA Facility, or outside designated smoking areas at STA Facility.
- v. blocking an aisle and/or restricting the free movement of passengers on a Vehicle(s), STA Property, or STA Facility with a non-collapsible stroller, baby buggy, walker, cart, package, bag, and/or item that cannot be held in the lap of the passenger;
- w. hanging items on, or attaching to, a mobility device (i.e. wheelchair, scooter, or walker) in a manner that blocks the aisle, restricts the free movement of passengers, or failing to properly secure such items to such mobility device. Oxygen bottles or tanks required for medical purposes must be properly secured and sized for the mobility device and placed in a location that does not restrict a proper and safe securement of the device;
- x. bringing a bicycle on-board a Vehicle. Bicycles must be placed on STA bike

- racks prior to boarding a Vehicle. Such bicycles shall not have any items, including bags, hanging from the bicycles while on a STA vehicle bike rack;
- y. throwing any object from Vehicle(s) or extending any portion of the body through any window or door of a Vehicle(s) in a manner that may cause harm or injury;
 - z. engaging in vandalism, graffiti, destruction and/or damage to Vehicle(s), STA Property, and/or STA Facility;
 - aa. carrying an explosive, illegal weapon (i.e. firearms or sharp edge objects), acid, flammable liquid, or toxic or hazardous material in a Vehicle(s), STA Property, and/or STA Facility;
 - bb. engaging in unauthorized canvassing, selling, soliciting, or distributing any material on Vehicle(s), STA Property, and/or STA Facility;
 - cc. due to health and safety concerns, passengers who have bodily fluids, urine, feces, or blood on themselves or their clothing are prohibited from entering a Vehicle(s), STA Property, and/or STA Facility. This provision does not apply to persons who cannot comply with this paragraph as a result of a disability, age, or a medical condition;
 - dd. affixing or posting signs, stickers, buttons, advertisements, circulars, or other printed materials on Vehicle(s), STA Property, and/or STA Facility. Written permission must be obtained from STA Administrator prior to placing, posting, or displaying any posters, notices, advertisements, signs, or other written material on Vehicle(s), STA Property, and/or STA Facility;
 - ee. engaging in violence, threat(s), fighting, pushing, crowding, shoving, or initiating physical contact toward another passenger or STA Representative;
 - ff. opening or tampering with vehicle equipment, for example, emergency windows and doors, except during an emergency;
 - gg. expectorating upon a STA Facility or Vehicle;
 - hh. failing to yield seating reserved for an elderly or disabled person; and
 - ii. Skateboarding, roller skating, bicycle riding, or roller blading in an STA Facility, including a parking structure, or in an STA Vehicle. This prohibition shall not apply to an activity that is necessary for utilization of an STA Facility by a bicyclist, including, but not limited to, an activity that is necessary for parking a bicycle or transporting a bicycle aboard an STA vehicle, if that activity is conducted with STA permission in a manner that does not interfere with the safety of the bicyclist or other patrons of STA.

- G. "STA" means the SunLine Transit Agency joint powers authority established by Riverside County and Coachella Valley cities charged with the duties, obligations and responsibilities to implement and enforce this Ordinance and any related ordinance and any regulations promulgated pursuant thereto as directed by the STA Board.
- H. "STA Facility" or "STA Facilities" means all STA Property and equipment of STA, including, inside and outside areas of STA Property, transit centers, bus stops, shelters, transfer points, signage, and Vehicles.
- I. "STA Property" means any real or personal property owned or controlled by STA and includes, but is not limited to, Vehicle(s), bus stops, buildings, and facilities owned, leased or operated by STA, and any Vehicle(s) operated under contract with STA.
- J. "STA Administrator" means the management level employee of STA designated by STA's CEO/General Manager to be responsible for administering and implementing this ordinance.
- K. "STA Representative" means any employee of STA.
- L. "Threat" means an expression or action showing intent to inflict harm. Giving signs or warnings of violence or the announcement of violence as a possibility.
- M. "Transportation Services" means services provided by a STA Representative using STA Property to transport passengers, including, but not limited to, a fixed route bus service, micro transit service, and paratransit service.
- N. "Vehicle(s)" means a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks, as defined in California Vehicle Code section 670, including, bus(es), shuttle(s), coach(es), car(s), van(s), and similar devices used for passenger conveyance.
- O. "Violence" means physical force employed to violate, damage, abuse, injure, or strike in any manner.

Section 4 Animals

- A. Designated service animals as defined in 49 Code of Federal Regulations Section 37.3 must always be under control of the passenger. Passengers may be asked by a STA Representative to describe the work or task the animal has been trained to perform. Service animals owners are responsible for any damage or injury caused by the animal. All other animals must be kept in a secure pet carrier that fits on the passenger's lap.
- B. Passengers are prohibited from denying seats to other passengers or blocking aisles due to animals or carriers.

- C. Passengers must promptly clean up animal waste from STA Property and/or STA Facility.

Section 5 Removal from Vehicle(s), STA Property, and STA Facility

- A. A person refusing to comply with the provisions of this ordinance or violating any provision of this ordinance, may be directed to leave Vehicle(s), STA Property, and/or STA Facilities by a STA Representative. If such person refuses to follow STA Representative(s) directions, the STA Representative(s) must contact the STA Administrator and local law enforcement and such person may be subject to arrest for trespassing.
- B. Any person engaging in Prohibited Conduct may be subject the following: (1) immediate removal of the violator from a Vehicle(s), STA Property, or STA Facility; (2) suspension of the violator's use of a Vehicle(s), STA Property, or STA Facility; (3) criminal citation issued by local law enforcement.
- C. A person may not occupy or use a Vehicle(s), STA Property, and/or STA Facility except for the purpose of boarding, disembarking, or waiting for a Vehicle. Persons occupying a Vehicle(s), STA Property, and/or STA Facility may be required to identify the intended STA route and destination upon the request of an STA Representative. Persons who fail to identify the intended STA route or destination may be asked to leave the Vehicle(s), STA Property, and/or STA Facility. Persons merely loitering at an STA Facility may be asked to leave the STA Facility by an STA Representative. Persons refusing to leave upon a demand to leave consistent with this ordinance may be considered in violation of this ordinance and STA Representative(s) reserves the right to contact law enforcement for assistance with removing such persons.
- D. Persons may occupy STA Facilities while awaiting passengers on arriving Vehicle(s). Upon arrival of such passengers, such persons and passengers shall leave Agency Facilities promptly. STA Representative(s) may request such persons and such passengers to leave STA Facilities, and refusal to comply with such STA Representative(s) request may amount to a violation of this ordinance.

Section 6 Enforcement Procedures

Upon witnessing a potential violation of this ordinance, STA Representative(s) may take any of the following steps to enforce compliance, and submit an incident report to the STA Administrator:

- A. Warn the violator that further violations will be grounds for removal from the Vehicle(s), STA Property, and/or STA Facility, or may result in suspension under this ordinance.
- B. Stop the Vehicle until the conduct violating this ordinance stops, the violator has been removed from the Vehicle, or law enforcement assists in removing the

violator.

- C. Refuse to admit the violator onto a Vehicle or inside STA Property and/or STA Facility if the conduct violating this ordinance occurs as the violator is boarding the Vehicle or entering STA Property and/or STA Facility.
- D. Report the violator's conduct to law enforcement. All incidents requiring STA Representative to contact law enforcement will be submitted to the STA Administrator for further review to determine whether suspension from service is warranted.
- E. STA reserves the right to pursue all remedies at law, but not limited to, enlisting the services of local law enforcement, petitioning the Superior Court for a Temporary Restraining Order (TRO) and/or seeking a permanent injunction in appropriate cases.

Section 7 Suspension Procedure

- A. STA Representative(s) may recommend to the STA Administrator suspending a person from use of Vehicle(s), STA Property, and/or STA Facility following one or more violations of this ordinance. Length of suspension, including whether such suspension is permanent, will depend on the severity of the violation at STA's sole discretion.
- B. Prior to suspending any person from use of Vehicle(s), STA Property, STA Facility, and/or Transportation Services, the STA Administrator will issue, or cause to be issued, to such person, a written suspension notice. The notice shall indicate the reasons for the suspension, the time period of the suspension, and the Vehicle(s), STA Property, and/or STA Facility or Transportation Services subject to the suspension. Such written suspension notice shall also include the appeals procedure details set forth in Section 7.D. below.
- C. Initial Review of Suspension Notice:
 - a. Within twenty-one (21) days from issuance of suspension notice, the person may request administrative review of the suspension. Such request may be made by telephone or in writing by contacting the STA Administrator at (760) 343-3456 or STA Administrator c/o SunLine Transit Agency, 32-505 Harry Oliver Trail, Thousand Palms, California 92276. The request must include any statement, information, evidence, or documents the person desires the STA Administrator to consider.
 - b. Within seven (7) days from receiving the person's request for initial review, the STA Administrator shall issue a decision as to whether it is 1) imposing the original suspension; 2) modifying the original suspension; or 3) satisfied that the violation did not occur or that extenuating circumstances make dismissal of the suspension appropriate.

- c. The STA Administrator shall mail a notice of the result of the initial review to the person. If STA Administrator does not cancel the suspension, this notice will include a reason for not canceling the suspension, a notification that the person is entitled to request an appeal under this ordinance, and details regarding such appeal procedure.

D. Appeal Procedure:

- a. Following the administrative review procedure, if the STA Administrator does not cancel the suspension, the person receiving a notice of suspension as provided above may request an appeal, within sixty (60) days after the mailing of the STA's decision following its Initial Review in section 7.C. above, either (1) in person, (2) by sending a written request to the STA Administrator c/o SunLine Transit Agency, 32-505 Harry Oliver Trail, Thousand Palms, California 92276, or (3) by calling (760) 343-3456. The request should include any statement, information, evidence, or documents the person desires the hearing officer to consider.
- b. The appeal shall be conducted before a hearing officer designated by the CEO/General Manager. The hearing officer shall issue a written decision, no later than thirty (30) days after the hearing. Such decision will detail whether the suspension was canceled, modified, or upheld. The decision may be personally delivered to the person or sent by mail.

Section 8 Non-Compliance with Suspension Order: Trespassing

If an individual subject to a suspension order enters the specified Vehicle(s), STA Property, and/or STA Facility during the suspension period, law enforcement will be called, and the individual may be subject to arrest for trespassing.

Section 9 Electronic Surveillance

All Agency Vehicle(s) and STA Facility are equipped with electronic surveillance devices/cameras which are used to view accident, incidents, and complaints received from passengers.

Section 10 Expressive Activity and Commercial Filming

A. Expressive Activity

- a. No person shall conduct or participate in assemblies or demonstrations, display or post signs or banners, solicit funds, or distribute written pamphlets, flyers, petitions, or other materials (collectively "Expressive Activity") in or on any of the following areas: (1) any bus or van operated by or for STA, or (2) STA owned or occupied workshops, offices, maintenance facilities, garages, or any other areas that are not open to the public.
- b. Expressive Activity is authorized on other public property owned or

controlled by STA or in public areas surrounding STA buses or property so long as the Expressive Activity does not: (1) interfere with access or egress of passengers to and from vehicles, (2) interfere with the access or egress of vehicles to and from bus stops or STA property, (3) interfere with STA employees' conduct of their business, or (4) harass, threaten, or coerce any person.

- c. Any person or group that will conduct or participate in an Expressive Activity shall provide STA with at least 5 business days' notice voluntarily providing the name, address, and telephone number of the person or group, specifying the proposed Expressive Activity, the date and time of the activity and the number of participants. STA may impose conditions to avoid injury to persons or property or to assure the safe and orderly use of STA property. Such conditions may include limitations on the number of participants, the time and duration of the activity, the place of the activity, and safety and security issues involving the activity.
- d. Any person or organization conducting or participating in Expressive Activity will be responsible for the removal of all written material and cleanup of property used for the Expressive Activity. No written materials may be left unattended on STA controlled or owned property.
- e. No person other than STA personnel or agents may post flyers, pamphlets, posters, or any other materials in STA buses or bus shelters.
- f. Nothing in this Policy is intended to abrogate or limit a person or organization's ability to address the STA Board of Directors in public meetings.

B. Commercial Filming

- a. Filming and/or still photography, which does not include filming home videos or still photography by individuals solely for personal use, on STA property requires a filming permit, payment of a per diem filming fee, and reimbursement for actual costs incurred by STA due to the filming, including, but not limited to costs of any STA personnel required to monitor or assist in the filming activity. Requests to film on STA property will be considered by STA management on an individual basis.
- b. A filming permit will be issued to the eligible permittee upon approval of STA management and payment of the applicable per diem charge. STA management will determine the per diem charge applicable to permittee's project. Permittee must comply with insurance requirements and other conditions applicable to use of STA property, as set forth by STA management.

SunLine Transit Agency

DATE: July 24, 2024 **ACTION**

TO: Board Operations Committee
Board of Directors

FROM: Tina Hamel, Chief Administrative Officer (DBELO)

RE: Approve Disadvantaged Business Enterprise (DBE) Participation Goal and DBE Program Update

Recommendation

Recommend that the Board of Directors approve SunLine's attached 2.5% DBE Goal and DBE program update for Federal Fiscal Years (FFYs) 2025-2027.

Background

SunLine is required to establish and submit a DBE participation goal to the Federal Transit Administration (FTA) every three (3) years in order to maintain SunLine's eligibility to receive federal financial assistance from the United States Department of Transportation (U.S. DOT). The purpose of establishing a DBE participation goal is to promote increased participation in federally assisted contracts by small, socially, and economically disadvantaged business enterprises through race neutral means. The DBE participation goal must be submitted to the FTA by August 1, 2024, 90 days before the start of FFY 2025.

The FTA and U.S. DOT guidance on DBE goal setting were utilized to develop SunLine's DBE goal for FFYs 2025–2027. After a thorough and thoughtful analysis, staff developed a proposed DBE goal of 2.5% for FFYs 2025-2027. The step by step methodology utilized by staff to develop this proposed goal is detailed in the attached *SunLine Transit Agency Disadvantaged Business Enterprise Triennial Goal Federal Fiscal Years 2025-2027*.

The DBE goal for FFYs 2022–2024 was set at 6.3%. Although SunLine successfully met this DBE participation goal for FFY 2022, SunLine did not meet the DBE participation goal for FFY 2023 and is currently projected to not meet the DBE participation goal for FFY 2024. To help address this shortfall issue, staff will actively engage with small businesses through outreach and workshops on how to become a DBE and SunLine's procurement process. However, through its analysis, staff have identified that there is a significant shortage of DBEs within the Coachella Valley, and this fact is reflected in the methodology for the proposed FFYs 2025-2027 DBE goal.

Below is SunLine's the DBE goal attainment for FFYs 2022-2024.

FFY October 1st - September 30th	FTA DBE Goal	Actual DBE Goal Attainment
2022	6.3%	6.3%
2023	6.3%	4.3%
2024	6.3%	0% as of June 1, 2024 Report

Staff are also proposing several revisions to the DBE Program to comply with new Federal DBE Regulations. The new Federal DBE regulations became effective in May. The DBE Program updates address revised monitoring and prompt payment requirements and also address other minor technical revisions to the DBE Regulations.

Financial Impact

Establishing a three (3) year DBE participation goal is required for continued eligibility to receive federal financial assistance from the FTA.

Attachments:

- [Item 10a](#) – Redlined Copy of DBE Program FFY 2025-2027
- [Item 10b](#) – DBE Program FFY 2025-2027 (Redlined Changes Accepted)
- [Item 10c](#) – SunLine Transit Agency Organizational Chart
- [Item 10d](#) – DBE Directory
- [Item 10e](#) – Enforcement Mechanisms/Legal Remedies
- [Item 10f](#) – Redlined Copy of DBE Goal FFY 2025-2027
- [Item 10g](#) – DBE Certification Forms
- [Item 10h](#) – 49 CFR Part 26



**DISADVANTAGED BUSINESS
ENTERPRISE PROGRAM
FFYs ~~2022~~2025-~~2024~~2027
~~Updated September 2023~~**

**32-505 Harry Oliver Trail
Thousand Palms, CA 92276**

SUBPART A – GENERAL REQUIREMENTS

Section 26.1, 26.23 - Objectives

The objectives are found in the policy statement on the first page of this program.

Section 26.3 - Applicability

SunLine is the recipient of federal transit funds authorized by Titles I, III, VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, II, and V of the Teas-21, Pub. L. 105-178.

Section 26.5 – Definitions

SunLine ~~will~~ adopts the definitions contained in Section 26.5 of Part 26 for this program.

Section 26.7 – Non-Discrimination Requirements

SunLine will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In administering its DBE program, SunLine will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishments of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

Section 26.11 – Record Keeping Requirements

Uniform Report of DBE Awards or Commitments and Payments: 26.11(a)

SunLine will report DBE participation to the Federal Transit Administration (FTA) using the Uniform Report of DBE Awards or Commitments and Payments, found in Appendix B to the DBE regulation.

Bidders List: 26.11 (c)

SunLine will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted Contracts. The purpose of this requirement is to allow use of the bidder list approach to calculating overall goals. The bidders list will

include the name, address, DBE non-DBE status, age, and annual gross receipts of firms.

SunLine will collect this information in the following ways:

- Vendor profiles on SunLine's website;
- Insert a clause in all agreements requiring prime bidders to report the names/addresses, and other information, of all firms who quote to them on subcontracts.

Section 26.13 – Assurances

Federal Financial Assistance Agreement Assurance: 26.13 (a)

SunLine shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract, or in the administration of its DBE Program or the requirements of 49 CFR Part 26. SunLine shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. SunLine's DBE Program, as required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in the agreement. Implementation of this program is a legal obligation and failure to carry out its terms, shall be treated as a violation of this agreement. Upon notification to SunLine of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

This language will appear in financial assistance agreements with Sub-recipients.

Contract Assurance: 26.13 (b)

We will ensure that the following clause is placed in every DOT-assisted contract and subcontract:

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 the contract, which may result in the termination of this contract, or such other remedy as SunLine deems appropriate.

SUBPART B – ADMINISTRATIVE REQUIREMENTS

Section 26.21 – DBE Program Update

Since SunLine has received a grant of \$250,000 or more in FTA planning capital, and or operating assistance in a federal fiscal year, we will continue to carry out this program until all funds from DOT financial assistance have been expended. We will provide to DOT updates representing significant changes in the program.

Section 26.25 – DBE Liaison Officer (DBELO)

SunLine's CEO/General Manager has designated the following individual as the Agency's DBE Liaison Officer:

Tina Hamel / Chief ~~of Compliance/Labor Relations~~ Administrative Officer
(DBELO/~~CEO~~)
32-505 Harry Oliver Trail
Thousand Palms, CA 92276
Phone (760) 343-3456 Ext. 1445
thamel@sunline.org

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program, and ensuring that SunLine complies with all provisions of 49 CFR Part 26. The DBELO has direct, independent access to the CEO/General Manager concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in Attachment 1 to this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. The duties and responsibilities include the following:

- Gathers and reports statistical data and other information as required by DOT
- Reviews third party contracts and purchase requisitions for compliance with this program
- Works with all departments to set overall annual goals
- Ensures that bid notices and requests for proposals are available to DBEs in a timely manner
- Identifies contracts and procurements so that DBE goals are included in solicitations (race-neutral methods and contract specific goals attainment) and identifies ways to improve progress DBE participation
- Analyzes SunLine's progress toward attainment of its DBE goal and identifies ways to improve progress DBE participation
- Participates in pre-bid meetings

- Advises the CEO/General Manager on DBE matters ~~and achievement~~
- Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance
- Plans and participates in DBE training seminars
- Provides outreach to DBEs and community organizations to advise them of opportunities
- Maintains SunLine's updated directory on certified DBEs

Section 26.27 – DBE Financial Institutions

It is the policy of SunLine to investigate the full extent of services offered by financial institutions, owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions. As part of its annual review and update of this plan, SunLine will identify any such institutions. Information on the availability of such institutions can be obtained from the DBE Liaison Officer.

Section 26.29 – Prompt Payment Mechanisms

SunLine will include the following clause in each DOT-assisted prime contract:

- The Contractor will be required to report its DBE participation obtained through race-neutral means throughout the period of performance of this Agreement.*
- The Contractor is required to pay its subcontractors performing work related to this Agreement for satisfactory performance of that work, no later than ~~407~~ days for public works projects and 15 days for professional services after the Contractor's receipt of payment for that work from the Agency. In addition, the ~~Vendor-Contractor~~ is required to return any retainage payments to those subcontractors within 30 days after the subcontractor's work related to this contract is satisfactorily completed.*
- The Contractor ~~must promptly notify the Agency whenever may not terminate or substitute~~ a DBE subcontractor performing work related to this Agreement, ~~without prior written approval of Agency, is terminated, or fails to complete its work, and must make good faith efforts to engage another DBE subcontractor to perform at least the same amount of work.~~ The Vendor may not terminate any DBE subcontractor and perform that work through its own forces or those of an affiliate without prior written consent of Agency.*

Section 26.31 – Directory

SunLine uses the ~~combined statewide~~ California Unified Certification Program directory identifying all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, date of the most recent certification, and type of work the firm has been certified to perform as a DBE (Work Codes and NAICS Codes); see Attachment 2.

Section 26.33 – Overconcentration

SunLine has not identified that overconcentration exists in the types of work that DBEs perform.

Section 26.35 – Business Development Programs

SunLine has implemented race and gender-neutral efforts to promote small business concerns, including DBEs. Each year the DBELO will facilitate and/or participate in at least two small business events, which may be coordinated with other U.S. DOT recipients to promote DBE outreach programs. Small businesses will be invited to meet with the Agency's DBE program, purchasing and project management staff and learn about the Agency's contracting program. SunLine staff will have an opportunity to become acquainted with qualified business owners who are interested in supplying services and products to the Agency. In addition, the DBELO will provide information on DBE certification and DBE program requirements and procedures. These events will include procedures explaining how to do business with the Agency and explore best business practices, which may be used to market small businesses.

Section 26.37 – Monitoring and Enforcement Mechanisms

SunLine will take the following monitory and enforcement mechanisms to ensure compliance with 49 CFR Part 26.

- We will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, ~~so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109.~~
- We will consider similar action under our own legal authorities, including responsibility determinations in future contracts. Attachment 3 lists the regulations, ~~provisions~~ statutes, and contract remedies available to ~~us~~ SunLine in the events of non-compliance ~~with the DBE regulation~~ by a participant contractor on a federally assisted ~~in our procurements~~ activities.
- We will also ~~provide~~ undertake monitoring and enforcement mechanisms, to verify that work committed to DBEs at contract award, is actually performed by

the DBEs. This will be accomplished by a written certification that contracting records have been reviewed and work site visits, to ensure that work committed to DBE firms at contract award is being conducted by DBEs.

- We will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award, to ensure that DBEs are being utilized as originally committed to and that the contractor will meet its DBE goal commitment or is otherwise undertaking good faith efforts to meet its DBE goal.

Section 26.39 – Small Business Participation

SunLine has implemented several strategies to foster small business participation in its contracting process. These include the following:

- Provide outreach by conducting DBE/Small Business Workshops
- In multi-year design-build contracts, or other large contracts (e.g., for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract, or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform
- On larger prime contracts requiring the prime contractor to consider subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved
- Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia, or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts
- Ensuring that a reasonable number of ~~prime~~ contracts are of a size that small businesses, including DBEs, can reasonably perform as a prime contractor

SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 26.43 – Set-asides or quotas

SunLine does not use quotas in ~~any way in~~ the administration of this DBE program. Additionally, SunLine does not set-aside contracts for DBEs on federally assisted contracts.

Section 26.45 – Overall Goals

In accordance with Section 26.45, SunLine will submit its triennial overall DBE goal to the FTA. A description of the methodology to calculate the overall goal and the goal calculations can be found in Attachment 4 to this program.

Before establishing the overall goal each year, SunLine will consult with minority, women's and general contractor groups, community organizations, and other business officials or organizations to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and SunLine's efforts to establish a level playing field for the participation of DBEs.

Following this consultation, we will publish a notice announcing ~~our~~ SunLine's proposed overall goal, before submission to the FTA on August 1st. The notice will be posted on SunLine's official Internet Website. If the proposed goal changes following review by the FTA, the revised goal will be posted on the official Internet Website.

Our overall goal submission to DOT will include: the goal (including the breakout of estimated race-neutral participation, as appropriate); a copy of the methodology, worksheets, etc., used to develop the goal; a summary of information and comments received during this public participation process and ~~our~~ SunLine's responses.

SunLine will begin using the proposed overall goal on October 1st of the specified year, unless ~~we have~~ SunLine has received other instructions from DOT. If ~~we~~ SunLine establishes its DBE-a goal on a project basis, ~~we~~ SunLine will begin using ~~our~~ the project specific goal by the time of the first solicitation for a DOT-assisted contract for the project. ~~Our~~ SunLine's DBE goal will remain effective for the duration of the three-year period established and approved by FTA.

Section 26.47 – Goal Setting and Accountability

If the awards and commitments shown on SunLine's Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall applicable to that fiscal year, we will:

- Analyze in detail the reason for the difference between the overall goal and the actual awards/commitments;
- Establish specific step and milestones to correct the problems identified in the analysis;
- ~~Submit~~ The analysis and plan will be retained by SunLine for 3 years and will be made available to FTA upon request. within 90 days of the end of the affected fiscal year.

Section 26.49 – Transit Vehicle Manufacturers Goals

SunLine will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, SunLine may, at its discretion and with FTA approval, establish project-specific goals for the DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

SunLine will submit within 30 days of making an award, the name of the successful TVM bidder, and the federal share of the contract commitment~~total dollar value of the contract~~ to FTA.

Section 26.51 – Meeting Overall Goals/Contract Goals

SunLine will meet the maximum feasible portion of its overall goal using race-neutral means of facilitating DBE participation. In order to do so, SunLine will:

- Arrange solicitations, times for the presentation of bids, quantities, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more assessable to DBEs and small businesseses.

SunLine will consider use using contract DBE goals to meet address ~~any portion of the overall projected shortfall to SunLine's overall DBE goal. SunLine does not project being able to meet using race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.~~

SunLine retains its discretion to~~We will~~ establish DBE contract goals ~~only on these on~~ DOT-assisted contracts that have subcontracting possibilities. ~~We need not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work.)~~ The DBE

~~We will express our~~ contract goal will be as a percentage of the total amount of a DOT-assisted contract.

Section 26.53 – Good Faith Efforts Procedures

Award of Contracts with a DBE Contract Goal: 26.53 (a)

In ~~those~~the instances where a contract-specific DBE goal is included in a procurement/solicitation, SunLine will not award the contract to a bidder who does not either: (1) meet the contract DBE goal with certified, countable DBE participation; or (2) documents it has made adequate good faith efforts to meet the DBE contract goal, even

though it was unable to do so. It is the obligation of the bidder to demonstrate it has made sufficient good faith efforts ~~prior to submission of its bid~~within five (5) days of bid opening.

Evaluation of Good Faith Efforts: 26.53 (a) & (c)

~~The process used to determine whether good faith efforts have been made by a bidder are as follows: The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in~~SunLine will follow the guidance contained in Appendix A to 49 CFR Part 26 to evaluate good faith efforts by bidders/offerors on federally assisted procurements.

~~We~~SunLine will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before ~~we~~SunLine~~commit to the performance of~~executes the contract ~~by~~with the bidder/offeror.

Information to be Submitted: 26.53 (b)

SunLine treats bidder/offeror's compliance with good faith efforts requirements as a matter of ~~responsiveness~~responsibility.

Each solicitation for which a DBE contract goal has been established will require the bidder/offerors to submit the following information no later than five (5) days after bid opening:

- The names and addresses of DBE firms that will participate in the contract;
- A description of the work that each DBE will perform;
- The dollar amount of the participation of each DBE firm participating;
- Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
- Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractors commitment; and
- If the contract goal is not met, evidence of good faith efforts

Administrative Reconsideration: 26.53 (d)

Within 15 days of being informed by SunLine that it is not responsive because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the following ~~reconsideration~~Reconsideration official~~Official~~:

Deputy Chief Financial Officer
32-505 Harry Oliver Trail
Thousand Palms, CA 92276
Phone (760) 343-3456

The reconsideration official will ~~not~~ have ~~played any~~ role in the original determination, that the bidder/offeror did not ~~document~~ conduct sufficient good faith efforts to meet the DBE goal.

As part of this reconsideration, the bidder/offeror will 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. The bidder/offeror will have the opportunity to meet in person with ~~our~~ the Reconsideration official, to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. ~~We~~ The Reconsideration Official will send the bidder/offeror a written decision ~~on~~ of their reconsideration, explaining the basis for finding that the bidder did or did not meet the goal, or make adequate good faith efforts to do so. The ~~result~~ decision of the ~~R~~reconsideration Official is final and process is not administratively appealable to the ~~department~~ Department of Transportation.

Good Faith Efforts when a DBE is Terminated/Replaced on a Contract with Contract Goals: 26.53 (f)

SunLine requires that prime contractors not terminate, substitute, or otherwise reduce the scope of work for a DBE subcontractor listed on a bid/contract with a DBE contract goal without SunLine's prior written consent. This includes instances when a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm. Prior written consent will only be provided where there is "good cause" for termination, substitution, or reduction in scope of work of the DBE firm, as ~~established~~ defined by 49 CFR Section 26.53 (f)(3) ~~of the DBE regulation~~.

Before transmitting to SunLine its request to terminate, substitute, or reduce the scope of work of a DBE firm, the prime contractor must submit a notice in writing to the affected DBE of its intent to do so. A copy of this notice must be provided to SunLine prior to consideration of the request to terminate, substitute, or reduce the scope of work. Upon receipt of such notice, ~~The~~ the DBE will ~~then~~ have five (5) days to respond and advise SunLine of why it objects to the proposed termination action by the prime contractor.

~~In those instances w~~here "good cause" exists, ~~to terminate a DBE's contract,~~ SunLine will require the prime contractor to make good faith efforts to replace the affected ~~a~~ DBE ~~that is terminated, or has otherwise failed to complete its work on a contract~~ with another certified DBE, ~~to the extent needed to meet the contract goal.~~ We will require the prime contractor to notify the DBE Liaison Officer immediately, ~~of the DBE's inability, of the DBE's inability~~ or unwillingness to perform and provide reasonable documentation.

In addition to obtaining SunLine's prior written consent whenever this situation, a DBE is terminated, substituted, or their scope of work is reduced, ~~we will require~~ the prime contractor ~~to obtain our prior approval of the substitute DBE and to~~ must provide copies of new or amended subcontracts, or documentation of good faith efforts to SunLine.

If the contractor fails or refuses to comply ~~in the time specified~~within the five (5) day period identified above, ~~our SunLine's~~ contracting office will issue an order stopping all or part of payment/work, until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Bid Specification:

The requirements of 49 CFR Part 26, Regulations of the U.S. Department of Transportation, apply to this contract. It is the policy of SunLine to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All ~~firms qualifying qualified firms~~under this solicitation are encouraged to submit bids/proposals. Award of this contract will be conditioned upon satisfying the requirements of this bid specification. These requirements apply to all bidders/offerors, including those who qualify as a DBE. A DBE contract goal of _____ percent has been established for this contract. The bidder/offeror ~~shall~~must make good faith efforts, as defined in Appendix A, 49 CFR Part 26, to meet ~~the this DBE~~ contract goal. ~~for DBE participation in the performance of this contract.~~

The bidder/offeror will be required to submit the following information: (1) the names and addresses of DBE firms that will participate in the contract; (2) a description of the work that each DBE firm will perform; (3) the dollar amount of the participation of each DBE firm participating; (4) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor, whose participation it submits to meet the contract goal; (5) Written confirmation from the DBE, that it is participating in the contract as provided in the commitment made under (4) and (5) if that contract goal is not met, evidence of good faith efforts; and (6) any other information SunLine deems necessary to evaluate DBE participation and good faith efforts.

Section 26.55 – Counting DBE Participation

SunLine will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55.

Section 26.65 – Business Size Determinations

SunLine will ensure that each DBE counted towards its overall DBE goal, possesses a valid DBE certification from a member of the California Unified Certification Program. SunLine will also regularly monitor DBE certifications through the entire contract to ensure participating DBE's remain certified for the contract term.

- ~~a. To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient SunLine will apply current SBA business size standards found in 13 CFR part 121, appropriate to the types of work the firm seeks to perform in~~

- ~~DOT-assisted contracts, including the primary industry classification of the applicant.~~
- ~~b. Even if the firm meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three (3) fiscal years, in excess of \$26.29 million.~~
- ~~c.a. SunLine adjusts the number in paragraph (b) of this section annually, using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.~~

SUBPART D & E - CERTIFICATION

Section 26.81 – Unified Certification Programs

SunLine is a non-certifying member of the Unified Certification Program (UCP) administered by Caltrans. ~~The UCP will meet all of the requirements of this section.~~ SunLine will use and count for apply DBE credit only those DBE firms certified by the California Unified Certification Program (CUCP). A listing of DBE's certified by the CUCP is available from Caltrans' Office of Civil Rights website <https://californiaucp.dbesystem.com/>. The following table represents a list of current Certifying Member Agencies:

Agency	Business Address	Telephone No.	Fax No.
City of Los Angeles Bureau of Contract Admin. Centralized Certification Section Email: bca.certifications@lacity.org http://bca.lacity.org/	1149 South Broadway Street, Suite 300 Los Angeles, CA 90015	(213) 847-2684	(213) 847-2777
Los Angeles County Metropolitan Transportation Authority (METRO) Diversity and Economic Opportunity Department Email: certificationunit@metro.net https://metro.gob2q.com/	One Gateway Plaza, MS 99-8-4 Los Angeles, CA 90012	(213) 922-2600	(213) 922-7660
S.F. Bay Area Rapid Transit District (BART) Office of Civil Rights www.bart.gov	300 Lakeside Drive 16 th Floor Oakland, CA 94612	(510) 464-6100	(510) 464-7587

City of Fresno Finance Department, Purchasing Division, DBE Program www.fresno.gov	2600 Fresno Street Room 2156 Fresno, CA 93721-3622	(559) 621-7036	(559) 488-1069
Santa Clara Valley Transportation Authority (VTA) Business Diversity Programs Email: osdb.osdb@vta.org https://www.vta.org/business-center/business-diversity-programs	3331 North First Street Bldg. B San Jose, CA 95134-1906	(408) 321-5962	(408) 955-9729
San Francisco Municipal Transportation Agency (SFMTA) Contract Compliance Office www.sfmuni.com	1 S. Van Ness Avenue 6 th Floor San Francisco, CA 94103	(415) 701-4436	(415) 701-4347
San Mateo County Transit District (SAMTRANS) / Peninsula Corridor Joint Powers Board (JPB) DBE Office www.samtrans.com	1250 San Carlos Avenue San Carlos, CA 94070	(650) 508-7939	(650) 508-7738
California Department of Transportation (CALTRANS) Office of Civil Rights www.dot.ca.gov	1823 14 th Street Sacramento, CA 95811	(916) 324-1700 (866) 810-6346	(916) 324-1862

SUBPART F – COMPLIANCE AND ENFORCEMENT

Section 26.109 – Information, Confidentiality, Cooperation

SunLine will safeguard from disclosure to third parties information that ~~may reasonably be regarded~~has been designated as confidential business information, ~~consistent with unless otherwise required to disclose such information under~~ Federal, State, and local laws. ~~Confidentiality of proposals is considered by SunLine as an essential element of maintaining fairness during the evaluation process. However, confidentiality cannot be guaranteed under the California Public Records Act.~~

~~Notwithstanding any contrary provisions of state or local law, we will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than DOT) without the written consent of the submitter.~~

Monitoring Payments to DBEs

We will require prime contractors to maintain records and documents of payments to DBEs, for three years following the performance of the contract. These records will be made available for inspection upon request, by any authorized representative of SunLine or DOT. This reporting requirement also extends to any certified DBE subcontractor.

We will perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors, to ensure that the actual amount paid to DBE subcontractors equals, or exceeds the dollar amounts stated in the schedule of DBE participation.

For each federally assisted contract, SunLine will actively monitor DBE participation by checking the work performed by DBE's on the contract compared to the work originally stated in the prime contractor's bid/proposals. The number of checks will depend on the size, complexity, and length of each contract.

ATTACHMENTS

Attachment 1: Organizational Chart

Attachment 2: DBE Directory

Attachment 3: ~~Monitoring and~~ Enforcement Mechanisms/Legal Remedies

Attachment 4: Goal Setting Methodology

Attachment 5: Certification Forms

Attachment 6: DBE Regulation, 49 CFR Part 26



**DISADVANTAGED BUSINESS
ENTERPRISE PROGRAM
FFYs 2025-2027**

**32-505 Harry Oliver Trail
Thousand Palms, CA 92276**

SUBPART A – GENERAL REQUIREMENTS

Section 26.1, 26.23 - Objectives

The objectives are found in the policy statement on the first page of this program.

Section 26.3 - Applicability

SunLine is the recipient of federal transit funds authorized by Titles I, III, VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, II, and V of the Teas-21, Pub. L. 105-178.

Section 26.5 – Definitions

SunLine adopts the definitions contained in Section 26.5 of Part 26 for this program.

Section 26.7 – Non-Discrimination Requirements

SunLine will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In administering its DBE program, SunLine will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishments of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

Section 26.11 – Record Keeping Requirements

Uniform Report of DBE Awards or Commitments and Payments: 26.11(a)

SunLine will report DBE participation to the Federal Transit Administration (FTA) using the Uniform Report of DBE Awards or Commitments and Payments, found in Appendix B to the DBE regulation.

Bidders List: 26.11 (c)

SunLine will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted Contracts. The purpose of this requirement is to allow use of the bidder list approach to calculating overall goals. The bidders list will

include the name, address, DBE non-DBE status, age, and annual gross receipts of firms.

SunLine will collect this information in the following ways:

- Vendor profiles on SunLine's website;
- Insert a clause in all agreements requiring prime bidders to report the names/addresses, and other information, of all firms who quote to them on subcontracts.

Section 26.13 – Assurances

Federal Financial Assistance Agreement Assurance: 26.13 (a)

SunLine shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract, or in the administration of its DBE Program or the requirements of 49 CFR Part 26. SunLine shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. SunLine's DBE Program, as required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in the agreement. Implementation of this program is a legal obligation and failure to carry out its terms, shall be treated as a violation of this agreement. Upon notification to SunLine of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

This language will appear in financial assistance agreements with Sub-recipients.

Contract Assurance: 26.13 (b)

We will ensure that the following clause is placed in every DOT-assisted contract and subcontract:

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 the contract, which may result in the termination of this contract or such other remedy as SunLine deems appropriate.

SUBPART B – ADMINISTRATIVE REQUIREMENTS

Section 26.21 – DBE Program Update

Since SunLine has received a grant of \$250,000 or more in FTA planning capital, and or operating assistance in a federal fiscal year, we will continue to carry out this program until all funds from DOT financial assistance have been expended. We will provide to DOT updates representing significant changes in the program.

Section 26.25 – DBE Liaison Officer (DBELO)

SunLine's CEO/General Manager has designated the following individual as the Agency's DBE Liaison Officer:

Tina Hamel / Chief Administrative Officer (DBELO)
32-505 Harry Oliver Trail
Thousand Palms, CA 92276
Phone (760) 343-3456 Ext. 1445
thamel@sunline.org

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that SunLine complies with all provisions of 49 CFR Part 26. The DBELO has direct, independent access to the CEO/General Manager concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in Attachment 1 to this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. The duties and responsibilities include the following:

- Gathers and reports statistical data and other information as required by DOT
- Reviews third party contracts and purchase requisitions for compliance with this program
- Works with all departments to set overall annual goals
- Ensures that bid notices and requests for proposals are available to DBEs in a timely manner
- Identifies contracts and procurements so that DBE goals are included in solicitations (race-neutral methods and contract specific goals attainment) and identifies ways to improve DBE participation
- Analyzes SunLine's progress toward attainment of its DBE goal and identifies ways to improve DBE participation
- Participates in pre-bid meetings
- Advises the CEO/General Manager on DBE matters

- Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance
- Plans and participates in DBE training seminars
- Provides outreach to DBEs and community organizations to advise them of opportunities
- Maintains SunLine’s updated directory on certified DBEs

Section 26.27 – DBE Financial Institutions

It is the policy of SunLine to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions and to encourage prime contractors on DOT-assisted contracts to make use of these institutions. As part of its annual review and update of this plan, SunLine will identify any such institutions. Information on the availability of such institutions can be obtained from the DBE Liaison Officer.

Section 26.29 – Prompt Payment Mechanisms

SunLine will include the following clause in each DOT-assisted prime contract:

- a. *The Contractor will be required to report its DBE participation obtained through race-neutral means throughout the period of performance of this Agreement.*
- b. *The Contractor is required to pay its subcontractors performing work related to this Agreement for satisfactory performance of that work, no later than 7 days for public works projects and 15 days for professional services after the Contractor’s receipt of payment for that work from the Agency. In addition, the Contractor is required to return any retainage payments to those subcontractors within 30 days after the subcontractor's work related to this contract is satisfactorily completed.*
- c. *The Contractor may not terminate or substitute a DBE subcontractor performing work related to this Agreement, without prior written approval of Agency. The Vendor may not terminate any DBE subcontractor and perform that work through its own forces or those of an affiliate without prior written consent of Agency.*

Section 26.31 – Directory

SunLine uses the California Unified Certification Program directory identifying all firms eligible to participate as DBEs. The directory lists the firm’s name, address, phone

number, date of the most recent certification, and type of work the firm has been certified to perform as a DBE (Work Codes and NAICS Codes); see Attachment 2.

Section 26.33 – Overconcentration

SunLine has not identified that overconcentration exists in the types of work that DBEs perform.

Section 26.35 – Business Development Programs

SunLine has implemented race and gender-neutral efforts to promote small business concerns, including DBEs. Each year the DBELO will facilitate and/or participate in at least two small business events, which may be coordinated with other U.S. DOT recipients to promote DBE outreach programs. Small businesses will be invited to meet with the Agency's DBE program, purchasing and project management staff and learn about the Agency's contracting program. SunLine staff will have an opportunity to become acquainted with qualified business owners who are interested in supplying services and products to the Agency. In addition, the DBELO will provide information on DBE certification and DBE program requirements and procedures. These events will include procedures explaining how to do business with the Agency and explore best business practices, which may be used to market small businesses.

Section 26.37 – Monitoring and Enforcement Mechanisms

SunLine will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26.

- We will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program.
- We will consider similar action under our own legal authorities, including responsibility determinations in future contracts. Attachment 3 lists the regulations, statutes, and contract remedies available to SunLine in the event of non-compliance by a contractor on a federally assisted procurements.
- We will also undertake monitoring and enforcement mechanisms, to verify that work committed to DBEs at contract award, is actually performed by the DBEs. This will be accomplished by a written certification that contracting records have been reviewed and work site visits, to ensure that work committed to DBE firms at contract award is being conducted by DBEs.
- We will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award, to ensure that DBEs are being utilized as

originally committed to and that the contractor will meet its DBE goal commitment or is otherwise undertaking good faith efforts to meet its DBE goal.

Section 26.39 – Small Business Participation

SunLine has implemented several strategies to foster small business participation in its contracting process. These include the following:

- Provide outreach by conducting DBE/Small Business Workshops
- In multi-year design-build contracts or other large contracts (e.g., for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract, or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform
- On larger prime contracts requiring the prime contractor to consider subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved
- Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia, or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts
- Ensuring that a reasonable number of contracts are of a size that small businesses, including DBEs, can reasonably perform as a prime contractor

SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 26.43 – Set-asides or quotas

SunLine does not use quotas in the administration of this DBE program. Additionally, SunLine does not set-aside contracts for DBEs on federally assisted contracts.

Section 26.45 – Overall Goals

In accordance with Section 26.45, SunLine will submit its triennial overall DBE goal to the FTA. A description of the methodology to calculate the overall goal and the goal calculations can be found in Attachment 4 to this program.

Before establishing the overall goal each year, SunLine will consult with minority, women’s and general contractor groups, community organizations, and other business officials or organizations to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on

opportunities for DBEs, and SunLine's efforts to establish a level playing field for the participation of DBEs.

Following this consultation, we will publish a notice announcing SunLine's proposed overall goal, before submission to the FTA on August 1st. The notice will be posted on SunLine's official Internet Website. If the proposed goal changes following review by the FTA, the revised goal will be posted on the official Internet Website.

Our overall goal submission to DOT will include: the goal (including the breakout of estimated race-neutral participation, as appropriate); a copy of the methodology, worksheets, etc., used to develop the goal; a summary of information and comments received during this public participation process and SunLine's responses.

SunLine will begin using the proposed overall goal on October 1st of the specified year, unless SunLine has received other instructions from DOT. If SunLine establishes its DBE goal on a project basis, SunLine will begin using the project specific goal by the time of the first solicitation for a DOT-assisted contract for the project. SunLine's DBE goal will remain effective for the duration of the three-year period established and approved by FTA.

Section 26.47 – Goal Setting and Accountability

If the awards and commitments shown on SunLine's Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall applicable to that fiscal year, we will:

- Analyze in detail the reason for the difference between the overall goal and the actual awards/commitments;
- Establish specific step and milestones to correct the problems identified in the analysis;
- The analysis and plan will be retained by SunLine for 3 years and will be made available to FTA upon request.

Section 26.49 – Transit Vehicle Manufacturers Goals

SunLine will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, SunLine may, at its discretion and with FTA approval, establish project-specific goals for the DBE

participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

SunLine will submit within 30 days of making an award, the name of the successful TVM bidder, and the federal share of the contract commitment to FTA.

Section 26.51 – Meeting Overall Goals/Contract Goals

SunLine will meet the maximum feasible portion of its overall goal using race-neutral means of facilitating DBE participation. In order to do so, SunLine will:

- Arrange solicitations, times for the presentation of bids, quantities, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more assessable to DBEs and small businesses.

SunLine will consider using contract DBE goals to address a projected shortfall to SunLine’s overall DBE goal.

SunLine retains its discretion to establish DBE contract goals on DOT-assisted contracts that have . The DBE contract goal will be a percentage of the total amount of a DOT-assisted contract.

Section 26.53 – Good Faith Efforts Procedures

Award of Contracts with a DBE Contract Goal: 26.53 (a)

In the instances where a contract-specific DBE goal is included in a procurement/solicitation, SunLine will not award the contract to a bidder who does not either: (1) meet the contract DBE goal with certified, countable DBE participation; or (2) documents it has made adequate good faith efforts to meet the DBE contract goal, even though it was unable to do so. It is the obligation of the bidder to demonstrate it has made sufficient good faith efforts within five (5) days of bid opening.

Evaluation of Good Faith Efforts: 26.53 (a) & (c)

SunLine will follow the guidance contained in Appendix A to 49 CFR Part 26 to evaluate good faith efforts by bidders/offerors on federally assisted procurements.

SunLine will ensure that all information is complete and accurate and adequately documents the bidder/offeror’s good faith efforts before SunLine executes the contract with the bidder/offeror.

Information to be Submitted: 26.53 (b)

SunLine treats bidder/offeror's compliance with good faith efforts requirements as a matter of responsibility.

Each solicitation for which a DBE contract goal has been established will require the bidder/offerors to submit the following information no later than five (5) days after bid opening:

- The names and addresses of DBE firms that will participate in the contract;
- A description of the work that each DBE will perform;
- The dollar amount of the participation of each DBE firm participating;
- Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
- Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractors commitment; and
- If the contract goal is not met, evidence of good faith efforts

Administrative Reconsideration: 26.53 (d)

Within 15 days of being informed by SunLine that it is not responsive because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the following Reconsideration Official:

Deputy Chief Financial Officer
32-505 Harry Oliver Trail
Thousand Palms, CA 92276
Phone (760) 343-3456

The reconsideration official will have no role in the original determination that the bidder/offeror did not conduct sufficient good faith efforts to meet the DBE goal.

As part of this reconsideration, the bidder/offeror will 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. The bidder/offeror will have the opportunity to meet in person with the Reconsideration Official, to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The Reconsideration Official will send the bidder/offeror a written decision of their reconsideration, explaining the basis for finding that the bidder did or did not meet the goal, or make adequate good faith efforts to do so. The decision of the Reconsideration Official is final and not administratively appealable to the Department of Transportation.

Good Faith Efforts when a DBE is Terminated/Replaced on a Contract with Contract Goals: 26.53 (f)

SunLine requires that prime contractors not terminate, substitute, or otherwise reduce the scope of work for a DBE subcontractor listed on a bid/contract with a DBE contract goal without SunLine's prior written consent. This includes instances when a prime

contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm. Prior written consent will only be provided where there is “good cause” for termination, substitution, or reduction in scope of work of the DBE firm, as defined by 49 CFR Section 26.53 (f)(3).

Before transmitting to SunLine its request to terminate, substitute, or reduce the scope of work of a DBE firm, the prime contractor must submit a notice in writing to the affected DBE of its intent to do so. A copy of this notice must be provided to SunLine prior to consideration of the request to terminate, substitute, or reduce the scope of work. Upon receipt of such notice, the DBE will have five (5) days to respond and advise SunLine of why it objects to the proposed action by the prime contractor.

Where “good cause” exists, SunLine will require the prime contractor to make good faith efforts to replace the affected DBE with another certified DBE. We will require the prime contractor to notify the DBE Liaison Officer immediately of the DBE’s inability or unwillingness to perform and provide reasonable documentation.

In addition to obtaining SunLine’s prior written consent whenever a DBE is terminated, substituted, or their scope of work is reduced, the prime contractor must provide copies of new or amended subcontracts, or documentation of good faith efforts to SunLine.

If the contractor fails or refuses to comply within the five (5) day period identified above, SunLine’s contracting office will issue an order stopping all or part of payment/work, until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Bid Specification:

The requirements of 49 CFR Part 26, Regulations of the U.S. Department of Transportation, apply to this contract. It is the policy of SunLine to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All qualified firms are encouraged to submit bids/proposals. Award of this contract will be conditioned upon satisfying the requirements of this bid specification. These requirements apply to all bidders/offerors, including those who qualify as a DBE. A DBE contract goal of ____ percent has been established for this contract. The bidder/offeror must make good faith efforts, as defined in Appendix A, 49 CFR Part 26, to meet this DBE contract goal.

The bidder/offeror will be required to submit the following information: (1) the names and addresses of DBE firms that will participate in the contract; (2) a description of the work that each DBE firm will perform; (3) the dollar amount of the participation of each DBE firm participating; (4) Written documentation of the bidder/offeror’s commitment to use a DBE subcontractor, whose participation it submits to meet the contract goal; (5) Written confirmation from the DBE, that it is participating in the contract as provided in the commitment made under (4) and (5) if that contract goal is not met, evidence of good

faith efforts; and (6) any other information SunLine deems necessary to evaluate DBE participation and good faith efforts.

Section 26.55 – Counting DBE Participation

SunLine will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55.

Section 26.65 – Business Size Determinations

SunLine will ensure that each DBE counted towards its overall DBE goal, possesses a valid DBE certification from a member of the California Unified Certification Program. SunLine will also regularly monitor DBE certifications through the entire contract to ensure participating DBE’s remain certified for the contract term.

a.

SUBPART D & E - CERTIFICATION

Section 26.81 – Unified Certification Programs

SunLine is a non-certifying member of the Unified Certification Program (UCP) administered by Caltrans. SunLine will apply DBE credit only those DBE firms certified by the California Unified Certification Program (CUCP). A listing of DBE’s certified by the CUCP is available from Caltrans’ Office of Civil Rights website <https://californiaucp.dbesystem.com/>. The following table represents a list of current Certifying Member Agencies:

Agency	Business Address	Telephone No.	Fax No.
City of Los Angeles Bureau of Contract Admin. Centralized Certification Section Email: bca.certifications@lacity.org http://bca.lacity.org/	1149 South Broadway Street, Suite 300 Los Angeles, CA 90015	(213) 847-2684	(213) 847-2777
Los Angeles County Metropolitan Transportation Authority (METRO) Diversity and Economic Opportunity	One Gateway Plaza, MS 99-8-4 Los Angeles, CA 90012	(213) 922-2600	(213) 922-7660

Department Email: certificationunit@metro.net https://metro.gob2g.com/			
S.F. Bay Area Rapid Transit District (BART) Office of Civil Rights www.bart.gov	300 Lakeside Drive 16 th Floor Oakland, CA 94612	(510) 464-6100	(510) 464-7587
City of Fresno Finance Department, Purchasing Division, DBE Program www.fresno.gov	2600 Fresno Street Room 2156 Fresno, CA 93721-3622	(559) 621-7036	(559) 488-1069
Santa Clara Valley Transportation Authority (VTA) Business Diversity Programs Email: osdb.osdb@vta.org https://www.vta.org/business-center/business-diversity-programs	3331 North First Street Bldg. B San Jose, CA 95134-1906	(408) 321-5962	(408) 955-9729
San Francisco Municipal Transportation Agency (SFMTA) Contract Compliance Office www.sfmuni.com	1 S. Van Ness Avenue 6 th Floor San Francisco, CA 94103	(415) 701-4436	(415) 701-4347
San Mateo County Transit District (SAMTRANS) / Peninsula Corridor Joint Powers Board (JPB) DBE Office www.samtrans.com	1250 San Carlos Avenue San Carlos, CA 94070	(650) 508-7939	(650) 508-7738
California Department of Transportation (CALTRANS) Office of Civil Rights www.dot.ca.gov	1823 14 th Street Sacramento, CA 95811	(916) 324-1700 (866) 810-6346	(916) 324-1862

SUBPART F – COMPLIANCE AND ENFORCEMENT

Section 26.109 – Information, Confidentiality, Cooperation

SunLine will safeguard from disclosure to third parties information that has been designated as confidential business information, unless otherwise required to disclose such information under Federal, State, and local laws.

Monitoring Payments to DBEs

We will require prime contractors to maintain records and documents of payments to DBEs, for three years following the performance of the contract. These records will be made available for inspection upon request, by any authorized representative of SunLine or DOT. This reporting requirement also extends to any certified DBE subcontractor.

We will perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors, to ensure that the actual amount paid to DBE subcontractors equals, or exceeds the dollar amounts stated in the schedule of DBE participation.

For each federally assisted contract, SunLine will actively monitor DBE participation by checking the work performed by DBE's on the contract compared to the work originally stated in the prime contractor's bid/proposals. The number of checks will depend on the size, complexity, and length of each contract.

ATTACHMENTS

Attachment 1: Organizational Chart

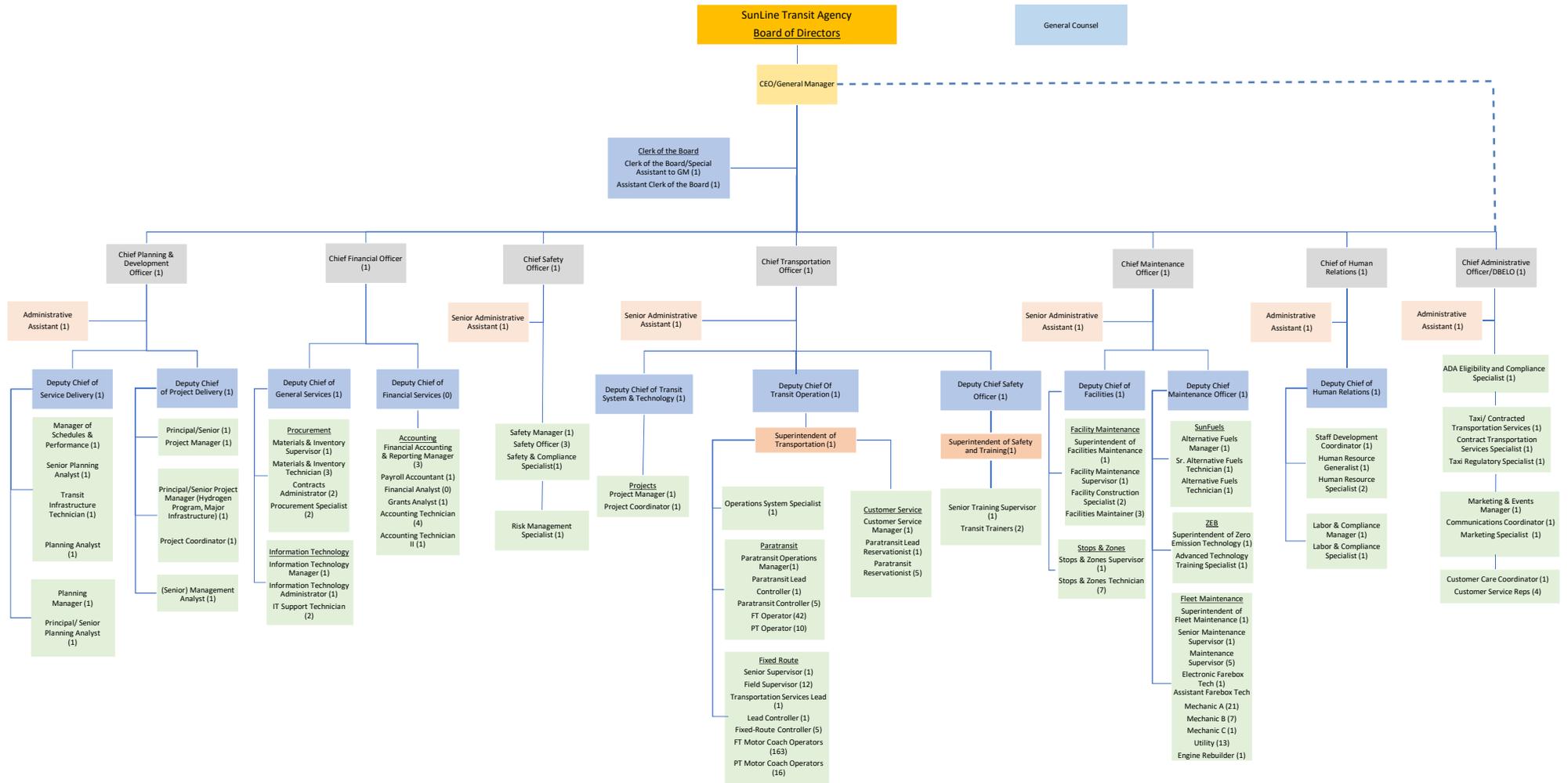
Attachment 2: DBE Directory

Attachment 3: Enforcement Mechanisms/Legal Remedies

Attachment 4: Goal Setting Methodology

Attachment 5: Certification Forms

Attachment 6: DBE Regulation, 49 CFR Part 26



DBE Directory

SunLine participates in the **(CUCP)** CALIFORNIA UNIFIED CERTIFICATION PROGRAM and utilizes the DBE query forms available on the Caltrans website.

<https://caltrans.dbesystem.com/>

<https://californiaucp.dbesystem.com/>

Enforcement Mechanisms/Legal Remedies

SunLine has available several remedies to enforce the DBE requirements contained in its contracts, including, but not limited to the following:

- Breach of contract action, pursuant to the terms of the contract
- Breach of contract action, pursuant to California Civil Code § 3300 et seq.
- The California Whistleblower Act authorizes the California State Auditor to receive complaints from state employees and members of the public

In addition, the federal government has available several enforcement mechanisms that it may pursue , including, but not limited to the following:

- Suspension or debarment proceedings pursuant to 49 CFR part 26
- Enforcement action pursuant to 49 CFR part 31
- Prosecution pursuant to 18 USC 1001

SunLine Transit Agency
DISADVANTAGED BUSINESS ENTERPRISE
TRIENNIAL GOAL FEDERAL FISCAL YEARS 2025-2027

As required by Federal Regulations 49 CFR Part 26.45, public agencies receiving Federal Department of Transportation-assisted funds who anticipate awarding \$250,000 or more in DOT-assisted contracts must adopt a three-year DBE goal.

The goal-setting process consists of two steps. Step one determines the base figure for the relative availability of DBEs. Step two determines what adjustment, if any, may be needed.

STEP ONE

1. ANTICIPATED PROJECTS FOR FEDERAL FISCAL YEARS 2025-2027

The following projects represent the anticipated federally funded contracting opportunities for the Federal Fiscal Year beginning October 1, 2024, through September 30, 2027. ~~The AgencySunLine~~ has projected ~~\$1,485,532~~\$13,957,465.00 federal dollars ~~are~~will be available for DBE contracting opportunities over the three-year term; see Exhibit A.

2. GOAL METHODOLOGY

A base figure is calculated by first determining the number of ready, willing and able DBEs using the North American Industry Classification System (NAICS) and the ~~Local-local Market-market Areaarea~~. NAICS is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing and publishing statistical data related to the U.S. business economy. The NAICS codes included in ~~this-SunLine's~~ methodology represent specific types of work ~~the AgencySunLine~~ anticipates will be performed on its DOT-assisted contracts over the next three fiscal years.

The local market area for each NAICS code reflects the area in which the majority of the contractors and subcontractors with which ~~the AgencySunLine~~ does business are located and the area in which the majority of the federal contracting dollars are spent.

Exhibit A identifies the NAICS codes for each of ~~the Agency'sSunLine's~~ DOT-assisted contracts with DBE contracting opportunities and the local market area for each NAICS code.

To determine the number of all ready, willing, and able firms, ~~the Agency~~SunLine used the six-digit level NAICS information available from the U.S. Census Censtats Database, *County Business Patterns Data*, for the local market area of Imperial, Riverside, San Bernardino, Los Angeles, and San Diego Counties.

~~The Agency~~SunLine queried the relative NAICS codes in the DBE Firm Search listed in the California Unified Certification Program (CUCP) database accessible on the Caltrans website ~~who have, which~~ indicated an ~~interest in doing~~ability to do business in Riverside County.

DBE regulations require the use of the most refined data available to avoid overestimating the number of firms in the DBE goal calculation.

3. **WEIGHTING**

To help ensure the step one base figure is as accurate as possible, ~~the Agency~~SunLine weighted the relative availability calculation discussed above. To calculate the percentage of weight, the sum of DOT-assisted contracts for each NAICS code was divided by the sum of all DOT-assisted contracts; see Exhibit A.

4. **ROUNDED, WEIGHTED STEP ONE BASE FIGURE**

Based on the above analysis, ~~the Agency's~~SunLine's step one base figure is ~~0.06340~~0.0245, or ~~6.342~~2.5%; see Exhibit A.

STEP TWO

1. **ADJUSTMENTS TO THE BASE FIGURE**

Step two of the goal setting process is intended to adjust the step one base figure. Once the base figure is calculated, all evidence available in the jurisdiction must be examined to determine if an adjustment to the base figure is needed to arrive at the overall goal.

Several factors as outlined underin 49 CFR Part 26.45 were ~~considered to see if there~~analyzed to determine whether was a need to adjust the step one bBase goalFigure should be adjusted. Evidence considered in making an adjustment to the Base Figure included an evaluation of SunLine's Ppast DBE Goal Attainments and other evidence, as follows.

- Past DBE Goal Attainments
~~SunLine analyzed As historical DBE participation attainments provide demonstrable evidence of DBE availability and capacity to perform,~~ past DBE participation attainments for the ~~five three~~ (35) federal fiscal years, for which DBE attainment data is available. The table below reflects the demonstrated capacity of DBEs on FTA-assisted contracts awarded by SunLine within the last ~~three five~~ (35) federal fiscal years.

Federal Fiscal Year (FFY)	<u>FTA DBE Goal</u>	<u>FTA-Actual DBE Goal Attainment-%</u>
2016		7.3%
2017		7.8%
2018 2021	<u>6%</u>	<u>11.35.4%</u>
2019 2022	<u>6.3%</u>	<u>6.06.3%</u>
2020 2023	<u>6.3%</u>	<u>24.04.3%</u>
Median DBE Attainment Within the Last Five Three (53) Years		<u>7.85.4%</u>

The reporting periods shown above, along with SunLine's the median DBE past participation percentage, ~~represent~~provide past evidence of successful DBE participation ~~in the Agency's program~~on SunLine's federally assisted contracts. DBE Goals from other ~~agencies~~federal recipients were not utilized as an adjustment factor for SunLine's overall goal, since as no other U.S. DOT recipients having substantially similar contracting opportunities were identified in the local market area. One disparity study, Advancement Project California 2022 Caltrans FTA Disparity Study; Race Counts, racecounts.org 2021, Riverside County prepared by BBC Research & Consulting, was reviewed. The study did not use NAICS codes to determine the types of businesses referenced and whether they would apply to the upcoming projects. SunLine determined that the disparity study did not specifically address DBE issues within SunLine's jurisdiction and local market area. The study did not use NAICS codes to determine the types of businesses referenced to assess if they would apply to upcoming projects. The disparity study also looked at California as a whole and did not break down its findings by county. Additionally, SunLine did not find other disparity studies within ~~their's~~ jurisdiction and ~~or~~ local market area to consider in this second step of the DBE goal-setting analysis.

SunLine's analysis concluded that the DBE goal established in step one did not require adjustment. In reviewing the information presented above, Accordingly, staff recommends (no adjustment) be made to the proposed SunLine's proposed overall annual Agency DBE goal for federal fiscal years 2025-2027 is **62.5%**.

UTILIZATION OF RACE/GENDER-NEUTRAL METHOD

~~The Agency SunLine~~ will annually meet its overall goal by using utilize race-neutral methods to facilitate DBE participation on its federally assisted contracts. ~~The~~

~~AgencySunLine~~ actively seeks to solicit procurement participation from ~~DBE certified~~DBE-certified firms and affirmatively ensures the same in its public notices.

~~SunLine's R~~race-neutral methods include, but are not ~~necessarily~~ limited to, the following:

- DBE participation through a prime contract obtained through competitive procurement procedures
- DBE participation through a subcontract on a prime contract without a DBE goal
- DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in its award process
- AgencySunLine participation in local area DBE outreach events

~~The AgencySunLine~~ will also make efforts to ensure that Requests for Proposals (RFPs), Invitation for Bids (IFBs) and all corresponding contracting requirements facilitate participation to DBEs and other small businesses. ~~The AgencySunLine~~ encourages prime contractors to subcontract portions of the work to DBEs. ~~Formal~~All SunLine RFPs and IFBs made publicly ~~are~~ available on ~~the Agency'sSunLine's~~ website, ~~as is the Agency'sSunLine's~~ DBE policy and general information about "how to do business" with ~~the AgencySunLine~~ are also made publicly available on SunLine's website.

PUBLIC PARTICIPATION

In accordance with 49 CFR Part 26.45(g), ~~as amended by the Final Rule effective November 3, 2014,~~ to establish its overall goal, ~~the AgencySunLine~~ must provide for consultation and publication.

1. CONSULTATION

The consultation must include a scheduled, direct, interactive exchange with minority, women's, and general contractor groups, community organizations, and other officials or organizations that could be expected to have information concerning:

- The availability of disadvantaged and non-disadvantaged businesses
- The effects of discrimination on opportunities for DBEs
- ~~The Agency'sSunLine's~~ efforts to establish a level playing field for DBE participation

To comply with this requirement, SunLine met with DBE and non-DBE businesses, public agencies, community organizations, and affected groups during the following workshops:

- ~~Greater Coachella Valley Chamber of Commerce Chamber Connect; June 4, 2021~~

- ~~SunLine Transit Agency Virtual DBE & Small Business Outreach; June 8, 2021~~
- ~~SunLine Transit Agency DBE & Small Business Workshop; November 15, 2021~~
- ~~Greater Coachella Valley Chamber of Commerce Annual Joint Mixer; May 17, 2023~~
- ~~Coachella Valley Local Government Vendor Fair; April 17, 2024~~

~~SunLine also met with the following groups via Zoom during the workshops listed above. No comments were received regarding the proposed DBE.~~

- ~~A Fair Way Mediation Center~~
- ~~BBSI La Quinta~~
- ~~California Behavioral Health~~
- ~~Dandelion Consulting Group~~
- ~~Flower Market~~
- ~~Food Now – Desert Hot Springs~~
- ~~Friends of the Indio Senior Center~~
- ~~G-Aries Visions~~
- ~~LASR-INK – Corp dba Central Printer Resources~~
- ~~Metrics Bookkeeping & Taxes~~
- ~~R. IZZO Strategic Solutions~~
- ~~Resort Opportunities~~
- ~~Service Zoom WebDesign and Marketing Agency~~
- ~~Spectrum Reach~~
- ~~Thryv~~

2. PUBLICATION

SunLine issued notice on their website of the SunLine draft proposed FTA overall DBE Goal Methodology for FFY 2025 – 2027. This notice informed the public that the proposed DBE goal and rationale ~~are~~were available for inspection at the offices of SunLine during normal business hours and that SunLine would accept comments on the DBE goal analysis for 30 days from the date of the Public Notice. **No comments were received during this comment period.**

ESTABLISHMENT OF GOAL

Based upon the information and methodology presented above, ~~it is proposed that the Agency's SunLine's~~ overall annual DBE goal for the Federal Fiscal Years 2025 – 2027 ~~be established at~~ is ~~6.0%~~2.5%.

RACE-NEUTRAL MEASURES

In conformance with 49 CFR Part 26 and in further response to FTA notices issued to Public Transportation Providers regarding DOT's DBE Program and Race-Neutral Policy Implementation Guidance, SunLine is required to submit and implement a **strictly Race-Neutral Overall Annual DBE Goal for FFY 2025 – 2027**, due to the absence of readily available evidence of discrimination and its effects in its marketplace.

SunLine will implement Race-Neutral measures to meet its Overall Annual DBE Goal objectives in accordance with 49 CFR Part 26.51, including but are not limited to:

- Arranging timely solicitations, ~~times for the presentation of bids, quantities, specifications and times for the presentation of bids, quantities, specifications,~~ and delivery schedules in ways that facilitate DBEs and other small business firms' participation.
- Unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own workforces.
- Providing information and communications programs on contracting procedures and specific contract opportunities.

EXHIBIT A

DOT-ASSISTED CONTRACTS WITH DBE CONTRACTING OPPORTUNITIES FOR FEDERAL FISCAL YEARS 2025 – 2027

Projects	Federal Share	NAICS US Census	Weighted Value = Project Value/Total Federal Dollars	No. Vendors	No. DBE Vendors	Relative Availability of DBE's = DBE Vendors/Total Vendors	Weighted Base Figure = Weighted Value x Relative Availability of DBE's	Dollars Available to DBE's = Federal Share x Weighted Base Figure
Radio Replacements & ITS - Phase 2 (CAD/AVL)	\$ 2,238,400	541511	0.1604	3700	74	0.0200	0.0032	\$ 7,179.58
Public Hydrogen Station Expansion - Division 1	\$ 5,960,000	332420	0.4270	14	0	0.0000	0.0000	\$ -
Public Hydrogen Station Expansion - Electrical	\$ 620,000	238210	0.0444	4139	74	0.0179	0.0008	\$ 492.39
Public Hydrogen Station Expansion - Concrete	\$ 250,000	238110	0.0179	780	72	0.0923	0.0017	\$ 413.34
Public Hydrogen Station Expansion - Grading	\$ 170,000	238910	0.0122	976	89	0.0912	0.0011	\$ 188.81
Liquid Hydrogen Station - Division 2	\$ 950,648	332420	0.0681	14	0	0.0000	0.0000	\$ -
Liquid Hydrogen Station - Division 2 - Electrical	\$ 190,000	238210	0.0136	4139	74	0.0179	0.0002	\$ 46.24
Liquid Hydrogen Station - Division 2 - Concrete	\$ 100,000	238110	0.0072	780	72	0.0923	0.0007	\$ 66.13
Liquid Hydrogen Station - Division 2 - Grading	\$ 50,000	238910	0.0036	976	89	0.0912	0.0003	\$ 16.33
Bus Stop Improvements	\$ 588,680	238910	0.0422	976	89	0.0912	0.0038	\$ 2,264.08
Asphalt & Concrete Upgrade	\$ 800,000	324121	0.0573	42	3	0.0714	0.0041	\$ 3,275.26
Design & Construction of New Storage Building	\$ 640,000	238910	0.0459	976	89	0.0912	0.0042	\$ 2,676.05
Upgrade Gate & Guard Shack	\$ 221,720	238910	0.0159	976	89	0.0912	0.0014	\$ 321.18
Facility Improvements	\$ 67,600	238910	0.0048	976	89	0.0912	0.0004	\$ 29.86
Facility Improvements - A/C Contractors	\$ 97,600	333415	0.0070	5139	15	0.0029	0.0000	\$ 1.99
Facility Improvements - Electrical	\$ 30,000	238210	0.0021	4139	74	0.0179	0.0000	\$ 1.15
Repair of Division 1 Maintenance Roof	\$ 160,000	238160	0.0115	993	1	0.0010	0.0000	\$ 1.85
Software Expansion - Equipment	\$ 480,000	423430	0.0344	525	6	0.0114	0.0004	\$ 188.65
Information & Technology - Services	\$ 257,771	541519	0.0185	413	44	0.1065	0.0020	\$ 507.18
Access Control Surveillance	\$ 85,046	238210	0.0061	4139	74	0.0179	0.0001	\$ 9.26
Total	\$ 13,957,465		1.0000	34812	1117	1.0166	0.0245	\$ 17,679.35
Median DBE Attainment for Last 3 Years		5.4%				Goal Percent	2.5	
Weighted (2.5+5.4)/2		3.9%				Goal Dollar Amount	\$ 17,679.35	

EXHIBIT B



SunLine Transit Agency
DISADVANTAGE BUSINESS ENTERPRISE
TRIENNIAL GOAL FEDERAL FISCAL YEARS 2025 – 2027

In accordance with 49 CFR Part 26, SunLine Transit Agency, announces a proposed Federal Transit Administration (FTA) Disadvantaged Business Enterprise (DBE) overall goal of ~~6%~~2.5% during the 2025 – 2027 federal fiscal years beginning October 1, 2024. This race-neutral goal represents the percentage of work to be performed by certified DBE firms on SunLine FTA-assisted projects during each federal fiscal year of the project period.

~~The methodology used to determine the proposed goal will be available for public inspection for thirty (30) days from the date of this notice, Monday through Friday from 8:00 AM to 5:00 PM at the following location:~~

~~SunLine Transit Agency
32505 Harry Oliver Trail
Thousand Palms, CA 92276
Tel: (760) 343-3456~~

~~SunLine will accept comments on this proposed goal for 30 days from the date of this notice. Written comments to the SunLine DBE Liaison Officer, Tina Hamel, may be sent to the address above and/or emailed to thamel@sunline.org.~~

Posted ~~6/9/2024~~7/25/2024

**OMB CONTROL NUMBER: 2105-0586**
EXPIRATION DATE: (05/31/2027)

Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2105-0586. Public reporting for this collection of information is estimated to be approximately 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information.

All responses to this collection of information are mandatory under 49 CFR §§ 23.39 and 26.83; the nature and extent of confidentiality to be provided, if any under 49 CFR §§ 26.83(d) and 26.109(b). Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, (your agency name and address), Washington, D.C. 20590.

Privacy Act Statement (5 U.S.C. § 552a, as amended):

AUTHORITY: [42 U.S.C. 2000d et seq.](#), [§ 12101 et seq.](#), [42 U.S.C. 6101 et seq.](#); [29 U.S.C. 794, 749d](#); [49 U.S.C. 47113](#); [42 U.S.C. 12101](#); [49 CFR Part 23](#); [49 CFR Part 26](#), and [Executive Order 13160](#).

PURPOSE(S): DOT will use the information collected to respond to Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) inquiries and adjudicate appeals.

ROUTINE USE(S): In accordance with DOT's system of records notice, DOT/ALL-24 Departmental Office of Civil Rights System, 76 FR 71108 (Nov. 16, 2011), the information provided may be disclosed to the U. S. Department of Justice, including United States Attorney's Offices, or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation. A comprehensive list of routine uses can be found in DOT/ALL 24 and DOT's General Statement of Routine uses, 75 FR 82138 (Dec. 29, 2010). 77 FR 42796 (July 20, 2012), 84 FR 55222 (Oct. 15, 2019).

DISCLOSURE: Provision of the requested information is voluntary; however, failure to furnish the requested information may result in the denial of a DBE or ACDBE application and an inability of the Department to process an appeal or inquiry from any party.



**UNIFORM CERTIFICATION APPLICATION
DISADVANTAGED BUSINESS ENTERPRISE (DBE)/AIRPORT CONCESSIONS
DISADVANTAGED BUSINESS ENTERPRISE (ACDBE) PROGRAMS 49 CFR Parts 23 and 26**

1. Should I apply?

You may be eligible to participate in the DBE/ACDBE programs if:

- (1) The firm is a for-profit business that performs or seeks to perform transportation-related work (or an airport concession activity) for a recipient of Federal Aviation Administration, Federal Highway Administration, or Federal Transit Administration funds.
 - The firm is at least 51% owned and controlled by a socially and economically disadvantaged individual(s) who is a U.S. citizen(s) or lawfully admitted permanent U.S. resident(s).
 - Refer to § 26.5 of 49 CFR Part 26 for the definition of “socially and economically disadvantaged individual.”
 - Refer to <https://www.transportation.gov/DBEPNW> for “personal net worth cap.”
 - Refer to § 26.69 and 26.70 of 49 CFR Part 26 to determine whether you meet the ownership and control requirements.
 - The firm meets the Small Business Administration’s (SBA) and the DBE/ACDBE program’s size standards at <https://www.transportation.gov/DBEsizestandards>

It is the applicant firm’s responsibility to provide sufficient evidence to demonstrate that, more likely than not, it meets all eligibility requirements.

2. How do I apply?

Firms applying for DBE/ACDBE certification in their home state, i.e., the state in which the firm maintains its principal place of business, must submit to a certifying agency in their home state a completed Uniform Certification Application and all required documents (see attached checklist) and participate in an on-site interview. Failure to timely submit documents may result in delayed processing or denial of your application.

Firms already certified as a DBE/ACDBE in their home state do not have to complete this form. Section 26.85 of 49 CFR Part 26 explains the process for obtaining certification in additional states, i.e., interstate certification.

3. Where can I send my application?

Transportation agencies in each state perform DBE and ACDBE certification functions. DOT’s website has a table of certifying agency contacts at <https://www.transportation.gov/DBEPOC>. Click on the link to access contact information for your state/territory and obtain details on how to submit your application.

4. What happens after I apply?

A transportation agency in your state that performs certification functions will contact you.

5. Where can I find more information?

Visit the USDOT website at <https://www.transportation.gov/DBE> for links to the DBE/ACDBE program rules and regulations (including those for interstate certification), answers to frequently asked questions, points of contact, and more.

SBA Small Business Size Standards matched to the North American Industry Classification System (NAICS): <http://www.census.gov/eos/www/naics/> and <http://www.sba.gov/content/table-small-business-size-standards>.

Under 49 CFR § 26.107, if, at any time, the Department or a recipient has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, the Department may initiate suspension or debarment proceedings against the person or firm under 2 CFR Parts [180](#) and [1200](#). No procurement Suspension and Department, take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, and/or refer the matter to the Department of Justice for criminal prosecution under 18 USC 1001, which prohibits false statements in federal programs



INSTRUCTIONS

NOTE: All participating firms must be for-profit enterprises with current business operations. If your firm is not for profit, or is not conducting business, then you do NOT qualify for the DBE/ACDBE program and should not complete this application. If you require additional space for any question in this application, please attach additional sheets or copies as needed, taking care to indicate on each attached sheet/copy the section and number of this application to which it refers.

Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information

- (1) Enter the name and title of the person completing this application who will serve as your firm's contact for this application.
- (2) Enter the legal name of your firm, as indicated in your firm's Articles of Incorporation (if any) or similar document.
- (3) Enter the primary phone number of your firm.
- (4) Enter a secondary phone number, if any.
- (5) Enter your firm's fax number, if any.
- (6) Enter the contact person's email address.
- (7) Enter your firm's website address, if any.
- (8) Enter the street address of the firm where its offices are physically located (not a P.O. Box).
- (9) Enter the mailing address of your firm, if it is different from your firm's street address.

B. Prior/Other Certifications and Applications

Indicate whether your firm or any firms owned by the persons listed has ever been denied certification as a DBE/ACDBE, 8(a), or Small Disadvantaged Business (SDB) firm, or state and local MBE/WBE firm. Indicate if the firm has ever been decertified from one of these programs. Indicate if the application was withdrawn or whether the firm was debarred, suspended, or otherwise had its bidding privileges denied or restricted by any state or local agency, or Federal entity. If your answer is yes, identify the name of the agency, and explain fully the nature of the action in the space provided. Indicate if you have ever appealed this decision to the Department and if so, attach a copy of USDOT's final agency decision(s).

Section 2: GENERAL INFORMATION

A. Business profile:

- (1) Give a concise description of the firm's primary activities, the product(s) or services the company provides, or type of construction. If your company offers more than one product/service, list primary product or service first (attach additional sheets if necessary). This description may be used in states' online directories of certified firms.
- (2) If you know the appropriate North American Industry Classification System (NAICS) code for the type(s) of work you identified in your business profile, enter the codes in the space provided.

- (3) State the date on which your firm was established as stated in your firm's Articles of Incorporation (if any) or similar document.
- (4) State the date each person became a firm owner. Check the appropriate box describing the manner in which you and each other owner acquired ownership of your firm. If you checked "Other," explain in the space provided.
- (5) Check the appropriate box that indicates whether your firm is "for profit." **If you checked "No," then you do NOT qualify for the DBE/ACDBE program** and should not complete this application. All participating firms must be for-profit enterprises. Provide the Federal Tax ID number as stated on your firm's Federal tax return.
- (6) Check the appropriate box that describes the type of legal business structure of your firm, as indicated in your firm's Articles of Incorporation or similar document. If you checked "Other," briefly explain in the space provided.
- (7) Indicate in the spaces provided how many employees your firm has, specifying the number of employees who work on a full-time, part-time, and seasonal basis. Attach a list of employees, their job titles, and dates of employment to your application.
- (8) Specify the firm's gross receipts for each of the **past five years**, as stated in your firm's filed federal tax returns. You must submit all portions of federal tax returns related to gross receipts and signature pages, as filed. If there is no federal tax return yet filed for the most recent taxable year, you may provide an income statement signed by a CPA who attests to its accuracy and completeness. If there are any affiliates or subsidiaries of the applicant firm or owners, you must provide documentation these firms' gross receipts also as described above. Affiliation is defined in 49 C.F.R. §26.5 and 13 C.F.R. Part 121.

B. Relationships and Dealings with Other Businesses

- (1) Check the appropriate box that indicates whether your firm is co-located at any of its business locations, or whether your firm shares a telephone number(s), a post office box, any office space, a yard, warehouse, other facilities, any equipment, financing, or any office staff and/or employees with any other business, organization or entity of any kind. If you answered "Yes," then specify the name of the other firm(s) and fully explain the nature of your relationship with these


U.S. Department of Transportation

other businesses by identifying the business or person with whom you have any formal, informal, written, or oral agreement. Provide an explanation of any items shared with other firms in the space provided.

- (2) Check the appropriate box indicating whether any other firm currently has or had an ownership interest in your firm at present or at any time in the past. If you checked yes, please explain.
- (3) Check the appropriate box that indicates whether at present or at any time in the past your firm:
 - (a) ever existed under different ownership, a different type of ownership, or a different name;
 - (b) existed as a subsidiary of any other firm;
 - (c) existed as a partnership in which one or more of the partners are/were other firms;
 - (d) owned any percentage of any other firm; and
 - (e) had any subsidiaries of its own.
 - (f) served as a subcontractor with another firm constituting more than 25% of your firm's receipts.

If you answered "Yes" to any of the questions in (3)(a-f), you may be asked to explain the arrangement in detail.

Section 3: MAJORITY OWNER INFORMATION

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below (if your firm has more than one owner, provide completed copies of this section for each owner):

A. Identify the majority owner of the firm holding 51% or more ownership interest:

- (1) Enter the full name of the owner.
- (2) Enter the owner's title or position.
- (3) Give the owner's phone number.
- (4) Enter the owner's home (street) address.
- (5) Indicate the owner's gender.
- (6) Identify the owner's ethnic group membership. If you checked "Other," specify this owner's ethnic group/identity not otherwise listed.
- (7) Check the appropriate box to indicate whether this owner is a U.S. citizen or a lawfully admitted permanent resident. If this owner is neither a U.S. citizen nor a lawfully admitted permanent resident of the U.S., then the firm may not rely on this owner's social and economic disadvantaged status for DBE certification eligibility.
- (8) Enter the number of years this owner has been an owner of your firm.
- (9) Indicate the percentage of the total ownership this person holds and the date acquired, including (if appropriate), the class of stock owned.
- (10) Indicate the dollar value of this owner's initial investment to acquire an ownership interest in your firm, broken down by cash, real estate, equipment, gift and/or other investment. Describe

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how the owner acquired the business and attach documentation substantiating this investment.

- (11) List additional investments.

B. Additional Owner Information

- (1) Describe the familial relationship of this owner to each other owner of your firm and employees.
- (2) Indicate whether this owner performs a management or supervisory function for any other business. If you checked "Yes," state the name of the other business and this owner's function/title held in that business.
- (3) (a) Check the appropriate box that indicates whether this owner owns or works for any other firm(s) that has any relationship with your firm. If you checked "Yes," identify the name of the other business, the nature of the business relationship, and the owner's function at the firm.
(b) If the owner works for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week, please explain this activity.
- (4) (a) Provide the personal net worth of the owner claiming social and economic disadvantage in the space provided. Complete and attach the accompanying "Personal Net Worth Statement for DBE/ACDBE Program Eligibility" with your application. Complete this section and accompanying statement only for each owner claiming to be socially and economically disadvantaged.
(b) Check the appropriate box that indicates whether any trust has been created for the benefit of the disadvantaged owner(s). If you answered "Yes," you may be asked to provide a copy of the trust instrument.
- (5) Check the appropriate to indicate whether any of your immediate family members, managers, or employees, own, manage, or are associated with another company. Immediate family member is defined in 49 C.F.R. §26.5. If you answered "Yes," provide the name of each person, your relationship to that person, , the name of the company, the type of business, and whether that person owns or manages the company.

Section 4: CONTROL
A. Identify the firm's Officers and Board of Directors

- (1) In the space provided, state the name, title, date of appointment, group membership, and gender of each officer.
- (2) In the space provided, state the name, title, date of appointment, group membership , and gender of each individual serving on your firm's Board of Directors.
- (3) Check the appropriate box to indicate whether any of your firm's officers and/or directors listed above performs a management or supervisory function for any other business. If you answered "Yes," identify each such individual by name and , provide the name of the other business in which that individual is involved, and describe the


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nature of that individual's role in the other business.

- (4) Check the appropriate box that indicates whether any of your firm's officers and/or directors listed above own or work for any other firm(s) that has a relationship with your firm. (e.g., ownership interest, shared office space, financial investments, equipment leases, personnel sharing, etc.) If you answered "Yes," identify the name of the firm, the individual's name, and the nature of the individual's relationship with that other firm.

B. Duties of Owners, Officers, Directors, Managers and Key Personnel

Specify the roles of the majority and minority owners, directors, officers, and managers, and key personnel who are responsible for the functions listed for the firm. Submit résumés for each owner and non-owner identified below. State the name of the individual, title, race and gender and percentage ownership if any. Circle the frequency of each person's involvement as follows: "always, frequently, seldom, or never" in each area.

Indicate whether any of the persons listed in this section perform a management or supervisory function for any other business. Identify the person, business, and their title/function. Identify if any of the persons listed above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investment, equipment, leases, personnel sharing, etc.) If you answered "Yes," describe the nature of his/her business relationship with that other firm.

C. Inventory: Indicate firm inventory in these categories:
(1) Equipment and Vehicles

State the make and model, and current dollar value of each piece of equipment and motor vehicle held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm or owner, whether it is used as collateral, and where this item is stored.

(2) Office Space

State the street address of each office space held and/or used by your firm. Indicate whether your firm or owner owns or leases the office space and the current dollar value of that property or its lease.

(3) Storage Space

State the street address of each storage space held and/or used by your firm. Indicate whether your firm or owner owns or leases the storage space and the current dollar value of that property or its lease. Provide a signed lease agreement for each property.

D. Does your firm rely on any other firm for management functions or employee payroll?

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Check the appropriate box that indicates whether your firm relies on any other firm for management functions or for employee payroll. If you answered "Yes," you may be asked to explain the nature of that reliance and the extent to which the other firm carries out such functions.

E. Financial / Banking Information

State the name, city and state of your firm's bank. Identify the individuals authorized to sign checks on this account. Provide bank documentation that shows all individuals who are authorized to sign checks on the firm's behalf.

Bonding Information. State your firm's bonding limits both aggregate and project limits.

F. Sources, amounts, and purposes of money loaned to your firm, including the names of persons or firms guaranteeing the loan.

State the name and address of each source, the name of person securing the loan, original dollar amount and the current balance of each loan, and the purpose for which each loan was made to your firm. Provide copies of signed loan agreements and security agreements

G. Contributions or transfers of assets to/from your firm and to/from any of its owners or another individual over the past two years:

Indicate in the spaces provided, the type of contribution or asset that was transferred, its current dollar value, the person or firm from whom it was transferred, the person or firm to whom it was transferred, the relationship between the two persons and/or firms, and the date of the transfer.

H. Current licenses/permits held by any owner or employee of your firm.

List the name of each person in your firm who holds a professional license or permit, the type of permit or license, the expiration date of the permit or license, and identify the state that issued the license or permit. Attach copies of licenses, license renewal forms, permits, and haul authority forms.

I. Largest contracts completed by your firm in the past three years, if any.

List the name of each owner or contractor for each contract, the name and location of the projects under each contract, the type of work performed on each contract, and the dollar value of each contract.

J. Largest active jobs on which your firm is currently working.

For each active job listed, state the name of the prime contractor and the project number, the location, the type of work performed, the project start date, the



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anticipated completion date, and the dollar value of the contract.

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**Section 5: AIRPORT CONCESSION (ACDBE)
APPLICANTS**

Complete the entries in this section if you are applying for ACDBE certification. Indicate in Section A if you operate a concession at the airport, and/or supply a good or service to an airport concessionaire. Indicate in Section B whether the applicant firm owns or operates any off-airport locations, providing the type of business, lease information, address/location, and annual gross receipts generated. Provide similar information in section C for any airport concession locations the firm currently owns or operates. If the applicant firm has any affiliates, provide the requested information in Section D. Indicate whether the ACDBE firm is participating in any joint ventures, and if so, include the original and any amended joint venture agreements.

DECLARATION & SIGNATURE

The Declaration of Eligibility must accompany your application. Carefully read the attached declaration in its entirety. Fill in the required information for each blank space, and sign and date the declaration.



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IF YOU ARE ALREADY CERTIFIED AS A DBE/ACDBE, YOU DO NOT HAVE TO COMPLETE THIS APPLICATION FOR OTHER STATES. REFER TO § 26.85 OF 49 CFR PART 26 FOR DETAILS ABOUT THE INTERSTATE CERTIFICATION PROCESS.

Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information:

My firm is applying for certification as _____ DBE ___ ACDBE

(1) Contact person's name and title:

(2) Legal name of firm:

(3) Phone #: _____ (4) Other Phone #: _____ (5) Fax#: _____

(6) E-mail: _____ (7) Firm Websites: _____

(8) Street address of firm (No P.O. Box): _____ City: _____ County/Parish: _____ State: _____ Zip: _____

(9) Mailing address of firm (No P.O. Box): _____ City: _____ County/Parish: _____ State: _____ Zip: _____

B. Prior/Other Certifications and Applications

(10) Indicate whether the firm or any persons listed in this application have ever been:

(a) Denied certification or decertified as a DBE, ACDBE, 8(a), SDB, MBE/WBE firm? __ Yes __ No

(b) Withdrawn an application for these programs, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or federal entity? __ Yes __ No If yes, explain the nature of the action. (If you appealed the decision to DOT or another agency, attach a copy of the decision.)

Section 2: GENERAL INFORMATION

A. Business Profile: (1) Give a concise description of the firm's primary activities and the product(s) or service(s) it provides. If your company offers more than one product/service, list the primary product or service first. Please use additional sheets if necessary. This description may be used in states' online databases and directories of certified firms. _____

(2) NAICS Codes for this line of work include: _____

(3) This firm was established on: _____

(4) Is the firm "for profit"? __ Yes Federal Tax ID# _____ **NO STOP! If the firm is NOT for-profit, then the firm does NOT qualify for this program and should not fill out this application.**



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(3) Home Phone #: _____

(4) Home Address (Street and Number) _____ City _____ State _____ Zip _____

(5) Gender: ___ Male ___ Female ___ Other: _____

(6) Group membership (Check all that apply):

- ___ Black American
___ Hispanic American
___ Asian-Pacific American
___ Native American
___ Subcontinent Asian American
___ Other: _____

(7) Residency Status:
___ U.S. Citizen
___ Lawfully Admitted Permanent Resident

(8) Number of years as owner: _____

(9) Percentage owned: _____

(a) Class of stock owned (if applicable): _____

(b) Date acquired _____

(10) Initial investment to acquire ownership in firm:

Table with 2 columns: Type, Dollar Value. Rows include Cash, Real Estate, Equipment, and Other.

Describe how the majority owner acquired ownership of the firm:

- ___ Started business myself
___ Received it as a gift from _____
___ Bought it from: _____
___ Inherited it from: _____
___ Other: _____

(Attach documentation substantiating your investment and method of acquisition)

B. Additional Owner Information

(1) Describe familial relationship to other owners and employees: _____

(2) Does this owner perform a management or supervisory function for any other business? ___ Yes ___ No
If yes, identify: Name of Business: _____ Function/Title: _____

(3)(a) Does this owner own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.) ___ Yes ___ No
If yes, identify the name of the business, and the nature of the relationship, and the owner's function at the firm: _____

(b) Does this owner work for any other firm, non-profit organization, or engage in any other activity more than 10 hours per week? ___ Yes ___ No
If yes, identify this activity: _____

(4)(a) What is the Personal Net Worth (PNW) of this disadvantaged owner? _____

(b) Has any trust been created for the benefit of this disadvantaged owner(s)? ___ Yes ___ No

(If Yes, you may be asked to provide a copy of the trust instrument).

(5) Do any of your immediate family members, owners, directors, officers, managers, or employees own, manage, or have any association with another company? ___ Yes ___ No
If yes, provide their name, relationship, company, type of business, and indicate whether they own or manage the company: (Please attach extra sheets, if needed): _____



A= Always F = Frequently	S = Seldom N = Never	Majority Owner (51% or more)				Minority Owner (49% or less)			
		Name: _____				Name: _____			
		Title: _____				Title: _____			
		Percent Owned: _____				Percent Owned: _____			
Sets policy for company direction/scope of operations		A	F	S	N	A	F	S	N
Bidding and estimating		A	F	S	N	A	F	S	N
Major purchasing decisions		A	F	S	N	A	F	S	N
Marketing and sales		A	F	S	N	A	F	S	N
Supervises field operations		A	F	S	N	A	F	S	N
Attend bid opening and lettings		A	F	S	N	A	F	S	N
Perform office management (billing, accounts receivable/payable, etc.)		A	F	S	N	A	F	S	N
Hires and fires management staff		A	F	S	N	A	F	S	N
Hire and fire field staff or crew		A	F	S	N	A	F	S	N
Designates profits spending or investment		A	F	S	N	A	F	S	N
Obligates business by contract/credit		A	F	S	N	A	F	S	N
Purchase equipment		A	F	S	N	A	F	S	N
Signs business checks		A	F	S	N	A	F	S	N

Do any of the persons listed in B1 or B2 perform a management or supervisory function for any other business? If Yes, identify the person, the business, and their title/function:

Do any of the persons listed above own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.) If Yes, describe the nature of the business relationship: _____

C. Inventory: Indicate your firm's inventory in the following categories (Please attach additional sheets if needed):

1. Equipment and Vehicles

Make and Model	Current value	Owned or leased by firm or owner?	Used as collateral?	Where is item stored?

2. Office Space

Address (Street and Number) _____ City _____ State _____ Zip _____
 Owned or Leased by Firm or Owner? Yes No (if yes, provide details): _____

Current Value of Property or Lease: _____

3. Storage Space (Provide signed lease agreements for the properties listed)

Address (Street and Number) _____ City _____ State _____ Zip _____
 Owned or Leased by Firm or Owner? _____ Yes _____ No (if yes, provide details): _____

Current Value of Property or Lease: _____



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D. Does your firm rely on any other firm for management functions or employee payroll? Yes No

E. Financial/Banking Information (Provide bank authorization and signature cards)

Name of bank: _____ City and State: _____

The following individuals are authorized to sign checks on this account: _____

Name of bank: _____ City and State: _____

The following individuals are authorized to sign checks on this account: _____

Name of bank: _____ City and State: _____

The following individuals are authorized to sign checks on this account: _____

Bonding Information: If you have bonding capacity, identify the firm's bonding aggregate and project limits:

Aggregate limit _____ Project limit _____

F. Identify all sources, amounts, and purposes of money loaned to your firm including from financial institutions. Identify whether the owner or any other person or firm loaned money to the applicant DBE/ACDBE. Include the names of any persons or firms guaranteeing the loan, if other than the listed owner. (Provide copies of signed loan agreements and security agreements).

Name of Source	Address of Source	Name of Person Guaranteeing the Loan	Original Amount	Current Balance	Purpose of Loan

G. List all contributions or transfers of assets to/from your firm and to/from any of its owners or another individual over the past two years (Attach additional sheets if needed):

Contribution/Asset	Dollar Value	From Whom Transferred	To Whom Transferred	Relationship	Date of Transfer

H. List current licenses/permits held by any owner and/or employee of your firm (e.g., contractor, engineer, architect, etc.)(Attach additional sheets if needed):

Name of License/Permit Holder	Type of License/Permit	Expiration Date	State

I. List the three largest contracts completed by your firm in the past three years, if any:

Name of Owner/Contractor	Name/Location of Project	Type of Work Performed	Dollar Value of Contract



SECTION 5 - AIRPORT CONCESSION
(ACDBE APPLICANTS ONLY)

A. I am applying for ACDBE certification to: (check all that apply)

_____ Operate a concession at an airport _____ Supply a good or service to an airport concessionaire

B. Does the applicant firm own/operate any off-airport locations? __ Yes ___ No (if yes, identify the following):

Type of Business (e.g., F&B, News & Gift, Retail, Duty Free, Advertising, etc.)	Lease Term (years)	Lease Start Date	Address / Location	Annual Gross Receipts Generated

C. Does the applicant firm currently own/operate any airport concession locations? _ Yes _ No (If yes, supply the following information):

Airport Name	Concession Type (e.g., F&B, News & Gift, Retail, Duty Free, Advertising, etc.)	Number of Leases	Number of Locations	Annual Gross Receipts Generated	Lease Type (e.g., Direct Lease, Subcontract Management Agreement, etc. enter all that apply to the leases listed)

D. Does the applicant firm have any affiliates? ___Yes ___No If Yes, provide the following information concerning any locations owned/operated by affiliate firms.

Airport Name	Concession Type (e.g., F&B, News & Gift, Retail, Duty Free, Advertising, etc.)	Number of Leases	Number of Locations	Annual Gross Receipts Generated	Lease Type (e.g., Direct Lease, Subcontract Management Agreement, etc. enter all that apply to the leases listed)

E. Is the ACDBE applicant firm a participant in any joint ventures? ___ Yes ___ No If Yes, attach all original and any amended Joint Venture Agreements and any amendments to the agreements.



DECLARATION OF ELIGIBILITY

This form must be signed by *EACH OWNER* upon whose disadvantaged status the firm relies for certification.

A FALSE STATEMENT OR MATERIAL OMISSION MADE IN CONNECTION WITH THIS SUBMISSION IS SUFFICIENT CAUSE FOR DENIAL OF CERTIFICATION, DECERTIFICATION, OR SUSPENSION OR DEBARMENT PROCEEDINGS, AND MAY SUBJECT THE PERSON OR ENTITY MAKING THE FALSE STATEMENT TO ANY AND ALL CIVIL AND CRIMINAL PENALTIES AVAILABLE UNDER FEDERAL AND STATE LAW.

I _____(full name printed), declare under penalty of perjury that I am _____(title) of the firm _____, all of the foregoing information and statements submitted for eligibility are true, correct, and complete to the best of my knowledge. The responses include all material information necessary to fully and accurately identify and explain the operations, capabilities and pertinent history of the named firm as well as the ownership, control, and affiliations thereof.

I recognize that the information submitted in this material is for the purpose of inducing certification by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the material, and I authorize such agency to contact any entity named in certification material, and the named firm's bonding companies, banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility.

I agree to submit to government audit, examination and review of books, records, documents and files, in whatever form they exist, of the named firm and its affiliates inspection of its places(s) of business and equipment, and to permit interviews of its principals, agents, and employees. I understand that refusal to permit such inquiries shall be grounds for denial or decertification.

If awarded a contract, subcontract, concession lease or sublease, as detailed in § 26.55, I agree to promptly and directly provide the prime contractor, if any, and the Department, recipient agency, or federal funding agency, on an ongoing basis, current, complete and accurate information regarding my firm's (1) commercially useful function (CUF) performed on the project or concession lease; (2) payments; and (3) proposed changes, if any, to the foregoing arrangements.

I agree to notify the certifying agency of a material change in circumstances that affects my firm's eligibility within 30 days of its occurrence, explain the change fully, and include a duly executed Declaration of Eligibility (this form) with the notice.

I acknowledge and agree that any misrepresentations in certification materials or in records pertaining to a contract

or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or decertification; suspension and debarment; and for initiating action under federal and/or state law.

I declare that I am a socially and economically disadvantaged individual who is an owner of the above-referenced firm seeking certification as a Disadvantaged Business Enterprise or Airport Concession Disadvantaged Business Enterprise. In support of my application, I declare that I am a member of one or more of the following groups, and that I have held myself out as a member of the group(s): (Check all that apply):

- Women Black American Hispanic American
- Native American Asian-Pacific American
- Subcontinent Asian American
- Other pursuant to 49 CFR § 26.67(d)

I declare that I am socially disadvantaged because I have been subjected to racial or ethnic prejudice or cultural bias, or have suffered the effects of discrimination, because of my identity as a member of one or more of the groups identified above, without regard to my individual qualities.

I further declare that my personal net worth does not exceed the DBE program's limit posted on <https://www.transportation.gov/DBEPNW>, and that I am economically disadvantaged because My ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

PURSUANT TO 28 USC § 1746:

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON _____

**SIGNATURE _____
(OWNER)**



SUPPORTING DOCUMENTS CHECKLIST

Required Documents for All Applicants

Résumés (that include places of employment with corresponding dates), for all owners, officers, and key personnel of the applicant firm.

Personal Net Worth Statement for each socially and economically disadvantaged owners who the applicant firm relies upon to satisfy the Regulation's 51% ownership requirement.

Personal Federal tax returns for the past 3 years, if applicable, for each disadvantaged owner.

Federal tax returns (and requests for extensions) filed by the firm and its affiliates with related schedules, for the past 5 years, or the number of years in business, if fewer.

Documented proof of contributions used to acquire ownership for each owner (e.g., both sides of cancelled checks).

Signed loan and security agreements, and bonding forms.

List of equipment and/or vehicles owned and leased including VIN numbers, copy of titles, proof of ownership, insurance cards for each vehicle.

Title(s), registration certificate(s), and U.S. DOT numbers for each truck owned or operated by your firm.

Licenses, license renewal forms, permits, and haul authority forms.

Descriptions of all real estate (including office/storage space, etc.) owned/leased by your firm and documented proof of ownership/signed leases.

Documented proof of any transfers of assets to/from your firm and/or to/from any of its owners over the past 2 years.

DBE/ACDBE and SBA 8(a), SDB, MBE/WBE certifications, denials, and/or decertification's, if applicable; and any U.S. DOT decisions on these actions.

Bank authorization and signatory cards.

Schedule of salaries (or other remuneration) paid to all officers, managers, owners, and/or directors of the firm.

List of all employees, job titles, and dates of employment.

Proof of warehouse/storage facility ownership or lease arrangements.

Partnership or Joint Venture

Original and any amended Partnership or Joint Venture Agreements.

Corporation or LLC

Official Certificate of Formation and current Operating/Shareholder Agreement, if any.

Official Articles of Incorporation (signed by the state official).

Both sides of all corporate stock certificates and your firm's stock transfer ledger.

Minutes of stockholder, member, partner, and board of director's meetings, if any.

Company by-laws and any amendments.

Evidence of signature authority on the firm's bank accounts.

Failure to provide any of these required documents that are applicable to your firm's application may result in denial of your application.

Optional Documents to Be Provided on Request

The certifying agency to which you are applying may require the submission of the following documents. If requested to provide any of these documents, you must supply them with your application or at the on-site visit. Failure to do so may result in denial of your application.

Proof of citizenship or lawful permanent residence

Insurance agreements for each truck owned or operated by your firm.

Audited financial statements (if available)

Trust agreements held by any owner claiming disadvantaged status.

Suppliers

List of product lines carried and list of distribution equipment owned and/or leased.



DBE/ACDBE PNW Statement

Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2105-0586. Public reporting for this collection of information is estimated to be approximately 8 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information.

All responses to this collection of information are mandatory 49 CFR § § 26.67, 26.68; the nature and extent of confidentiality to be provided, if any (49 CFR §§ 23.35, 23.39, 26.83(d) and 26.109(b)]. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, (your agency name and address), Washington, D.C. 20590.

Privacy Act Statement (5 U.S.C. § 552a, as amended):

AUTHORITY: [42 U.S.C. 2000d et seq.](#), [§ 12101 et seq.](#), [42 U.S.C. 6101 et seq.](#); [29 U.S.C. 794, 749d](#); [49 U.S.C. 47113](#); [42 U.S.C. 12101](#); [49 CFR Part 23](#); [49 CFR Part 26](#), and [Executive Order 13160](#).

PURPOSE(S): DOT will use the information collected to respond to Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) inquiries and adjudicate appeals.

ROUTINE USE(S): In accordance with DOT's system of records notice, [DOT/ALL-24 Departmental Office of Civil Rights System, 76 FR 71108 \(Nov. 16, 2011\)](#), the information provided may be disclosed to the U. S. Department of Justice, including United States Attorney's Offices, or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation. A comprehensive list of routine uses can be found in DOT/ALL 24 and DOT's General Statement of Routine uses, 75 FR 82138 (Dec. 29, 2010). 77 FR 42796 (July 20, 2012), 84 FR 55222 (Oct. 15, 2019).

DISCLOSURE: Provision of the requested information is voluntary; however, failure to furnish the requested information may result in the denial of a DBE or ACDBE application and an inability of the Department to process an appeal or inquiry from any party.



INSTRUCTIONS

An individual's personal net worth according to 49 C.F.R. Parts 23 and 26 includes assets and liabilities that she or he owns or is deemed to own without regard to community property or equitable distribution laws.

If the personal net worth of the majority owner(s) of the firm exceeds the PNW cap posted online at <https://www.Transportation.gov/DBEPNW>, as defined by 49 C.F.R. Parts 23 and 26, the firm is not eligible for DBE or ACDBE certification.

Provide all Worksheets. Provide documents to support each entry. If you have any questions about completing this form, contact the certifying agency.

Assets

Report assets at their current fair market values as of the date of your PNW form. In cases of joint ownership, report only the value of your ownership unless Worksheet directs otherwise. Do not report the value of the applicant firm.

Cash and Cash Equivalents: Enter total from Worksheet 1.

Investment Accounts and Individual Securities: Enter total from Worksheet 2.

Real Estate: Enter total from Worksheet 3.

Personal Property and Other Assets: Enter total from Worksheet 4.

Ownership in Other Businesses: Enter total from Worksheet 5.

Life Insurance: Enter total from Worksheet 6.

Amounts Owed to You: Enter total from Worksheet 7.

Assets Held in Trust: Enter total from Worksheet 8.

Transfers Within Preceding Two Years: If you transferred assets worth at least \$20,000 in aggregate to related parties within the last two years, enter total from Worksheet 9. *Exclude transfers to applicant or DBE.*

Relatives include your spouse or domestic partner, children (whether biological, adopted, or stepchildren), siblings (including stepsiblings and those of the spouse or domestic partner), and parents (including stepparents and those of the spouse or domestic partner). Related entities include for-profit privately held companies of which any relative is an owner, officer, director, or equivalent; and family or other trusts of which you or any relative is grantor, trustee, or beneficiary, except when the transfer is irrevocable. See 49 C.F.R. 26.68(c)(7)-(9).

Liabilities

Report current balances. Report only your own, direct liabilities. *Do not report* guarantees or other contingent liabilities. *Do not report* business debt, debt secured by retirement assets, or any amount you owe, directly or indirectly, to the applicant or DBE.

Mortgages: Enter total from Worksheet 10.

Loans on Life Insurance: Enter total from Worksheet 11.

Other Liabilities: Enter total from Worksheet 12.

Other Information

Retirement Assets. Complete Worksheet 13 but *do not* enter value on PNW Statement.

Primary Residence. Complete Worksheet 14 but *do not* enter value on PNW Statement.

Declaration

You must sign and date the statement.



Personal Net Worth Statement

As of _____

This form is used by all participants in the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) and Airport Concession DBE (ACDBE) Programs. Each individual owner of a firm applying to participate as a DBE or ACDBE, whose ownership and control are relied upon for DBE certification must complete this form. Each person signing this form authorizes the certifying agency to make inquiries as necessary to verify the accuracy of the statements made. The agency you apply to will use the information provided to determine whether an owner is economically disadvantaged as defined in the DBE program regulations 49 C.F.R. Parts 23 and 26. Return form to appropriate certifying agency, not U.S. DOT.

Name			
Residence (As reported to the IRS) Address, City, State, and Zip Code			
Company's Legal Name		Phone:	
Marital Status: Single <input type="checkbox"/> Married/Domestic Partnership <input checked="" type="checkbox"/>		Business Phone:	
Assets	(Omit Cents)	Liabilities	(Omit Cents)
1. Cash and Cash Equivalents (checking and savings accounts, CDs etc.) (Complete Worksheet 1)		10. Mortgages on Real Estate Other Than Primary Residence (Complete Worksheet 10)	
2. Investment Accounts and Individual Securities (Complete Worksheet 2)		11. Loans on Life Insurance (Complete Worksheet 11)	
3. Value of Your Ownership Interest in Real Estate, Excluding Primary Residence (Complete Worksheet 3)		12. Other Liabilities (Complete Worksheet 12)	
4. Personal Property and Other Assets (Complete Worksheet 4)			
5. Ownership in Other Businesses (Complete Worksheet 5)			
6. Life Insurance (Cash Surrender Value) (Complete Worksheet 6)			
7. Amounts Owed to You (Complete Worksheet 7)			
8. Assets Held in Trust (Complete Worksheet 8)			
9. Assets Transferred to Related Parties Within the Past Two Years (Complete Worksheet 9)			
<u>Total Assets:</u>		<u>Total Liabilities:</u>	

Personal Net Worth:



Worksheets

Worksheet 1—List Cash and Cash Equivalents (checking or savings accounts CDs etc.) (Attach additional sheets as necessary)

Cash/Account	Balance

Total _____

Worksheet 2—Investment Accounts and Individual Securities (e.g., Brokerage and Custodial accounts, stocks, bonds) (Full Value) (Attach additional sheets as necessary)

Account or Security Name and Number	Value

Total _____

Worksheet 3—Real Estate Other than Primary Residence (Attach additional sheets as necessary)

	Property 1	Property 2	Property 3
Type of Property			
Address			
Date Acquired			
Purchase Price			
Present Market Value			
Source of Market Valuation			

Total _____



Worksheet 4—Personal Property and Other Assets (Attach additional sheets as necessary)

Type of Property or Asset	Is this asset insured?	Value
Vehicles (e.g., cars, trucks, recreational vehicles, motorcycles, boats, etc.) and titled in your name or of which you are the primary operator. (Itemize)		
Household Property (total value)		
Artwork (total value)		
Jewelry (total value)		
Other collectables (total value)		
Amounts owed to you (e.g., loans to others, including companies) (Itemize)		
Assets subject to the two-year transfer rule (see 49 CFR 26.68 (c)(7)-(9))		
Other (e.g., livestock, farm equipment, greenhouse)		

Total _____



OMB APPROVAL NO: 2105-0586
EXPIRATION DATE: (05/31/2027)

Worksheet 5—Ownership in Other Business Investments (excluding applicant firm) Sole Proprietorships, General Partners, Joint Ventures, Limited Liability Companies, Closely-held and Public Traded Corporations. (Attach additional sheets as necessary)

	Business 1	Business 2	Business 3	Business 4
Business name				
Address				
Value				

Total _____

Worksheet 6— Life Insurance (do not list term life insurance) (Attach additional sheets as necessary)

Policy	Insurance Company	Cash Surrender Amount

Total _____

Worksheet 7—Amounts Owed to You (loans to other individuals and entities including applicant firm) (Attach additional sheets as necessary)

Debtor	Description	Balance

Total _____

Worksheet 8—Assets Held in Trust (Attach additional sheets as necessary)

Trust Name	Description/Additional Information	Value

Total _____



Worksheet 9— Assets Transferred to Related Parties Within the Past Two Years (Attach additional sheets as necessary)

Asset	Description	Value

Total _____

Worksheet 10—Mortgages on Real Estate Other Than Primary Residence (Itemize by loan, attaching additional sheets if necessary)

	Property 1	Property 2	Property 3
Type of Property			
Address			
Name of all Mortgage Holders			
Loan Balance			

Total _____

Worksheet 11— Loan on Life Insurance (do not list term life insurance) (Attach additional sheets as necessary)

Policy	Insurance Company	Loan Amount

Total _____



Worksheet 12—Other Liabilities (Attach additional sheets as necessary)

Type of Debt	Creditor	Amount of Liability (Balance)
Loans on Motor Vehicles (itemize)		
Loans Secured by Property Other Than Real Estate or Vehicles		
Loans Secured by Property Other Than Real Estate or Vehicles		
Unpaid Taxes (fixed in amount and currently due)		
Any Other Amount, Not Reported Above, That You Currently Owe (itemize and describe)		

Total _____



Worksheet 13—Retirement Accounts (Attach additional sheets as necessary)

Account Name	Value

Total _____

Worksheet 14--Primary Residence

Address	
Date Acquired	
Purchase Price	
Market Value	
Source of Market Valuation	

Declaration

I declare under penalty of perjury that the information provided in this personal net worth statement and supporting documents is complete, true and correct. I declare that no assets have been transferred to any beneficiary for less than fair market value in the last two years. I recognize that the information submitted in this application is for the purpose of inducing certification approval by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the application and this personal net worth statement, and I authorize such agency to contact any entity named in the application or this personal financial statement, including the names banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility. I acknowledge and agree that any misrepresentations in this application or in records pertaining to a contract or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or revocation of certification; suspension and debarment; and for initiating action under federal and/or state law concerning false statement, fraud or other applicable offenses.

Signature (DBE/ACDBE Owner)

Date



California Department of Transportation

Interstate Certification Process

The California Unified Certification Program has published the **DBE Interstate Application Checklist** and the **DBE Interstate Application Affidavit**. The Interstate Certification process applies to firms already certified in their home state and seeking certification in California. Guidance provided by the US DOT, in the summer of 2014, provided that a firm currently is certified in its home state is not required to submit a **new** uniform certification application as if it were seeking certification for the first time. A DBE firm may simply present a copy of its DBE application among other required documents as submitted to its home State's UCP. The DBE Interstate Application Checklist provides the list of items required. The DBE Interstate Application Affidavit **must** be completed and submitted with the application.

Instructions: As an out-of-state applicant, your firm must be currently certified as a Disadvantaged Business Enterprise (DBE) or Airport Concession Disadvantaged Business Enterprise (ACDBE) pursuant to 49 Code of Federal Regulations Part 23 or 26 in your "home" state before you can apply to the California Unified Certification Program (CUCP). Pursuant to 49 CFR § 26.85(c), the firm's owner(s) (hereinafter "you") acknowledge and agree to comply with the following regulations:

You must provide to the CUCP, along with this declaration form, a completed copy of the application form, all supporting documents, and any other information you have submitted to your home state or any other state related to your firm's DBE or ACDBE 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 your home state, as well as any correspondence you have had with your home state's UCP or any other government entity concerning your application or status as a DBE or ACDBE firm.

You must also provide to the CUCP any notices or correspondence from states other than your home state relating to your status as an applicant or certified DBE in those states, if applicable. For example, if you have been denied certification or decertified by a state UCP other than your home state, or subject to a decertification action there, you must inform the CUCP of this fact and provide all documentation concerning this action to the CUCP.

If you have filed a certification appeal with the U.S. Department of Transportation (DOT) (see § 26.89), you must inform the CUCP of this fact and provide your letter of appeal and DOT's response to the CUCP.

You must submit this declaration form executed under penalty of perjury of the laws of the United States.

This declaration 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 your home state. If the on-site report from your home state supporting your certification in your home state is more than three years old, as of the date of your application to the CUCP, please acknowledge in your declaration that you also affirm that the facts in the on-site report remain true and correct.

DISADVANTAGED BUSINESS ENTERPRISE OUT-OF-STATE CERTIFICATION DECLARATION

CALIFORNIA UNIFIED
CERTIFICATION PROGRAM
(CUCP)



Is your firm currently certified as a DBE or ACDBE in your home state? (If Yes, check appropriate box and provide requested information. If No, please STOP and apply to your state Unified Certification Program before applying to California.)	Name of Certifying Agency in Firm's State Has your firm's state UCP conducted an on-site visit? <input type="checkbox"/> Yes, on ____/____/____ <input type="checkbox"/> No
<input type="checkbox"/> DBE <input type="checkbox"/> ACDBE	

A. Home State Certification

I affirm that the facts in the on-site report conducted by my state UCP over three years ago from the date of this declaration remain true and correct. Check if applicable

B. Contact Information

(1) Contact Person and Title		(2) Legal Name of Firm	
(3) Phone #	(4) Alternate Phone #	(5) Fax #	
(6) E-mail		(7) Website (If available)	
(8) Street Address of Firm (No P.O. Box)	City	County/Parist	State Zip
(9) Mailing Address of Firm (If different)	City	County/Parist	State Zip

A. Indicate Counties Where You Prefer to Perform Work

<input type="checkbox"/> 01 Alameda	<input type="checkbox"/> 11 Glenn	<input type="checkbox"/> 21 Marin	<input type="checkbox"/> 31 Placer	<input type="checkbox"/> 41 San Mateo	<input type="checkbox"/> 51 Sutter
<input type="checkbox"/> 02 Alpine	<input type="checkbox"/> 12 Humboldt	<input type="checkbox"/> 22 Mariposa	<input type="checkbox"/> 32 Plumas	<input type="checkbox"/> 42 Santa Barbara	<input type="checkbox"/> 52 Tehama
<input type="checkbox"/> 03 Amador	<input type="checkbox"/> 13 Imperial	<input type="checkbox"/> 23 Mendocino	<input type="checkbox"/> 33 Riverside	<input type="checkbox"/> 43 Santa Clara	<input type="checkbox"/> 53 Trinity
<input type="checkbox"/> 04 Butte	<input type="checkbox"/> 14 Inyo	<input type="checkbox"/> 24 Merced	<input type="checkbox"/> 34 Sacramento	<input type="checkbox"/> 44 Santa Cruz	<input type="checkbox"/> 54 Tulare
<input type="checkbox"/> 05 Calaveras	<input type="checkbox"/> 15 Kern	<input type="checkbox"/> 25 Modoc	<input type="checkbox"/> 35 San Benito	<input type="checkbox"/> 45 Shasta	<input type="checkbox"/> 55 Tuolumne
<input type="checkbox"/> 06 Colusa	<input type="checkbox"/> 16 Kings	<input type="checkbox"/> 26 Mono	<input type="checkbox"/> 36 San Bernardino	<input type="checkbox"/> 46 Sierra	<input type="checkbox"/> 56 Ventura
<input type="checkbox"/> 07 Contra Costa	<input type="checkbox"/> 17 Lake	<input type="checkbox"/> 27 Monterey	<input type="checkbox"/> 37 San Diego	<input type="checkbox"/> 47 Siskiyou	<input type="checkbox"/> 57 Yolo
<input type="checkbox"/> 08 Del Norte	<input type="checkbox"/> 18 Lassen	<input type="checkbox"/> 28 Napa	<input type="checkbox"/> 38 San Francisco	<input type="checkbox"/> 48 Solano	<input type="checkbox"/> 58 Yuba
<input type="checkbox"/> 09 El Dorado	<input type="checkbox"/> 19 Los Angeles	<input type="checkbox"/> 29 Nevada	<input type="checkbox"/> 39 San Joaquin	<input type="checkbox"/> 49 Sonoma	
<input type="checkbox"/> 10 Fresno	<input type="checkbox"/> 20 Madera	<input type="checkbox"/> 30 Orange	<input type="checkbox"/> 40 San Luis Obispo	<input type="checkbox"/> 50 Stanislaus	



California Unified Certification Program (CUCP) DBE Interstate Application Checklist 49 CFR Part 26.85(c)

The California Department of Transportation Office of Civil Rights (OCR) and its certifying agencies (CUCP) do not have reciprocity with other State UCP's. The CUCP, as a whole, chooses not to accept other State's DBE certification of a firm. Therefore, as the applicant, your firm must provide the following information in paragraphs (1) through (5) of this section to the CUCP agency where the interstate application will be submitted.

- 1. You **must** provide **a complete copy** of the application form (*that was provided to your home state*), all supporting documents, and any other information you have submitted to your home State. This includes affidavits of no change, any notices of changes that you have submitted to your home State, as well as any correspondence you have had with your home State's UCP or any other recipient concerning your application or status as a DBE firm.
- 2. You **must** provide a current **Personal Net Worth Statement** for all disadvantaged owners of the firm. Additionally, you must provide the last **3 years** of **personal and business taxes** for the firm and all **affiliated businesses** associated with the firm or firm's owner.
- 3. You **must** provide any notices or correspondence from states other than your home State relating to your status as an applicant or certified DBE in those states. For example, if you have been denied certification or decertified in another State, or subject to a decertification action, you must inform the CUCP Certifying Agency of this fact and provided all documentation concerning this action to the CUCP Certifying Agency, with whom you're applying for Interstate certification.
- 4. If you have filed a certification appeal with the US DOT, you must inform the CUCP Certifying Agency of this fact and provide your letter of appeal, and the US DOT's response to the CUCP Certifying Agency.
- 5. You **must** submit an affidavit sworn to by the firm's owner(s) 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 Part 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.

DISADVANTAGED BUSINESS ENTERPRISE OUT-OF-STATE CERTIFICATION DECLARATION

CALIFORNIA UNIFIED
CERTIFICATION PROGRAM
(CUCP)



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

**California Unified Certification Program
DISADVANTAGED BUSINESS ENTERPRISE
Interstate Application Affidavit**

Business Name:	
Federal Identification No: (EIN)	
Business Address:	
Telephone No:	
Business Contact Email Address:	

I/We the undersigned owner(s) of the above referenced firm submit the enclosed application for Disadvantaged Business Enterprise (DBE) certification in the State of California and do hereby declare and affirm the facts presented herein are true and correct to the best of my/our knowledge:

1. All the information required by 49 CFR 26.85(c) is attached, and complete.
2. The facts set forth in the on-site conducted _____ from _____(home state) remain true and correct.
3. An identical copy of the application, all supporting documents, and any other information submitted to my/our home state, along with any other state related to this firm's certification, including all affidavits of no change, any notices of changes, as well as all correspondence related to the firm's applications or status as a DBE has been provided with the affidavit.

ANY MATERIAL OR FALSE STATEMENT OR OMISSION MADE IN CONNECTION WITH THIS APPLICATION OR AFFIDAVIT IS SUFFICIENT CAUSE FOR DENIAL OF CERTIFICATION, REVOCATION OF A PRIOR APPROVAL, INITIATION OF SUSPENSION OR DEBARMENT PROCEEDINGS, AND MAY SUBJECT THE PERSON AND/OR ENTITY MAKING THE FALSE STATEMENT TO ANY AND ALL CIVIL AND CRIMINAL PENALTIES AVAILABLE PURSUANT TO APPLICABLE FEDERAL AND STATE LAW.

_____ Owner 1 Signature	_____ Printed Name and Title	_____ Date
_____ Owner 2 Signature	_____ Printed Name and Title	_____ Date
_____ Owner 3 Signature	_____ Printed Name and Title	_____ Date
_____ Owner 4 Signature	_____ Printed Name and Title	_____ Date

DISADVANTAGED BUSINESS ENTERPRISE OUT-OF-STATE CERTIFICATION DECLARATION

CALIFORNIA UNIFIED
CERTIFICATION PROGRAM
(CUCP)



Notary

STATE OF: _____ **COUNTY OF:** _____

Sworn to (or affirmed) and subscribed before me this _____ day _____ 20_____

(NOTARY SEAL)

(Signature of Notary)

(Name of Notary, Typed, Printed, or Seal)

Personally, known or produced identification, _____ (type of identification).

This content is from the eCFR and is authoritative but unofficial.

Title 49 –Transportation

Subtitle A –Office of the Secretary of Transportation

Part 26 Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs

Subpart A General

- § 26.1 What are the objectives of this part?
- § 26.3 To whom does this part apply?
- § 26.5 What do the terms used in this part mean?
- § 26.7 What discriminatory actions are forbidden?
- § 26.9 How does the Department issue guidance and interpretations under this part?
- § 26.11 What records do recipients keep and report?
- § 26.13 What assurances must recipients and contractors make?
- § 26.15 How can recipients apply for exemptions or waivers?

Subpart B Administrative Requirements for DBE Programs for Federally Assisted Contracting

- § 26.21 Who must have a DBE program?
- § 26.23 What is the requirement for a policy statement?
- § 26.25 What is the requirement for a liaison officer?
- § 26.27 What efforts must recipients make concerning DBE financial institutions?
- § 26.29 What prompt payment mechanisms must recipients have?
- § 26.31 What information must a UCP include in its DBE/ACDBE directory?
- § 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?
- § 26.35 What role do business development and mentor-protégé programs have in the DBE program?
- § 26.37 What are a recipient's responsibilities for monitoring?
- § 26.39 Fostering small business participation.

Subpart C Goals, Good Faith Efforts, and Counting

- § 26.41 What is the role of the statutory 10 percent goal in this program?
- § 26.43 Can recipients use set-asides or quotas as part of this program?
- § 26.45 How do recipients set overall goals?
- § 26.47 Can recipients be penalized for failing to meet overall goals?
- § 26.49 What are the requirements for transit vehicle manufactures (TVMs) and for awarding DOT-assisted contracts to TVMs?
- § 26.51 What means do recipients use to meet overall goals?
- § 26.53 What are the good faith efforts procedures recipients follow in situations where there

are contract goals?

§ 26.55 How is DBE participation counted toward goals?

Subpart D Certification Standards

§ 26.61 Burden of proof

§ 26.63 General certification rules.

§ 26.65 Business Size Determinations.

§ 26.67 Social and economic disadvantage.

§ 26.68 Personal net worth.

§ 26.69 Ownership.

§ 26.70 Debt-financed investments.

§ 26.71 Control.

§ 26.73 NAICS Codes.

Subpart E Certification Procedures

§ 26.81 What are the requirements for Unified Certification Programs?

§ 26.83 What procedures do certifiers follow in making certification decisions?

§ 26.85 Interstate certification.

§ 26.86 Decision letters.

§ 26.87 Decertification.

§ 26.88 Summary suspension of certification.

§ 26.89 Appeals to the Department.

§ 26.91 What actions do certifiers take following DOT certification appeal decisions?

Subpart F Compliance and Enforcement

§ 26.101 What compliance procedures apply to recipients?

§ 26.103 What enforcement actions apply in FHWA and FTA programs?

§ 26.105 What enforcement actions apply in FAA programs?

§ 26.107 What enforcement actions apply to firms participating in the DBE program?

§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

Appendix A to Part 26

Guidance Concerning Good Faith Efforts

Appendix B to Part 26 [Reserved]

Appendix C to Part 26

DBE Business Development Program Guidelines

Appendix D to Part 26

Mentor-Protégé Program Guidelines

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS

ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

Authority: 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, et seq.; 49 U.S.C. 47113, 47123; Sec. 1101(b), Pub. L. 114-94, 129 Stat. 1312, 1324 (23 U.S.C. 101 note); Sec. 150, Pub. L. 115-254, 132 Stat. 3215 (23 U.S.C. 101 note); Pub. L. 117-58, 135 Stat. 429 (23 U.S.C. 101 note).

Source: 64 FR 5126, Feb. 2, 1999, unless otherwise noted.

Subpart A—General

§ 26.1 What are the objectives of this part?

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- (b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- (c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- (e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- (f) To promote the use of DBEs in all types of federally assisted contracts and procurement activities conducted by recipients.
- (g) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- (h) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

[64 FR 5126, Feb. 2, 1999, as amended at 79 FR 59592, Oct. 2, 2014; 89 FR 24963, Apr. 9, 2024]

§ 26.3 To whom does this part apply?

- (a) If you are a recipient of any of the following types of funds, this part applies to you:
 - (1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Public Law 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114-94; and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Public Law 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Public Law 105-178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Public Law 112-141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114-94; and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58), Public Law 117-58.

(3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Mariana Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

[89 FR 24963, Apr. 9, 2024]

§ 26.5 What do the terms used in this part mean?

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

(i) One concern controls or has the power to control the other; or

(ii) A third party or parties controls or has the power to control both; or

(iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

Assets mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

Business, business concern or business enterprise means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

Compliance means that a recipient has correctly implemented the requirements of this part.

Contingent Liability means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

Contractor means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

Days mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

Department or DOT means the U.S. Department of Transportation, including the Office of the Secretary, the Departmental Office of Civil Rights, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged Business Enterprise or DBE means a for-profit small business concern—

- (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged; and
- (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

FTA Tier I recipient means an FTA recipient to whom this part applies that will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds \$670,000 in FTA funds in a Federal fiscal year.

FTA Tier II recipient means an FTA recipient to whom this part applies who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which does not exceed \$670,000 in FTA funds in a Federal fiscal year.

Good faith efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

Indian Tribe or Native American Tribe means any federally or State-recognized Tribe, band, nation, or other organized group of Indians (Native Americans), or an ANC.

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Liabilities mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Notice of decision or NOD means determination that denies a firm's application or decertifies a DBE.

Notice of intent or NOI means recipients letter informing a DBE of a suspension or proposed decertification.

Operating Administration or OA means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

Personal net worth or PNW means the net value of an individual's reportable assets and liabilities, per the calculation rules in § 26.68.

Primary industry classification means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available online on the U.S. Census Bureau website: www.census.gov/naics/.

Primary recipient means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business. The term does not include construction trailers or other temporary construction sites.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

Recipient means any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or that has applied for such assistance.

Secretary means DOT's Secretary of Transportation or the Secretary's designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or SBA means the United States Small Business Administration.

SBA certified firm refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in § 26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a group and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.
- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
 - (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (iii) "Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
 - (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Mariana Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, Maldives, Nepal or Sri Lanka;

- (vi) Women;
 - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
- (3) Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

Spouse means a married person, including a person in a domestic partnership or a civil union recognized under State law.

Transit vehicle manufacturer (TVM) means any manufacturer whose primary business purpose is to manufacture vehicles built for mass transportation. Such vehicles include, but are not limited to buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Businesses that perform retrofitting or post-production alterations to vehicles so that such vehicles may be used for public transportation purposes are also considered TVMs. Businesses that manufacture, mass-produce, or distribute vehicles primarily for personal use are not considered TVMs.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

Unsworn declaration means an unsworn statement, dated and in writing, subscribed as true under penalty of perjury.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35553, June 16, 2003; 76 FR 5096, Jan. 28, 2011; 79 FR 59592, Oct. 2, 2014; 89 FR 24963, Apr. 9, 2024]

§ 26.7 What discriminatory actions are forbidden?

- (a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.
- (b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

§ 26.9 How does the Department issue guidance and interpretations under this part?

- (a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999 express the official positions and views of the Department of Transportation or any of its operating administrations.
- (b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or any of its operating administrations, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.

[72 FR 15617, Apr. 2, 2007]

§ 26.11 What records do recipients keep and report?

- (a) You must submit a report on DBE participation to the concerned Operating Administration containing all the information described in the Uniform Report to this part. This report must be submitted at the intervals required by, and in the format acceptable to, the concerned Operating Administration.
- (b) You must continue to provide data about your DBE program to the Department as directed by DOT Operating Administrations.
- (c) You must obtain bidders list information as described in paragraph (c)(2) of this section and enter it into a system designated by the Department.
 - (1) The purpose of this bidders list information is to compile as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your federally assisted contracts for use in helping you set your overall goals, and to provide the Department with data for evaluating the extent to which the objectives of § 26.1 are being achieved.
 - (2) You must obtain the following bidders list information about all DBE and non-DBEs who bid as prime contractors and subcontractors on each of your federally assisted contracts:
 - (i) Firm name;
 - (ii) Firm address including ZIP code;
 - (iii) Firm's status as a DBE or non-DBE;
 - (iv) Race and gender information for the firm's majority owner;
 - (v) NAICS code applicable to each scope of work the firm sought to perform in its bid;
 - (vi) Age of the firm; and
 - (vii) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (e.g., less than \$1 million; \$1-3 million; \$3-6 million; \$6-10 million; etc.) rather than requesting an exact figure from the firm.
 - (3) You must collect the data from all bidders for your federally assisted contracts by requiring the information in paragraph (c)(2) of this section to be submitted with their bids or initial responses to negotiated procurements. You must enter this data in the Department's designated system no later than December 1 following the fiscal year in which the relevant contract was awarded. In the case of a "design-build" contracting situation where subcontracts will be solicited throughout the contract period as defined in a DBE Performance Plan pursuant to § 26.53(e), the data must be entered no later than December 1 following the fiscal year in which the design-build contractor awards the relevant subcontract(s).
- (d) You must maintain records documenting a firm's compliance with the requirements of this part. At a minimum, you must keep a complete application package for each certified firm and all Declarations of Eligibility, change notices, and on-site visit reports. These records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement. Other

certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient's financial assistance agreement, whichever is longer.

- (e) The State department of transportation in each Unified Certification Program (UCP) established pursuant to § 26.81 must report to DOT's Departmental Office of Civil Rights each year, the following information:
- (1) The number and percentage of in-state and out-of-state DBE certifications by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);
 - (2) The number of DBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;
 - (3) The number of decertified firms:
 - (i) Total in-state and out-of-state firms decertified;
 - (ii) Names of in-state and out-of-state firms decertified because SEDO exceeded the personal net worth cap;
 - (iii) Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard.
 - (4) The number of in-state and out-of-state firms summarily suspended;
 - (5) The number of in-state and out-of-state applications received for an individualized determination of social and economic disadvantage status;
 - (6) The number of in-state and out-of-state firms certified whose owner(s) made an individualized showing of social and economic disadvantaged status.

[89 FR 24964, Apr. 9, 2024]

§ 26.13 What assurances must recipients and contractors make?

- (a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance: The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).
- (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.

[79 FR 59593, Oct. 2, 2014]

§ 26.15 How can recipients apply for exemptions or waivers?

- (a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.
- (b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:
 - (1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.
 - (2) Your application must show that—
 - (i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;
 - (ii) Conditions in your jurisdiction are appropriate for implementing the proposal;
 - (iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and
 - (iv) Your proposal is consistent with applicable law and program requirements of the concerned operating administration's financial assistance program.
 - (3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

- (i) DBE eligibility is determined as provided in subparts D and E of this part, and DBE participation is counted as provided in § 26.49;
 - (ii) Your level of DBE participation continues to be consistent with the objectives of this part;
 - (iii) There is a reasonable limitation on the duration of your modified program; and
 - (iv) Any other conditions the Secretary makes on the grant of the waiver.
- (4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

Subpart B—Administrative Requirements for DBE Programs for Federally Assisted Contracting

§ 26.21 Who must have a DBE program?

- (a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:
 - (1) All FHWA primary recipients receiving funds authorized by a statute to which this part applies;
 - (2) All FTA recipients receiving planning, capital and/or operating assistance must maintain a DBE program.
 - (i) FTA Tier I recipients must have a DBE program meeting all the requirements of this part.
 - (ii) Beginning 180 days after the publication of the final rule, FTA Tier II recipients must maintain a program locally meeting the following requirements of this part:
 - (A) Reporting and recordkeeping under § 26.11;
 - (B) Contract assurances under § 26.13;
 - (C) Policy statement under § 26.23;
 - (D) Fostering small business participation under § 26.39; and
 - (E) Transit vehicle procurements under § 26.49.
 - (3) FAA recipients receiving grants for airport planning or development that will award prime contracts the cumulative total value of which exceeds \$250,000 in FAA funds in a Federal fiscal year.
- (b)
 - (1) You must submit a conforming DBE program to the concerned Operating Administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except goals that are reviewed by the relevant OA).
 - (2) You do not have to submit regular updates of your DBE program plan if you remain in compliance with this part. However, you must submit significant changes to the relevant OA 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 DBE program until all funds from DOT financial assistance have been expended.

[89 FR 24965, Apr. 9, 2024]

§ 26.23 What is the requirement for a policy statement?

You must issue a signed and dated policy statement that expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation. You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

§ 26.25 What is the requirement for a liaison officer?

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part.

§ 26.27 What efforts must recipients make concerning DBE financial institutions?

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

§ 26.29 What prompt payment mechanisms must recipients have?

- (a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.
- (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 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 include the mechanisms you will use for proactive monitoring and oversight of a prime contractor's compliance with subcontractor prompt payment and return of retainage requirements in this part. Reliance on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is not a sufficient monitoring and oversight mechanism.
- (e) Your DBE program must provide appropriate means to enforce the requirements of this section. These means must be described in your DBE program and should 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.
- (f) Prompt payment and return of retainage requirements in this part also apply to lower-tier subcontractors.
- (g) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:
 - (1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.
 - (2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.
 - (3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

[68 FR 35553, June 16, 2003, as amended at 89 FR 24965, Apr. 9, 2024]

§ 26.31 What information must a UCP include in its DBE/ACDBE directory?

- (a) In the directory required under § 26.81(g), you must list all firms eligible to participate as a DBE and/or ACDBE in your program. In the listing for each firm, you must include its business address, business phone number, firm website(s), and the types of work the firm has been certified to perform as a DBE and/or ACDBE.
- (b) You must list each type of work a DBE and/or ACDBE is eligible to perform by using the most specific NAICS code available to describe each type of work the firm performs. Pursuant to § 26.81(n)(1) and (3), your directory must allow for NAICS codes to be supplemented with specific descriptions of the type(s) of work the firm performs.
- (c) Your directory may include additional data fields of other items readily verifiable in State or locally maintained databases, such as State licenses held, Prequalifications, and Bonding capacity.
- (d) Your directory must be an online system that permits the public to search and/or filter for DBEs by:
 - (1) Physical location;
 - (2) NAICS code(s);
 - (3) Work descriptions; and

- (4) All optional information added pursuant to paragraph (c) of this section. The directory must include a prominently displayed disclaimer (e.g., large type, bold font) that states the information within the directory is not a guarantee of the DBE's capacity and ability to perform work.
- (e) You must make any changes to your current directory entries by November 5, 2024.

[89 FR 24965, Apr. 9, 2024]

§ 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?

- (a) If you determine that DBE firms are so overconcentrated 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.

§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?

- (a) You may or, if an operating administration directs you to, you must establish a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program. You may require a DBE firm, as a condition of receiving assistance through the BDP, to agree to terminate its participation in the DBE program after a certain time has passed or certain objectives have been reached. See Appendix C of this part for guidance on administering BDP programs.
- (b) As part of a BDP or separately, you may establish a "mentor-protégé" program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm.
 - (1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protégé program are eligible to participate in the mentor-protégé program.
 - (2) In the mentor-protégé relationship, you must:
 - (i) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than one half of its goal on any contract let by the recipient; and
 - (ii) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.
 - (3) For purposes of making determinations of business size under this part, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program. See Appendix D of this part for guidance concerning the operation of mentor-protégé programs.

- (c) Your BDPs and mentor-protégé programs must be approved by the concerned operating administration before you implement them. Once approved, they become part of your DBE program.

[64 FR 5126, Feb. 2, 1999, as amended at 89 FR 24966, Apr. 9, 2024]

§ 26.37 What are a recipient's responsibilities for monitoring?

- (a) A recipient must implement appropriate mechanisms to ensure compliance with the requirements in this part by all program participants (e.g., applying legal and contract remedies available under Federal, State, and local law). The recipient must set forth these mechanisms in its DBE program.
- (b) A recipient's DBE program must also include a monitoring and enforcement mechanism to ensure that work committed, or in the case of race-neutral participation, the work subcontracted, to all DBEs at contract award or subsequently is performed by the DBEs to which the work was committed or subcontracted to, and such work is counted according to the requirements of § 26.55. This mechanism must include a written verification that you have reviewed contracting records and monitored the work site to ensure the counting of each DBE's participation is consistent with its function on the contract. The monitoring to which this paragraph (b) refers may be conducted in conjunction with monitoring of contract performance for other purposes such as a commercially useful function review.
- (c) You must effectively implement the following running tally mechanisms:
 - (1) With respect to achieving your overall goal, you must use a running tally that provides for a frequent comparison of cumulative DBE awards/commitments to DOT-assisted prime contract awards to determine whether your current implementation of contract goals is projected to be sufficient to meet your annual goal. This mechanism should inform your decisions to implement goals on contracts to be advertised according to your established contract goal-setting process.
 - (2) With respect to each DBE commitment, you must use a running tally that provides for a frequent comparison of payments made to each listed DBE relative to the progress of work, including payments for such work to the prime contractor to determine whether the contractor is on track with meeting its DBE commitment and whether any projected shortfall exists that requires the prime contractor's good faith efforts to address to meet the contract goal pursuant to § 26.53(g).

[89 FR 24966, Apr. 9, 2024]

§ 26.39 Fostering small business participation.

- (a) Your DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.
- (b) This element must be submitted to the appropriate DOT operating administration for approval as a part of your DBE program. As part of this program element you may include, but are not limited to, the following strategies:
 - (1) Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million).

- (2) In multi-year design-build contracts or other large contracts (e.g., for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.
 - (3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.
 - (4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.
 - (5) To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.
- (c) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your DBE program.

[76 FR 5097, Jan. 28, 2011, as amended at 89 FR 24966, Apr. 9, 2024]

Subpart C—Goals, Good Faith Efforts, and Counting

§ 26.41 What is the role of the statutory 10 percent goal in this program?

- (a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.
- (b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.
- (c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

§ 26.43 Can recipients use set-asides or quotas as part of this program?

- (a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.
- (b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

§ 26.45 How do recipients set overall goals?

- (a) **General rule.**
 - (1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.
 - (2) If you are an FTA Tier II recipient or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) \$670,000 or less in FTA or \$250,000 or less in FAA funds in prime contracts in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA respectively for that fiscal year.

- (b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.
- (c) **Step 1.** You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.
- (1) **Use DBE Directories and Census Bureau Data.** Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market that perform work in the same NAICS codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site, <https://www.census.gov/programs-surveys/cbp.html>;) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.
 - (2) **Use a bidders list.** Determine the number of DBEs that have bid or quoted (successful and unsuccessful) on your DOT-assisted prime contracts or subcontracts in the past three years. Determine the number of all businesses that have bid or quoted (successful and unsuccessful) on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all businesses to derive a base figure for the relative availability of DBEs in your market. When using this approach, you must establish a mechanism (documented in your goal submission) to directly capture data on DBE and non-DBE prime and subcontractors that submitted bids or quotes on your DOT-assisted contracts.
 - (3) **Use data from a disparity study.** Use a percentage figure derived from data in a valid, applicable disparity study.
 - (4) **Use the goal of another DOT recipient.** If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.
 - (5) **Alternative methods.** Except as otherwise provided in this paragraph, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market. The exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of paragraph (c)(2) of this section, is not an acceptable alternative means of determining the availability of DBEs.
- (d) **Step 2.** Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at your overall goal. If the evidence does not suggest an adjustment is necessary, then no adjustment shall be made.

- (1) There are many types of evidence that must be considered when adjusting the base figure. These include:
 - (i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;
 - (ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and
 - (iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.
 - (2) If available, you must consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:
 - (i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;
 - (ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.
 - (3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.
- (e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:
- (1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming three fiscal years.
 - (2) If you are an FTA or FAA recipient, as a percentage of all FT or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the three forthcoming fiscal years.
 - (3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.
 - (i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.
 - (ii) A project goal covers the entire length of the project to which it applies.
 - (iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.
 - (iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

(f)

(1)

- (i) If you set your overall goal on a fiscal year basis, you must submit it to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency's website.
 - (ii) You may adjust your three-year overall goal during the three-year period to which it applies, in order to reflect changed circumstances. You must submit such an adjustment to the concerned operating administration for review and approval.
 - (iii) The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.
 - (iv) While you are required to submit an overall goal to FHWA, FTA, or FAA only every three years, the overall goal and the provisions of Sec. 26.47(c) apply to each year during that three-year period.
 - (v) You may make, for informational purposes, projections of your expected DBE achievements during each of the three years covered by your overall goal. However, it is the overall goal itself, and not these informational projections, to which the provisions of section 26.47(c) of this part apply.
- (2) If you are a recipient and set your overall goal on a project or grant basis as provided in paragraph (e)(3) of this section, you must submit the goal for review at a time determined by the FHWA, FTA or FAA Administrator, as applicable.
 - (3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence you relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see § 26.51(c)).
 - (4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you. In evaluating the adequacy or soundness of the methodology used to derive the overall goal, the operating administration will be guided by goal setting principles and best practices identified by the Department in guidance issued pursuant to § 26.9.
 - (5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:
 - (i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and
 - (ii) Avoid imposing undue burdens on non-DBEs.
 - (6) Timely submission and operating administration approval of your overall goal is a condition of eligibility for DOT financial assistance.

(7) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive DOT financial assistance.

(g)

(1) In establishing an overall goal, you must provide for consultation and publication. This includes:

(i) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before you are required to submit your methodology to the operating administration for review pursuant to paragraph (f) of this section. You must document in your goal submission the consultation process you engaged in. Notwithstanding paragraph (f)(4) of this section, you may not implement your proposed goal until you have complied with this requirement.

(ii) A published notice announcing your proposed overall goal before submission to the operating administration on August 1st. The notice must be posted on your official Internet Web site and may be posted in any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the operating administration, the revised goal must be posted on your official Internet Web site.

(2) At your discretion, you may inform the public that the proposed overall goal and its rationale are available for inspection during normal business hours at your principal office and for a 30-day comment period. Notice of the comment period must include addresses to which comments may be sent. The public comment period will not extend the August 1st deadline set in paragraph (f) of this section.

(h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 65 FR 68951, Nov. 15, 2000; 68 FR 35553, June 16, 2003; 75 FR 5536, Feb. 3, 2010; 76 FR 5097, Jan. 28, 2011; 79 FR 59593, Oct. 2, 2014; 89 FR 24966, Apr. 9, 2024]

§ 26.47 Can recipients be penalized for failing to meet overall goals?

(a) You cannot be penalized, or treated by the Department as being in noncompliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith.

(b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

- (c) If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your DBE program in good faith:
- (1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;
 - (2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;
 - (3)
 - (i) If you are a state highway agency; one of the 50 largest transit authorities as determined by the FTA; or an CORE 30 airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (c)(1) and (2) of this section to the appropriate operating administration for approval. If the operating administration approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.
 - (ii) As a transit authority or airport not meeting the criteria of paragraph (c)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to FTA or FAA on request for their review.
 - (4) FHWA, FTA, or FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.
 - (5) You may be regarded as being in noncompliance with this Part, and therefore subject to the remedies in § 26.103 or § 26.105 of this part and other applicable regulations, for failing to implement your DBE program in good faith if any of the following things occur:
 - (i) You do not submit your analysis and corrective actions to FHWA, FTA, or FAA in a timely manner as required under paragraph (c)(3) of this section;
 - (ii) FHWA, FTA, or FAA disapproves your analysis or corrective actions; or
 - (iii) You do not fully implement the corrective actions to which you have committed or conditions that FHWA, FTA, or FAA has imposed following review of your analysis and corrective actions.
 - (d) If, as recipient, your Uniform Report of DBE Awards or Commitments and Payments or other information coming to the attention of FTA, FHWA, or FAA, demonstrates that current trends make it unlikely that you will achieve DBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FHWA, FTA, or FAA, as applicable, may require you to make further good faith efforts, such as by modifying your race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011; 89 FR 24966, Apr. 9, 2024]

§ 26.49 What are the requirements for transit vehicle manufactures (TVMs) and for awarding DOT-assisted contracts to TVMs?

- (a) If you are an FTA recipient, you must require in your DBE program that each TVM, as a condition of being authorized to bid or propose on FTA assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.
 - (1) Only those TVMs listed on FTA's list of eligible TVMs, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved at the time of solicitation are eligible to bid.
 - (2) A TVM that fails to follow the requirements of this section and this part will be deemed as non-compliant, which will result in removal from FTA's eligible TVMs list and ineligibility to bid.
 - (3) An FTA recipient's failure to comply with the requirements set forth in paragraph (a) of this section may result in formal enforcement action or appropriate sanction as determined by FTA (e.g., FTA declining to participate in the vehicle procurement).
 - (4) Within 30 days of becoming contractually required to procure a transit vehicle, an FTA recipient must report to FTA:
 - (i) The name of the TVM that was the successful bidder; and
 - (ii) The Federal share of the contractual commitment at that time.
- (b) If you are a TVM, you must establish and submit to FTA an annual overall percentage goal for DBE participation.
 - (1) In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts on which you will bid on during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by your own forces.
 - (i) You must consider and include in your base figure all domestic contracting opportunities made available to non-DBEs.
 - (ii) You must exclude from this base figure funds attributable to work performed outside the United States and its territories, possessions, and commonwealths.
 - (iii) In establishing an overall goal, you must provide for public participation. This includes consultation with interested parties consistent with § 26.45(g).
 - (2) The requirements of this part with respect to submission and approval of overall goals apply to you as they do to recipients, except that TVMs set and submit their goals annually and not on a triennial basis.
- (c) TVMs must comply with the reporting requirements of § 26.11, including the requirement to submit the Uniform Report of DBE Awards or Commitments and Payments, in order to remain eligible to bid on FTA assisted transit vehicle procurements.
- (d) TVMs must implement all other requirements of this part, except those relating to UCPs and DBE certification procedures.

- (e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of the equipment must meet the same requirements (including goal approval by FHWA or FAA) that TVMs must meet in FTA assisted procurements.
- (f) Recipients may establish project-specific goals for DBE participation in the procurement of transit vehicles from specialized manufacturers when a TVM cannot be identified.
 - (1) Project-specific goals established pursuant to this section are subject to the same review and approval and must be established as prescribed in the project goal provisions of § 26.45.
 - (2) FTA must approve the decision to use a project goal before the recipient issues a public solicitation for the vehicles in question.
 - (3) To support the request to develop a project goal, recipients must demonstrate that no TVMs are available to manufacture the vehicle.

[89 FR 24966, Apr. 9, 2024]

§ 26.51 What means do recipients use to meet overall goals?

- (a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.
- (b) Race-neutral means include, but are not limited to, the following:
 - (1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.
 - (2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);
 - (3) Providing technical assistance and other services;
 - (4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
 - (5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
 - (6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

- (7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
 - (8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
 - (9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.
- (c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.
- (d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.
- (e) The following provisions apply to the use of contract goals:
- (1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.
 - (2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.
 - (3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.
 - (4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.
- (f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:
- (1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year, unless it becomes necessary in order meet your overall goal.

Example to paragraph (f)(1): Your overall goal for Year 1 is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year 1. However, if part way through Year 1, your DBE awards or commitments are not at a level that would permit you to achieve your overall goal for Year 1, you could begin setting race-conscious DBE contract goals during the remainder of the year as part of your obligation to implement your program in good faith.

- (2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

Example to paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

- (3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

- (4) If you obtain DBE participation that exceeds your overall goal in two consecutive years using contract goals (*i.e.*, not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

Example to paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the

contract goal projection by 25 percent (*i.e.*, from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two *consecutive* years of exceeding overall goals.

- (g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011; 79 FR 59595, Oct. 2, 2014; 89 FR 24967, Apr. 9, 2024]

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

- (a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:
- (1) Documents that it has obtained enough DBE participation to meet the goal; or
 - (2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.
- (b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:
- (1) Award of the contract will be conditioned on meeting the requirements of this section;
 - (2) All bidders or offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:
 - (i) The names and addresses of DBE firms that will participate in the contract;
 - (ii) A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
 - (iii) The dollar amount of the participation of each DBE firm participating;
 - (iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and
 - (v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment. Each DBE listed to perform work as a regular dealer or distributor must confirm its participation according to the requirements of paragraph (c)(1) of this section.

- (vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and
- (3)
- (i) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—
 - (A) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or
 - (B) No later than 7 days after bid opening as a matter of responsibility. The 7 days shall be reduced to 5 days beginning January 1, 2017.
 - (ii) Provided that, in a negotiated procurement, such as a procurement for professional services, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient. This paragraph (b)(3)(ii) does not apply to a design-build procurement, which must follow the provisions in paragraph (e) of this section.
- (c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.
- (1) For each DBE listed as a regular dealer or distributor you must make a preliminary counting determination to assess its eligibility for 60 or 40 percent credit, respectively, of the cost of materials and supplies based on its demonstrated capacity and intent to perform as a regular dealer or distributor, as defined in § 26.55(e)(2)(iv)(A), (B), and (C) and (e)(3) under the contract at issue. Your preliminary determination shall be made based on the DBE's written responses to relevant questions and its affirmation that its subsequent performance of a commercially useful function will be consistent with the preliminary counting of such participation. Where the DBE supplier does not affirm that its participation will meet the specific requirements of either a regular dealer or distributor, you are required to make appropriate adjustments in counting such participation toward the bidder's good faith efforts to meet the contract goal. The bidder is responsible for verifying that the information provided by the DBE supplier is consistent with the counting of such participation toward the contract goal.
 - (2) [Reserved]
- (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.

- (3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.
 - (4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.
 - (5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.
- (e) In a design-build contracting situation, in which the recipient solicits proposals to design and build a project with minimal-project details at time of letting, the recipient may set a DBE goal that proposers must meet by submitting a DBE Open-Ended DBE Performance Plan (OEPP) with the proposal. The OEPP replaces the requirement to provide the information required in paragraph (b) of this section that applies to design-bid-build contracts. To be considered responsive, the OEPP must include a commitment to meet the goal and provide details of the types of subcontracting work or services (with projected dollar amount) that the proposer will solicit DBEs to perform. The OEPP must include an estimated time frame in which actual DBE subcontracts would be executed. Once the design-build contract is awarded, the recipient must provide ongoing monitoring and oversight to evaluate whether the design-builder is using good faith efforts to comply with the OEPP and schedule. The recipient and the design-builder may agree to make written revisions of the OEPP throughout the life of the project, e.g., replacing the type of work items the design-builder will solicit DBEs to perform and/or adjusting the proposed schedule, as long as the design-builder continues to use good faith efforts to meet the goal.
- (f)
- (1)
- (i) You must require that a prime contractor not terminate a DBE or any portion of its work listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm per paragraph (g) of this section) without your prior written consent, unless you cause the termination or reduction. A termination includes any reduction or underrun in work listed for a DBE not caused by a material change to the prime contract by the recipient. This requirement applies to instances that include, but are not limited to, when a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.
 - (ii) You must include in each prime contract a provision stating that:
 - (A) The contractor must utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains your written consent as provided in this paragraph (f); and
 - (B) Unless your consent is provided under this paragraph (f), the prime contractor must not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.
- (2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the listed DBE or any portion of its work.

- (3) Good cause does not exist if the prime contractor seeks to terminate a DBE or any portion of its work that it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged, or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award. For purposes of this paragraph (f)(3), good cause includes the following circumstances:
- (i) The listed DBE subcontractor fails or refuses to execute a written contract;
 - (ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
 - (iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements;
 - (iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
 - (v) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR parts 180, 215, and 1200 or applicable State law;
 - (vi) You have determined that the listed DBE subcontractor is not a responsible contractor;
 - (vii) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;
 - (viii) The listed DBE is ineligible to receive DBE credit for the type of work required;
 - (ix) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract; and
 - (x) Other documented good cause that you determine compels the termination of the DBE subcontractor.
- (4) Before transmitting to you its request to terminate a DBE subcontractor or any portion of its work, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you sent concurrently, of its intent to request to terminate and the reason for the proposed request.
- (5) The prime contractor's written notice must give the DBE 5 days to respond, advising you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract/or portion thereof and why you should not approve the prime contractor's request. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than 5 days.
- (6) In addition to post-award terminations, the provisions of this section apply to pre-award deletions or changes to DBEs or their listed work put forward by offerors in negotiated procurements.
- (g) When a DBE subcontractor or any portion of its work is terminated by the prime contractor as provided in paragraph (f) of this section, or if work committed to a DBE is reduced due to overestimations made prior to award, the prime contractor must use good faith efforts to include additional DBE participation to the extent needed to meet the contract goal. The good faith efforts shall be documented by the contractor. If the recipient requests documentation under this provision, the contractor shall submit the documentation

within 7 days, which may be extended for an additional 7 days, if necessary, at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

- (h) You must include in each prime contract the contract clause required by § 26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth in that section you deem appropriate if the prime contractor fails to comply with the requirements of this section.
- (i) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.
- (j) You must require the contractor awarded the contract to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011; 79 FR 59595, Oct. 2, 2014; 89 FR 24967, Apr. 9, 2024]

§ 26.55 How is DBE participation counted toward goals?

- (a) When a DBE participates in a contract, you count only the value of the work performed by the DBE toward DBE goals.
 - (1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
 - (2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
 - (3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
- (b) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
- (c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.
 - (1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with

respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is performing and the DBE credit claimed for its performance of the work, and other relevant factors.

- (2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.
 - (3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected within normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.
 - (4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
 - (5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.
- (d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
- (1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
 - (2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
 - (3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
 - (4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
 - (5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT operating administration.

Example to paragraph (d)(5): DBE Firm X uses two of its own trucks on a contract. It leases

two trucks from DBE Firm Y and six trucks equipped with drivers from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

- (6) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

Example to paragraph (d)(6): DBE Firm X uses two of its own trucks on a contract. It leases two additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four trucks.

- (7) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

- (e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)

- (i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies.
- (ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that owns (or leases) and operates a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications. Manufacturing includes blending or modifying raw materials or assembling components to create the product to meet contract specifications. When a DBE makes minor modifications to the materials, supplies, articles, or equipment, the DBE is not a manufacturer. Minor modifications are additional changes to a manufactured product that are small in scope and add minimal value to the final product.

(2)

- (i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies (including transportation costs).
- (ii) For purposes of this section, a regular dealer is a firm that owns (or leases) and operates, a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in sufficient quantities, and regularly sold or leased to the public in the usual course of business.

- (iii) Items kept and regularly sold by the DBE are of the "general character" when they share the same material characteristics and application as the items specified by the contract.
- (iv) You must establish a system to determine that a DBE regular dealer per paragraph (e)(2)(iv)(A) of this section, over a reasonable period of time, keeps sufficient quantities and regularly sells the items in question. This system must also ensure that a regular dealer of bulk items per (e)(2)(iv)(B) of this section owns/leases and operates distribution equipment for the products it sells. This requirement may be administered through questionnaires, inventory records reviews, or other methods to determine whether each DBE supplier has the demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer prior to its participation. The system you implement must be maintained and used to identify all DBE suppliers with capacity to be eligible for 60 percent credit, contingent upon the performance of a CUF. This requirement is a programmatic safeguard apart from that described in § 26.53(c)(1).
 - (A) To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A DBE supplier performs a CUF as a regular dealer and receives credit for 60 percent of the cost of materials or supplies (including transportation cost) when all, or at least 51 percent of, the items under a purchase order or subcontract are provided from the DBE's inventory, and when necessary, any minor quantities delivered from and by other sources are of the general character as those provided from the DBE's inventory.
 - (B) A DBE may be a regular dealer in such bulk items as petroleum products, steel, concrete or concrete products, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in paragraph (e)(2)(ii) of this section if the firm both owns and operates distribution equipment used to deliver the products. Any supplementing of regular dealers' own distribution equipment must be by a long-term operating lease and not on an ad hoc or contract-by-contract basis.
 - (C) A DBE supplier of items that are not typically stocked due to their unique characteristics (e.g., limited shelf life or items ordered to specification) should be considered in the same manner as a regular dealer of bulk items per paragraph (e)(2)(iv)(B) of this section. If the DBE supplier of these items does not own or lease distribution equipment, as described above, it is not a regular dealer.
 - (D) Packagers, brokers, manufacturers' representatives, or other persons who arrange, facilitate, or expedite transactions are not regular dealers within the meaning of paragraph (e)(2) of this section.
- (3) If the materials or supplies are purchased from a DBE distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question, count 40 percent of the cost of materials or supplies (including transportation costs). A DBE distributor is an established business that engages in the regular sale or lease of the items specified by the contract. A DBE distributor assumes responsibility for the items it purchases once they leave the point of origin (e.g., a manufacturer's facility), making it liable for any loss or damage not covered by the carrier's insurance. A DBE distributor performs a CUF when it demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the DBE

distributor. If these conditions are met, DBE distributors may receive 40 percent for drop-shipped items. Terms that transfer liability to the distributor at the delivery destination (e.g., FOB destination), or deliveries made or arranged by the manufacturer or another seller do not satisfy this requirement.

- (4) With respect to materials or supplies purchased from a DBE that is neither a manufacturer, a regular dealer, nor a distributor, count the entire amount of fees or commissions charged that you deem to be reasonable, including transportation charges for the delivery of materials or supplies. Do not count any portion of the cost of the materials and supplies themselves.
- (5) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer, distributor, or a transaction facilitator) on a contract-by-contract basis.
- (f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in § 26.87(j).
- (g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.
- (h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the contractor has paid the DBE the amount being counted.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35554, June 16, 2003; 79 FR 59595, Oct. 2, 2014; 89 FR 24968, Apr. 9, 2024]

Subpart D—Certification Standards

§ 26.61 Burden of proof

- (a) In determining whether to certify a firm, the certifier must apply the standards of this subpart. Unless the context indicates otherwise, singular terms include their plural forms and vice versa.
- (b) The firm has the burden of demonstrating, by a preponderance of the evidence, *i.e.*, more likely than not, that it satisfies all of the requirements in this subpart. In determining whether the firm has met its burden, the certifier must consider all the information in the record, viewed as a whole.
 - (1) **Exception 1.** In a decertification proceeding the certifier bears the burden of proving, by a preponderance of the evidence, that the firm is no longer eligible for certification under the rules of this part.
 - (2) **Exception 2.** If a certifier has a reasonable basis to believe that an individual who is a member of a group in § 26.67(a) of this section is not, in fact, socially and/or economically disadvantaged, the certifier bears the burden of proving, by a preponderance of the evidence, that the individual is not socially and/or economically disadvantaged.

[89 FR 24969, Apr. 9, 2024]

§ 26.63 General certification rules.

- (a) **General rules.** Except as otherwise provided:
 - (1) The firm must be for-profit and engaged in business activities.

- (2) In making eligibility determinations, a certifier may not consider whether a firm performs a commercially useful function (CUF), or the potential effect on goals or counting.
 - (3) A certifier cannot condition eligibility on State prequalification requirements for bidding on contracts.
 - (4) Certification is not a warranty of competence or suitability.
 - (5) A certifier determines eligibility based on the evidence it has at the time of its decision, not on the basis of historical or outdated information, giving full effect to the "curative measures" provisions of this part.
 - (6) Entering into a fraudulent transaction or presenting false information to obtain or maintain DBE certification is disqualifying.
- (b) **Indirect ownership.** A subsidiary (*i.e.*, S) that SEDOs own and control indirectly is eligible, if it satisfies the other requirements of this part and only under the following circumstances.
- (1) **Look-through.** SEDOs own at least 51 percent of S through their ownership of P (*i.e.*, the parent firm) as shown in the examples following.
 - (2) **Control.** SEDOs control P, and P controls S.
 - (3) **One tier of separation.** The SEDOs indirectly own S through P and no other intermediary. That is, no applicant or DBE may be more than one entity (P) removed from its individual SEDOs.
 - (4) **Examples.** The following examples assume that S and its SEDOs satisfy all other requirements in this part.
 - (i) **Example 1 to paragraph (b)(4).** SEDOs own 100 percent of P, and P owns 100 percent of S. S is eligible for certification.
 - (ii) **Example 2 to paragraph (b)(4).** Same facts as Example 1, except P owns 51 percent of S. S is eligible.
 - (iii) **Example 3 to paragraph (b)(4).** SEDOs own 80 percent of P, and P owns 70 percent of S. S is eligible because SEDOs indirectly own 56 percent of S. The calculation is 80 percent of 70 percent or $.8 \times .7 = .56$.
 - (iv) **Example 4 to paragraph (b)(4).** SEDOs own and control P, and they own 52 percent of S by operation of this paragraph (b). However, a non-SEDO controls S. S is ineligible.
 - (v) **Example 5 to paragraph (b)(4).** SEDOs own 60 percent of P, and P owns 51 percent of S. S is ineligible because SEDOs own just 31 percent of S.
 - (vi) **Example 6 to paragraph (b)(4).** P indirectly owns and controls S and has other affiliates. S is eligible only if its gross receipts, plus those of all of its affiliates, do not exceed the applicable small business size cap of § 26.65. Note that all of P's affiliates are affiliates of S by virtue of P's ownership and/or control of S.
- (c) **Indian Tribes, NHOs, and ANCs** –
- (1) **Indian Tribes and NHOs.** A firm that is owned by an Indian Tribe or Native Hawaiian organization (NHO), rather than by Indians or Native Hawaiians as individuals, is eligible if it meets all other certification requirements in this part.
 - (2) **Alaska Native Corporations (ANCs).**

- (i) Notwithstanding any other provisions of this subpart, a subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification if it meets all the following requirements:
 - (A) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;
 - (B) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and
 - (C) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.
- (ii) As a certifier to whom an ANC-related entity applies for certification, a certifier must not use the Uniform Certified Application. The certifier must obtain from the firm documentation sufficient to demonstrate that the entity meets the requirements of paragraph (c)(2)(i) of this section. The certifier must also obtain sufficient information about the firm to allow the certifier to administer its program (e.g., information that would appear in a UCP directory).
- (iii) If an ANC-related firm does not meet all the conditions of paragraph (c)(2)(i) of this section, then it must meet the requirements of paragraph (c)(1) of this section in order to be certified.

[89 FR 24969, Apr. 9, 2024]

§ 26.65 Business Size Determinations.

- (a) **By NAICS Code.** A firm (including its affiliates) must be a small business, as defined by the Small Business Administration (SBA). The certifier must apply the SBA business size limit in 13 CFR part 121 which corresponds to the applicable primary industry classifications (NAICS codes). The firm is ineligible when its affiliated "receipts" (computed on a cash basis), as defined in 13 CFR 121.104(a) and averaged over the firm's preceding five fiscal years, exceed the applicable SBA size cap(s).
- (b) **Statutory Cap.** Even if a firm is a small business under paragraph (a) of this section, it is ineligible to perform DBE work on FHWA or FTA assisted contracts if its affiliated annual gross receipts, as defined in 13 CFR 121.104, over the firm's previous three fiscal years exceed \$30.40 million (as of March 1, 2023). The Department will adjust this amount annually and post the adjusted amount on its website available at <https://www.transportation.gov/DBEsizestandards>.

[89 FR 24970, Apr. 9, 2024]

§ 26.67 Social and economic disadvantage.

- (a) **Group membership** –
 - (1) **General rule.** Citizens of the United States (or lawfully admitted permanent residents) who are women, Black American, Hispanic American, Native American, Asian Pacific American, Subcontinent Asian American, or other minorities found to be disadvantaged by the Small Business Administration

(SBA), are rebuttably presumed to be socially and economically disadvantaged. A firm owner claiming the presumption must specify of which groups in this paragraph (a)(1) she or he is a member on the Declaration of Eligibility (DOE).

- (2) **Native American group membership.** An owner claiming Native American group membership must submit a signed DOE as well as proof of enrollment in a federally or State-recognized Indian Tribe. An owner claiming Native Hawaiian or Alaska Native group membership must submit documentation legally recognized under State or Federal law attesting to the individual's status as a member of that group.
- (3) **Questioning group membership.** (1) Certifiers may not question claims of group membership as a matter of course. Certifiers must not impose a disproportionate burden on members of any particular group. Imposing a disproportionate burden on members of a particular group could violate Title VI of the Civil Rights Act of 1964, paragraph (b) of this section, and/or 49 CFR part 21.
- (i) If a certifier has a well-founded reason(s) to question an owner's claim of membership in a group in paragraph (a)(1) of this section, it must provide the individual a written explanation of its reason(s), using the most recent email address provided. The firm bears the burden of proving, by a preponderance of the evidence, that the owner is a member of the group in question.
- (ii) A certifier's written explanation must instruct the individual to submit evidence demonstrating that the individual has held herself/himself/themself out publicly as a member of the group for a long period of time prior to applying for DBE certification, and that the relevant community considers the individual a member. The certifier may not require the individual to provide evidence beyond that related to group membership.
- (iii) The owner must email the certifier evidence described in paragraph (a)(3)(ii) of this section no later than 20 days after the written explanation. The certifier must email the owner a decision no later than 30 days after receiving timely submitted evidence.
- (iv) If a certifier determines that an individual has not demonstrated group membership, the certifier's decision must specifically reference the evidence in the record that formed the basis for the conclusion and give a detailed explanation of why the evidence submitted was insufficient. It must also inform the individual of the right to appeal, as provided in § 26.89(a), and of the right to reapply at any time under paragraph (e) of this section.

(b) **Rebuttal of social disadvantage.**

- (1) If a certifier has a reasonable basis to believe that an individual who is a member of a group in paragraph (a)(1) of this section is not, in fact, socially disadvantaged, the certifier must initiate a § 26.87 proceeding, regardless of the firm's DBE status. As is the case in all section § 26.87 proceedings, the certifier must prove ineligibility.
- (2) If the certifier finds that the owner is not socially disadvantaged, its decision letter must inform the firm of its appeal rights.

(c) **Rebuttal of economic disadvantage –**

- (1) **Personal net worth.** If a certifier has a reasonable basis to believe that an individual who submits a PNW Statement that is below the currently applicable PNW cap is not economically disadvantaged, the certifier may rebut the individual's presumption of economic disadvantage.

- (i) The certifier must not attempt to rebut presumed economic disadvantage as a matter of course and it must avoid imposing unnecessary burdens on individual owners or disproportionately impose them on members of a particular group.
- (ii) The certifier must proceed as provided in § 26.87.

(2) ***Economic disadvantage in fact.***

- (i) To rebut the presumption, the certifier must prove that a reasonable person would not consider the individual economically disadvantaged. The certifier may consider assets and income, free use of them or ready access to their benefits, and any other trappings of wealth that the certifier considers relevant. There are no assets (including retirement assets), income, equity, or other exclusions and no limitations on inclusions. A broad and general analysis suffices in most cases: the owner has, or enjoys the benefits of, income of X; two homes worth approximately Y; substantial interests in outside businesses Q, R, and S; four rental properties of aggregate value Z; etc. The certifier need only demonstrate "ballpark" values based on available evidence. The reasonable person is not party to detailed financial information. S/he considers the owner's overall circumstances and lifestyle.
- (ii) The certifier must proceed as provided in § 26.87.

(d) ***Non-presumptive disadvantage.*** An owner who is not presumed to be SED under paragraph (a) of this section may demonstrate that he is SED based on his own experiences and circumstances that occurred within American society.

- (1) To attempt to prove individual SED, the owner provides the certifier a Personal Narrative (PN) that describes in detail specific acts or omissions by others, which impeded his progress or success in education, employment, and/or business, including obtaining financing on terms available to similarly situated, non-disadvantaged persons.
- (2) The PN must identify at least one objective basis for the detrimental discrimination. The basis may be any identifiable status or condition. The PN must describe this objective distinguishing feature(s) (ODF) in sufficient detail to justify the owner's conclusion that it prompted the prejudicial acts or omissions.
- (3) The PN must state how and to what extent the discrimination caused the owner harm, including a full description of type and magnitude.
- (4) The owner must establish that he is economically disadvantaged in fact and that he is economically disadvantaged relative to similarly situated non-disadvantaged individuals.
- (5) The owner must attach to the PN a current PNW statement and any other financial information he considers relevant.
- (6) This rule does not prescribe how the owner must satisfy his burden of proving disadvantage. He need not, for example, have filed any formal complaint, or prove discrimination under a particular statute.

Example 1 to paragraph (d): A White male claiming to have experienced employment discrimination must provide evidence that his employment status and/or limited opportunities to earn income result from specific prejudicial acts directed at him personally because of an ODF, and not, e.g., an economic recession that caused widespread unemployment.

[89 FR 24970, Apr. 9, 2024]

§ 26.68 Personal net worth.

- (a) **General.** An owner whose PNW exceeds the regulation's currently applicable PNW limit is not presumed economically disadvantaged.
- (b) **Required documents.** Each owner on whom the firm relies for certification must submit a DOE and a corroborating personal net worth (PNW) statement, including required attachments. The owner must report PNW on the form, available at <https://www.Transportation.gov/DBEFORMS>. A certifier may require an owner to provide additional information on a case-by-case basis to verify the accuracy and completeness of the PNW statement. The certifier must have a legitimate and demonstrable need for the additional information.
- (c) **Reporting.** The following rules apply without regard to State community property, equitable distribution, or similar rules. The owner reports assets and liabilities that she owns or is deemed to own. Ownership tracks title to the asset or obligor status on the liability except where otherwise provided or when the transaction results in evasion or abuse.
 - (1) The owner excludes her ownership interest in the applicant or DBE.
 - (2) The owner excludes her share of the equity in her primary residence. There is no exclusion when the SEDO does not own the home.

Example 1 to paragraph (c)(2): The owner and her spouse hold joint title to their primary residence, for which they paid \$300,000 and are coequal debtors on a bank mortgage and a home equity line of credit with current combined balances of \$150,000. The owner may exclude her \$75,000 share of the \$150,000 of total equity.

- (3) The owner includes the full value of the contents of her primary residence unless she cohabits with a spouse or domestic partner, in which case she excludes only 50 percent of those assets.
- (4) The owner includes the value of all motor vehicles, including watercraft and ATVs, titled in her name or of which she is the principal operator.
- (5) The owner excludes the liabilities of any other party and those contingent on a future event or of undetermined value as of the date of the PNW Statement.
- (6) The owner includes her proportional share of the balance of a debt on which she shares joint and severable liability with other primary debtors.

Example 2 to paragraph (c)(6): When the owner co-signs a debt instrument with two other individuals, the rule considers her liable for one-third of the current loan balance.

- (7) The owner includes assets transferred to relatives or related entities within the two years preceding any UCA or DOE, when the assets so transferred during the period have an aggregate value of more than \$20,000. Relatives include the owner's spouse or domestic partner, children (whether biological, adopted or stepchildren), siblings (including stepsiblings and those of the spouse or domestic partner), and parents (including stepparents and those of the spouse or domestic partner). Related

entities include for-profit privately held companies of which any relative is an owner, officer, director, or equivalent; and family or other trusts of which the owner or any relative is grantor, trustee, or beneficiary, except when the transfer is irrevocable.

- (8) The owner excludes direct payments, on behalf of immediate family members or their children, to unrelated providers of healthcare, education, or legal services.
- (9) The owner excludes direct payments to providers of goods and services directly related to a celebration of an immediate family member's or that family member's child's significant, normally non-recurring life event.
- (10) The owner excludes from net worth all assets in qualified retirement accounts but must report those accounts, the value of assets in them, and any significant terms and restrictions concerning the assets' use, to the certifier.

(d) **Regulatory adjustments.**

- (1) The Department will adjust the PNW cap by May 9, 2024 by multiplying \$1,600,000 by the growth in total household net worth since 2019 as described by "Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h)" produced by the Board of Governors of the Federal Reserve (<https://www.federalreserve.gov/releases/z1/>), and normalized by the total number of households as collected by the Census in "Families and Living Arrangements" (<https://www.census.gov/topics/families/families-and-households.html>) to account for population growth. The Department will adjust the PNW cap every 3 years on the anniversary of the initial adjustment date described in this section. The Department will post the adjustments on the Departmental Office of Civil Rights' web page, available at <https://www.Transportation.gov/DBEPNW>. Each such adjustment will become the currently applicable PNW limit for purposes of this regulation.
- (2) The Department will use the following formula to adjust the PNW limit:

$$\text{Future Year PNW Cap} = \frac{\text{Q1-Q4 Average Household Net Worth of Future Year} / \text{Total Households of Future Year}}{\text{Q1-Q4 Average Household Net worth of 2019 (\$106,722,704 million} / \text{Total Households of 2019 (128,579))}} \times \$1,600,000$$

- (e) **Confidentiality.** Notwithstanding any provision of Federal or State law, a certifier must not release an individual's PNW 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 or to any other State to which the individual's firm has applied for certification under § 26.85.

[89 FR 24971, Apr. 9, 2024]

§ 26.69 Ownership.

- (a) **General rule.** A SEDO must own at least 51 percent of each class of ownership of the firm. Each SEDO whose ownership is necessary to the firm's eligibility must demonstrate that her ownership satisfies the requirements of this section. If not, the firm is ineligible.
- (b) **Overall Requirements.** A SEDO's acquisition and maintenance of an ownership interest meets the requirements of this section only if the SEDO demonstrates the following:

- (1) **Acquisition.** The SEDO acquires ownership at fair value and by one or more "investments," as defined in paragraph (c) of this section.
- (2) **Proportion.** No owner derives benefits or bears burdens that are clearly disproportionate to their ownership shares.
- (3) **Maintenance.** This section's requirements continue to apply after the SEDO's acquisition and the firm's certification. That is, the SEDO must maintain her investment and its proportion relative to those of other owners.
 - (i) The SEDO may not withdraw or revoke her investment.
 - (ii) When an existing co-owner contributes significant, additional, post-acquisition cash or property to the firm, the SEDO must increase her own investment to a level not clearly disproportionate to the non-SEDO's investment.
 - (A) **Example 1 to paragraph (b)(3)(ii).** SEDO and non-SEDO own DBE 60/40. Their respective investments are approximately \$600,000 and \$400,000. The DBE has operated its business under this ownership and with this capitalization for 2 years. In Year 3, the non-SEDO contributes a \$2 million asset to the business. The SEDO, as a result, owns 60 percent of a \$2 million asset without any additional outlay. Her ownership interest, assuming no other pertinent facts, is worth \$1.2 million more than it was before. Unless the SEDO increases her investment significantly, it is clearly disproportionate to the non-SEDO's investment and to her nominal 60 percent ownership. She has not maintained her investment.
 - (B) **Example 2 to paragraph (b)(3)(ii).** Same facts except that the DBE purchases the asset with a combination of 30 percent operating income and 70 percent proceeds of a bank loan. The SEDO maintains her investment because it remains in proportion to the non-SEDO's investment and to the value of her 60 percent ownership interest.
 - (C) **Example 3 to paragraph (b)(3)(ii).** Same facts except that the non-SEDO, not a bank, is the DBE's creditor. The SEDO has not maintained her investment because the benefits and burdens of her ownership are clearly disproportionate to those of the non-SEDO. The transaction may also raise § 26.71 concerns.
 - (iii) An organic increase in the value of the business does not affect maintenance because the value of the owners' investments remains proportional. In Example 2 above, the SEDO and the non-SEDO own the new asset at 60 percent and 40 percent of its net value of \$60,000.
- (c) **Investments.** A SEDO may acquire ownership by purchase, capital contribution, or gift. Subject to the other requirements of this section, each is considered an "investment" in the firm, as are additional purchases, contributions, and qualifying gifts.
 - (1) Investments are unconditional and at full risk of loss.
 - (2) Investments include a significant outlay of the SEDO's own money.
 - (3) For purposes of this part, title determines ownership of assets used for investments and of ownership interests themselves. This rule applies regardless of contrary community property, equitable distribution, banking, contract, or similar laws, rules, or principles.
 - (i) The person who has title to the asset owns it in proportion to her share of title.

(ii) However, the title rule is deemed not to apply when it produces a certification result that is manifestly unjust.

(4) If the SEDO jointly (50/50) owns an investment of cash or property, the SEDO may claim at least a 51 percent ownership interest only if the other joint owner formally transfers to the SEDO enough of his ownership in the invested asset(s) to bring the SEDO's investment to at least 51 percent of all investments in the firm. Such transfers may be gifts described in paragraph (e) of this section.

(d) **Purchases and capital contributions.**

(1) A purchase of an ownership interest is an investment when the consideration is entirely monetary and not a trade of property or services.

(2) Capital that the SEDO contributes directly to the company is an investment when the contribution is all cash or a combination of cash and tangible property and/or realty.

(3) Contributions of time, labor, services, and the like are not investments or components of investments.

(4) Loans are not investments. The proceeds of loans may be investments to the extent that they finance the SEDO's qualifying purchase or capital contribution.

(5) Debt-financed purchases or capital contributions are investments when they comply with the rules in this section and in § 26.70.

(6) Guarantees are not investments.

(7) The firm's purchases or sales of property, including ownership in itself or other companies, are not the SEDO's investments.

(8) Other persons' or entities' purchases or capital contributions are not the SEDO's investments.

(e) **Gifts.** A gift to the SEDO is an investment when it meets the requirements of this section. The gift rules apply to partial gifts, bequests, inheritances, trust distributions, and transfers for inadequate consideration. They apply to gifts of ownership interests and to gifts of cash or property that the SEDO invests. The following requirements apply to gifts on which the SEDO relies for her investment.

(1) The transferor/donor is or immediately becomes uninvolved with the firm in any capacity and in any other business that contracts with the firm other than as a lessor or provider of standard support services;

(2) The transferor does not derive undue benefit; and

(3) A writing documents the gift. When the SEDO cannot reasonably produce better evidence, a receipt, cancelled check, or transfer confirmation suffices, if the writing identifies transferor, transferee, amount or value, and date.

(f) **Curative measures.** The rules of this section do not prohibit transactions that further the objectives of, and compliance with, the provisions of this part. A SEDO or firm may enter into legitimate transactions, alter the terms of ownership, make additional investments, or bolster underlying documentation in a good faith effort to remove, surmount, or correct defects in eligibility, as long as the actions are consistent with this part.

(1) The certifier may notify the firm of eligibility concerns and give the firm time, if the firm wishes, to attempt to remedy impediments to certification.

- (2) The firm may, of its own volition, take curative action up to the time of the certifier's decision. However, it must present evidence of curation before the certifier's decision.
- (3) The certifier may provide general assistance and guidance but not professional (legal, accounting, valuation, etc.) advice or opinions.
- (4) While the certifier may not affirmatively impede attempts to cure, it may maintain its decision timeline and make its decision based on available evidence.
- (5) The certifier must deny or remove certification when the firm's efforts or submissions violate the rules in paragraph (g) of this section.

(g) Anti-abuse rules.

- (1) The substance and not the form of transactions drives the eligibility determination.
- (2) The certifier must deny applications based on sham transactions or false representations, and it must decertify DBEs that engage in or make them. Transactions or representations designed to evade or materially mislead subject the firm to the same consequences.
- (3) Fraud renders the firm ineligible and subjects it to sanctions, suspension, debarment, criminal prosecution, civil litigation, and any other consequence or recourse not proscribed in this part.

Example 1 to paragraph (g)(3): SEDO claims an investment consisting of a contribution of equipment and a significant amount of her own cash. She shows that she transferred title to the equipment and wrote a check from an account she alone owns. She does not disclose that her brother-in-law lent her the money and she must repay him. The firm is ineligible under paragraphs (g)(1) and (2) of this section.

[89 FR 24972, Apr. 9, 2024]

§ 26.70 Debt-financed investments.

- (a) Subject to the other provisions of this subpart, a SEDO may borrow money to *finance* a § 26.69(c) investment entirely or partially if the SEDO has paid, on a net basis, at least 15 percent of the total value of the investment by the time the firm applies for certification.

Example 1 to paragraph (a) introductory text: A SEDO who borrows \$9,000 of her \$10,000 cash investment in Applicant, Inc., must have repaid, from her own funds, at least \$500 of the loan's principal by the time Applicant, Inc. applies for certification.

Example 2 to paragraph (a) introductory text: A SEDO who finances \$8,000 of a \$10,000 investment in Applicant may apply for Applicant's certification at any time.

Example 3 to paragraph (a) introductory text: A SEDO who contributes to the Applicant equipment worth \$40,000, which she purchased with \$10,000 of her own money and \$30,000 of seller financing may apply for Applicant's certification at any time.

- (1) The SEDO pays the net 15 percent portion of the investment to Seller or Applicant (as the case may be) from her own, not borrowed, money.

- (2) Money that the SEDO receives as a § 26.69(e) gift is her own money.
- (3) The firm, whether Applicant or DBE, does not finance any part of the investment, directly or indirectly.
- (b) The loan is real, enforceable, not in default, not offset by another agreement, and on standard commercial arm's length terms. The following conditions also apply.
 - (1) The SEDO is the sole debtor.
 - (2) The firm is not party to the loan in any capacity, including as a guarantor.
 - (3) The SEDO does not rely on the company's credit or other resources to repay any part of the debt or otherwise to finance any part of her investment.
 - (4) The loan agreement requires level, regularly recurring payments of principal and interest, according to a standard amortization schedule, at least until the SEDO satisfies requirements in paragraph (a) of this section.
 - (5) The loan agreement permits prepayments, including by refinancing.
- (c) If the creditor forgives or cancels all or part of the debt, or the SEDO defaults, the entire debt-financed portion of the SEDO's purchase or capital contribution is no longer an investment.

Example 4 to paragraph (c): SEDO finances \$40,000 of a \$50,000 investment, and the firm becomes certified. When the SEDO has repaid half of the loan's principal and associated interest, the creditor forgives the remaining \$20,000 debt. The SEDO's investment is now \$10,000.

- (d) Paragraph (c) of the section does not prohibit refinancing with debt that meets the requirements of this section or preclude prompt curation under § 26.69(f).

[89 FR 24973, Apr. 9, 2024]

§ 26.71 Control.

- (a) **General rules.**
 - (1) One or more SEDOs of the firm must control it.
 - (2) Control determinations must consider all pertinent facts, viewed together and in context.
 - (3) A firm must have operations in the business for which it seeks certification at the time it applies. Certifiers do not certify plans or intentions, or issue contingent or conditional certifications.
- (b) **SEDO as final decision maker.** A SEDO must be the ultimate decision maker in fact, regardless of operational, policy, or delegation arrangements.
- (c) **Governance.** Governance provisions may not require that any SEDO obtain concurrence or consent from a non-SEDO to transact business on behalf of the firm.
 - (1) **Highest officer position.** A SEDO must hold the highest officer position in the company (e.g., chief executive officer or president).
 - (2) **Board of directors.** Except as detailed in paragraph (c)(4) of this section, a SEDO must have present control of the firm's board of directors, or other governing body, through the number of eligible votes.

- (i) **Quorum requirements.** Provisions for the establishment of a quorum must not block the SEDO from calling a meeting to vote and transact business on behalf of the firm.
 - (ii) **Shareholder actions.** A SEDO's authority to change the firm's composition via shareholder action does not prove control within the meaning of paragraph (c) of this section.
- (3) **Partnerships.** In a partnership, at least one SEDO must serve as a general partner, with control over all partnership decisions.
- (4) **Exception.** Bylaws or other governing provisions that require non-SEDO consent for extraordinary actions generally do not contravene the rules in paragraph (c) of this section. Non-exclusive examples are a sale of the company or substantially all of its assets, mergers, and a sudden, wholesale change of type of business.
- (d) **Expertise.** At least one SEDO must have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature. The requirements of this paragraph (d) vary with type of business, degree of technological complexity, and scale.
- (e) **SEDO decisions.** The firm must show that the SEDO critically analyzes information provided by non-SEDOs and uses that analysis to make independent decisions.
- (f) **Delegation.** A SEDO may delegate administrative activities or operational oversight to a non-SED individual as long as at least one SEDO retains unilateral power to fire the delegate(s), and the chain of command is evident to all participants in the company and to all persons and entities with whom the firm conducts business.
- (1) No non-SED participant may have power equal to or greater than that of a SEDO, considering all the circumstances. Aggregate magnitude and significance govern; a numerical tally does not.
 - (2) Non-SED participants may not make non-routine purchases or disbursements, enter into substantial contracts, or make decisions that affect company viability without the SEDO's consent.
 - (3) Written provisions or policies that specify the terms under which non-SED participants may sign or act on the SEDO's behalf with respect to recurring matters generally do not violate this paragraph (f), as long as they are consistent with the SEDO having ultimate responsibility for the action.
- (g) **Independent business.**
- (1) If the firm receives from or shares personnel, facilities, equipment, financial support, or other essential resources, with another business (whether a DBE or non-DBE firm) or individual on other than commercially reasonable terms, the firm must prove that it would be viable as a going concern without the arrangement.
 - (2) The firm must not regularly use another firm's business-critical vehicles, equipment, machinery, or facilities to provide a product or service under contract to the same firm or one in a substantially similar business.
 - (i) **Exception 1.** Paragraphs (g)(1) and (2) of this section do not preclude the firm from providing services to a single customer or to a small number of them, provided that the firm is not merely a conduit, captive, or unnecessary third party acting on behalf of another firm or individual. Similarly, providing a volume discount to such a customer does not impair viability unless the firm repeatedly provides the service at a significant and unsustainable loss.

(ii) **Exception 2.** A firm may share essential resources and deal exclusively with another firm that a SEDO controls and of which the SEDO owns at least 51 percent ownership.

(h) **Franchise and license agreements.** 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, the certifier 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, if 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.

[89 FR 24973, Apr. 9, 2024]

§ 26.73 NAICS Codes.

(a) A certifier must grant certification to a firm only for specific types of work that the SEDO controls. To become certified in an additional type of work, the firm must demonstrate to the certifier only that its SEDO controls the firm with respect to that type of work. The certifier must not require that the firm be recertified or submit a new application for certification but must verify the SEDO's control of the firm in the additional type of work.

(1) A correct NAICS code is the 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.

(2) If there is not a NAICS code that fully, clearly, or sufficiently narrowly describes the type(s) of work for which the firm seeks certification, the certifier must supplement or limit the assigned NAICS code(s) with a clear, specific, and concise narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is insufficient.

(3) Firms and certifiers 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.

(4) A certifier may change a certification classification or description if there is a factual basis in the record, in which case it must notify the firm 30 days before making the change. Certifiers may not apply such changes retroactively.

(5) In addition to applying the appropriate NAICS code, the certifier may apply a descriptor from a classification scheme of equivalent detail and specificity. Such a descriptor (e.g., a "work code") does not supersede or limit the types of work for which a DBE is eligible under an appropriate NAICS code.

(b) [Reserved]

[89 FR 24974, Apr. 9, 2024]

Subpart E—Certification Procedures

§ 26.81 What are the requirements for Unified Certification Programs?

- (a) You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).
 - (1) All recipients in the same jurisdiction (normally a State) must sign an agreement establishing a UCP and submit the agreement to the Secretary for approval.
 - (2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.
 - (3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.
 - (4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.
- (b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.
 - (1) Certification decisions by the UCP shall be binding on all DOT recipients within the state.
 - (2) The UCP shall provide “one-stop shopping” to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.
 - (3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.
- (c) All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.
- (d) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The “home state” UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm's application.
- (e) Subject to DOT approval as provided in this section, recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.
- (f) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.

- (g) Each UCP must maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other States certified under the provisions of this part), the information required by § 26.31. The UCP must make the directory available to the public electronically, on the internet. The UCP must update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.
- (h) Except as otherwise specified in this section, all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

[89 FR 24974, Apr. 9, 2024]

§ 26.83 What procedures do certifiers follow in making certification decisions?

- (a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.
- (b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.
- (c)
 - (1) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:
 - (i) A certifier must visit the firm's principal place of business, virtually or in person, and interview the SEDO, officers, and key personnel. The certifier must review those persons' résumés and/or work histories. The certifier must maintain a complete audio recording of the interview. The certifier must also visit one or more active job sites (if there is one). These activities comprise the "on-site review" (OSR), a written report of which the certifier must keep in its files.
 - (ii) Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing
 - (iii) Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank account signature cards;
 - (iv) Determine the work history of the firm, including contracts it has received, work it has completed; and payroll records;
 - (v) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any.
 - (vi) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;
 - (vii) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 3 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.

- (viii) Require potential DBEs to complete and submit an appropriate application form, except as otherwise provided in § 26.85 of this part.
- (2) You must use the application form provided in Appendix F to this part without change or revision. However, you may provide in your DBE program, with the written approval of the concerned operating administration, for supplementing the form by requesting specified additional information not inconsistent with this part.
- (3) The certifier must ensure that the SEDO signs the Declaration of Eligibility (DOE) at the end of the Uniform Certification Application (UCA), subscribed to as true under penalty of perjury that all information provided is current, accurate, and complete.
- (4) You must review all information on the form prior to making a decision about the eligibility of the firm. You may request clarification of information contained in the application at any time in the application process.
- (d) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other recipient.
- (e) [Reserved]
- (f) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.
- (g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.
- (h)
 - (1) Once a certifier has certified a firm, the firm remains certified unless and/or until the certifier removes certification, in whole or in part (*i.e.*, NAICS code removal), through the procedures of § 26.87.
 - (2) The certifier may not require a DBE to reapply for certification, renew its certification, undergo a recertification, or impose any functionally equivalent requirement. The certifier may, however, conduct a certification review at any reasonable time and/or at regular intervals of at least two years. The certification review may, at the certifier's discretion, include a new OSR. The certifier may also make an unannounced visit to the DBE's offices and/or job site. The certifier may also rely on another certifier's report of its OSR of the DBE.
- (i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.
 - (1) Changes in management responsibility among members of a limited liability company are covered by this requirement.
 - (2) You must attach supporting documentation describing in detail the nature of such changes.

- (3) The DBE must notify the certifier of a material change in its circumstances that affects its continued eligibility within 30 days of its occurrence, explain the change fully, and include a duly executed DOE with the notice. The DBE's non-compliance is a § 26.109(c) failure to cooperate.
- (j) A DBE must provide its certifier(s), every year on the anniversary of its original certification, a new DOE along with the specified documentation in § 26.65(a), including gross receipts for its most recently completed fiscal year, calculated on a cash basis regardless of the DBE's overall accounting method. The sufficiency of documentation (and its probative value) may vary by business type, size, history, resources, and overall circumstances. However, the following documents may generally be considered "safe harbors," provided that they include all reportable receipts, properly calculated, for the full reporting period: audited financial statements, a CPA's signed attestation of correctness and completeness, or all income-related portions of one or more (when there are affiliates) signed Federal income tax returns as filed. Non-compliance, whether full or partial, is a § 26.109(c) failure to cooperate.
- (k) The certifier must advise each applicant within 30 days of filing whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.
- (l) The certifier must render a final eligibility decision within 90 days of receiving all information required from the applicant under this part. The certifier may extend this time period once, for no more than an additional 30 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. On a case-by-case basis, the concerned OA may give the certifier one deadline extension if it approves a written request explaining why the certifier needs more time. The certifier's failure to issue a compliant decision by the applicable deadline is a constructive denial of the application, appealable to DOT under § 26.89. In this case, the certifier may be subject to enforcement actions described in §§ 26.103 and 26.105.
- (1) [Reserved]
- (2) The certifier must make an entry in DOCCR's Online Portal within 5 days of a denial. The certifier must enter the name of the firm, names(s) of the firm's owner(s), date of decision, and the reason(s) for its decision.
- (m)
- (1) A certifier may notify the applicant about ineligibility concerns and allow the firm to rectify deficiencies within the period in paragraph (l) of this section.
- (2) If a firm takes curative measures before the certifier renders a decision, the certifier must consider any evidence it submits of having taken such measures. The certifier must not automatically construe curative measures as successful or abusive.
- (i) **Example 1 to paragraph (m)(2).** The firm may obtain proof of an investment, transaction, or other fact on which its eligibility depends.
- (ii) **Example 2 to paragraph (m)(2).** An owner or related party may create a legally enforceable document of irrevocable transfer to the SEDO.
- (iii) **Example 3 to paragraph (m)(2).** The firm may amend an operating agreement, bylaw provision, or other governance document, provided that the amendment accurately reflects the parties' relationships, powers, responsibilities, and other pertinent circumstances.

- (n) Except as otherwise provided in this paragraph (n), if an applicant for DBE certification withdraws its application before the certifier issues a decision, the applicant can resubmit the application at any time. However, the certifier may place the reapplication at the "end of the line," behind other applications that have been made since the firm's previous application was withdrawn. The certifier may apply the § 26.86(c) waiting period to a firm that has established a pattern of withdrawing applications before its decision.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003; 76 FR 5100, Jan. 28, 2011; 79 FR 59598, Oct. 2, 2014; 89 FR 24974, Apr. 9, 2024]

§ 26.85 Interstate certification.

- (a) **Applicability.** This section applies to a DBE certified in any UCP.
- (b) **General rule.** When a DBE applies to another UCP for certification, the new UCP must accept the DBE's certification from its jurisdiction of original certification (JOC). The JOC is the State in which the firm maintains its principal place of business at the time of application unless and until the firm loses certification in that jurisdiction.
- (c) **Application procedure.** To obtain certification by an additional UCP, the DBE must provide:
- (1) A cover letter with its application that specifies that the DBE is applying for interstate certification, identifies all UCPs in which the DBE is certified (including the UCP that originally certified it)
 - (2) An electronic image of the UCP directory of the original UCP that shows the DBE certification; and
 - (3) A new DOE.
- (d) **Confirmation of eligibility.** Within 10 business days of receiving the documents required under paragraph (c) of this section, the additional UCP must confirm the certification of the DBE preferably by reference to the UCP directory of the JOC.
- (e) **Certification.** If the DBE fulfills the requirements of paragraph (c) of this section and the UCP confirms the DBE's certification per paragraph (d) of this section, the UCP must certify the DBE immediately without undergoing further procedures and provide the DBE with a letter documenting its certification.
- (f) **Noncompliance.** Failure of the additional UCP to comply with paragraphs (d) and (e) of this section is considered non-compliance with this part.
- (g) **Post-interstate certification proceedings.**
- (1) After the additional UCP certifies the DBE, the UCP may request a fully unredacted copy of all, or a portion of, the DBE's certification file from any other UCP in which the DBE is certified.
 - (2) A UCP must provide a complete unredacted copy of the DBE's certification materials to the additional UCP within 30 days of receiving the request. Confidentiality requirements of §§ 26.83(d) and 26.109(b) do not apply.
 - (3) Once the new UCP certifies, then it must treat the DBE as it treats other DBEs, for all purposes.
 - (4) The DBE must provide an annual DOE with documentation of gross receipts, under § 26.83(j), to certifying UCPs on the anniversary date of the DBE's original certification by its JOC.
- (h) **Decertifications.**

- (1) If any UCP has reasonable cause to remove a DBE's certification, in whole or in part (*i.e.*, NAICS code removal), it must notify the other UCPs in which the DBE is certified ("other jurisdictions") via email. The notice must explain the UCP's reasons for believing the DBE's certification should be removed.
- (2) Within 30 days of receiving the notice, the other jurisdictions must email the UCP contemplating decertification a concurrence or non-concurrence with the proposed action. The other jurisdictions' responses may provide written arguments and evidence and may propose additional reasons to remove certification. A jurisdiction's failure to timely respond to the reasonable cause notice will be deemed to be a concurrence.
- (3) After a UCP receives all timely responses, it must make an independent decision whether to issue a NOI and what grounds to include.
- (4) Other UCPs may, before the hearing, submit written arguments and evidence concerning whether the firms should remain certified, but may not participate in the hearing.
- (5) If the UCP finds the firm ineligible the firm immediately loses certification in all jurisdictions in which it is certified. The NOD must include appeal instructions provided on the Departmental Office of Civil Rights' web page, available at <https://www.transportation.gov/dbeappeal>. The UCP must email a copy of its decision to the other jurisdictions within 3 business days.
- (6) The rules of this paragraph (h)(6) do not apply to attempts to decertify based upon a DBE's actions or inactions pertaining to §§ 26.83(j) (Declaration of Eligibility) and 26.87(e)(6) (failure to cooperate).
- (7) Decertifications under this paragraph (h) must provide due process to DBEs.
 - (i) If a UCP decides not to issue a NOD removing the DBE's certification, no jurisdiction may initiate decertification proceedings, within one year, on the same or similar grounds and underlying facts.
 - (ii) If a DBE believes a UCP unfairly targets it with repeated decertification attempts, the DBE may file a complaint to the appropriate OA.
- (8) The Department's appeal decisions are binding on all UCPs unless stated otherwise.

[89 FR 24975, Apr. 9, 2024]

§ 26.86 Decision letters.

- (a) When a certifier denies a firm's request for certification or decertifies the firm, the certifier must provide the firm a NOD explaining the reasons for the adverse decision, specifically referencing the evidence in the record that supports each reason. A certifier must also include, verbatim, the instructions found on the Departmental Office of Civil Rights' web page, available at <https://www.transportation.gov/dbeappeal>.
- (b) The certifier must promptly provide the applicant copies of all documents and other information on which it based the denial if the applicant requests them.
- (c) The certifier must establish a waiting period for reapplication of no more than 12 months. That period begins to run the day after the date of the decision letter is emailed. After the waiting period expires, the denied firm may reapply to any member of the UCP that denied the application. The certifier must inform the applicant of that right, and specify the date the waiting period ends, in its decision letter.
- (d) An appeal does not extend the waiting period.

[89 FR 24976, Apr. 9, 2024]

§ 26.87 Decertification.

- (a) **Burden of proof.** To decertify a DBE, the certifier bears the burden of proving, by a preponderance of the evidence, that the DBE does not meet the certification standards of this part.
- (b) **Initiation of decertification proceedings.**
 - (1) A certifier may determine on its own that it has reasonable cause to decertify a DBE.
 - (2) If an OA determines that there is reasonable cause to believe that a DBE does not meet the eligibility criteria of this part, the OA may direct the certifier to initiate a proceeding to remove the DBE's certification.
 - (i) The OA must provide the certifier and the DBE written notice describing the reasons for the directive, including any relevant documentation or other information.
 - (ii) The certifier must immediately commence a proceeding to decertify as provided by paragraph (e) of this section.
 - (3) Any person may file a complaint explaining, with specificity, why the certifier should decertify a DBE. The certifier need not act on a general allegation or an anonymous complaint. The certifier must keep complainants' identities confidential as provided in § 26.109(b).
 - (i) The certifier must review its records concerning the DBE, any material the DBE and/or complainant provides, and any other available information. The certifier may request additional information from the DBE or conduct any other investigation that it deems necessary.
 - (ii) If the certifier determines that there is reasonable cause to decertify the DBE, it initiates a decertification proceeding. If it determines that there is not such reasonable cause, it notifies the complainant and the DBE in writing of its decisions and the reasons for it.
- (c) **Notice of intent (NOI).** A certifier's first step in any decertification proceeding must be to email a notice of intent (NOI) to the DBE.
 - (1) The NOI must clearly and succinctly state each reason for the proposed action, and specifically identify the supporting evidence for each reason.
 - (2) The NOI must notify the DBE of its right to respond in writing, at an informal hearing, or both.
 - (3) The NOI must inform the DBE of the hearing scheduled on a date no fewer than 30 days and no more than 45 days from the date of the NOI.
 - (4) If the ground for decertification is that the DBE has been suspended or debarred for conduct related to the DBE program, the certifier issues a NOD decertifying the DBE. In this case, there is no NOI or opportunity for a hearing or written response.
- (d) **Response to NOI.**
 - (1) If the DBE wants a hearing, it must email the certifier saying so within 10 days of the NOI. If the DBE does not do so, it loses its opportunity for a hearing.
 - (2) The certifier and DBE may negotiate a different hearing date from that stated in the NOI. Parties must not engage in dilatory tactics.

- (3) If the DBE does not want a hearing, or does not give timely notice to the certifier that it wants one, the DBE may still provide written information and arguments to the certifier rebutting the reasons for decertification stated in the NOI.

(e) **Hearings.**

- (1) The purpose of the hearing is for the certifier to present its case and for the DBE to rebut the certifier's allegations.
- (2) The hearing is an informal proceeding with rules set by the hearing officer. The SEDO's attorney, a non-SEDO, or other individuals involved with the DBE may attend the hearing and answer questions related to their own experience or more generally about the DBE's ownership, structure and operations.
- (3) The certifier must maintain a complete record of the hearing, either in writing, video or audio. If the DBE appeals to DOT under § 26.89, the certifier must provide that record to DOT and to the DBE.

(f) **Separation of functions.** The certifier must ensure that the decision in a decertification case is made by an individual who did not take part in actions leading to or seeking to implement the proposal to decertify the DBE and is not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

- (1) The certifier's method of implementing this requirement must be made part of its DBE program and approved by the appropriate OA.
- (2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of this part.

(g) **Notice of decision.** The certifier must send the firm a NOD no later than 30 days of the informal hearing and/or receiving written arguments/evidence from the firm in response to the NOI.

- (1) The NOD must describe with particularity the reason(s) for the certifier's decision, including specific references to the evidence in the record that supports each reason. The NOD must also inform the firm of the consequences of the decision under paragraph (i) of this section and of its appeal rights under § 26.89.
- (2) The certifier must send copies of the NOD to the complainant in an ineligibility complaint or to the OA that directed the certifier to initiate the proceeding.
- (3) When sending a copy of an NOD to a complainant other than an OA, the certifier must not include information reasonably construed as confidential business information, unless the certifier has the written consent of the firm that submitted the information.
- (4) The certifier must make an entry in DOCR's Online Portal within 5 days of the action. The certifier must enter the name of the firm, names(s) of the firm's owner(s), date of decision, and the reason(s) for its decision.

(h) **Status of firm during proceeding.**

- (1) A DBE remains certified until the certifier issues a NOD.
- (2) [Reserved]

(i) [Reserved]

- (j) **Consequences.** Decertification has the following effects on contract and overall goals and DBE participation:
- (1) When a prime contractor has made a commitment to use the decertified firm, but a subcontract has not been executed before the certifier issues the NOD, the certified firm does not count toward the contract goal. The recipient must direct the prime contractor to meet the contract goal with an eligible DBE or demonstrate to the certifier that it has made good faith efforts to do so.
 - (2) When the recipient has made a commitment to using a DBE prime contractor, but a contract has not been executed before a decertification notice provided for in paragraph (g) of this section is issued, the decertified firm does not count toward the recipient's overall DBE goal.
 - (3) If a prime contractor has executed a subcontract with the firm before the certifier has notified the firm of its decertification, the prime contractor may continue to use the firm and may continue to receive credit toward the DBE goal for the firm's work. In this case, however, the prime contractor may not extend or add work to the contract after the firm was notified of its decertification without prior written consent from the recipient.
 - (4) If a prime contractor has executed a subcontract with the firm before the certifier has notified the firm of its decertification, the prime contractor may continue to use the firm as set forth in paragraph (j)(3) of this section; however, the portion of the decertified firm's continued performance of the contract must not count toward the recipient's overall goal.
 - (5) If the recipient executed a prime contract with a DBE that was later decertified, the portion of the decertified firm's performance of the contract remaining after the certifier issued the notice of its decertification must not count toward an overall goal, but the DBE's performance of the contract may continue to count toward satisfying the contract goal.
 - (6) The following exceptions apply to this paragraph (j):
 - (i) If a certifier decertifies a firm solely because it exceeds the business size standard during the performance of the contract, the recipient may continue to count the portion of the decertified firm's performance of the contract remaining after it issued the notice of its decertification toward the recipient's overall goal as well as toward the contract goals.
 - (ii) If the certifier decertifies the DBE because it was acquired by or merged with a non-DBE, the recipient may not continue to count the portion of the decertified firm's performance on the contract remaining after the certifier decertified it toward either the contract goal or the overall goal, even if a prime contractor has executed a subcontract with the firm or the recipient has executed a prime contract with the DBE that was later decertified. In this case, if eliminating the credit of the decertified firm will affect the prime contractor's ability to meet the contract goal, the recipient must direct the prime contractor to subcontract to an eligible DBE to the extent needed to meet the contract goal or demonstrate to the recipient that it has made good faith efforts to do so.

[89 FR 24976, Apr. 9, 2024]

§ 26.88 Summary suspension of certification.

- (a) **Definition.** Summary suspension is an extraordinary remedy for lapses in compliance that cannot reasonably or adequately be resolved in a timely manner by other means.

- (1) A firm's certification is suspended under this part as soon as the certifier transmits electronic notice to its owner at the last known email address.
- (2) During the suspension period, the DBE may not be considered to meet a contract or participation goal on contracts executed during the suspension period.

(b) **Mandatory and elective suspensions** –

- (1) **Mandatory.** The certifier must summarily suspend a DBE's certification when:

- (i) The certifier has clear and credible evidence of the DBE's or its SEDO's involvement in fraud or other serious criminal activity.
- (ii) The OA with oversight so directs.

- (2) **Elective.**

- (i) The certifier has discretion to suspend summarily if it has clear and credible evidence that the DBE's continued certification poses a substantial threat to program integrity.
- (ii) An owner upon whom the firm relies for eligibility does not timely file the declaration and gross receipts documentation that § 26.83(j) requires.

- (c) **Coordination with other remedies.** In most cases, a simple information request or a § 26.87 NOI is a sufficient response to events described in paragraphs (b)(1) and (2) of this section. The certifier should consider the burden to the DBE and to itself in determining whether summary suspension is a more prudent and proportionate, effective response. The certifier may *elect* to suspend the same DBE just once in any 12-month period.

(d) **Procedures** –

- (1) **Notice.** The certifier must notify the firm, by email, of its summary suspension notice (SSN) on a business day during regular business hours. The SSN must explain the action, the reason for it, the consequences, and the evidence on which the certifier relies.
 - (i) Elective SSNs may not cite more than one reason for the action.
 - (ii) Mandatory SSNs may state multiple reasons.
 - (iii) The SSN, regardless of type, must demand that the DBE show cause why it should remain certified and provide the time and date of a virtual show-cause hearing at which the firm may present information and arguments concerning why the certifier should lift the suspension. The SSN must also advise that the DBE may provide written information and arguments lieu of or in addition to attending the hearing.
- (2) **Hearing.** The hearing date must be a business day that is at least 15 but not more than 25 days after the date of the notice. The DBE may respond in writing in lieu of or in addition to attending the hearing; however, it will have waived its right to a hearing if it does not confirm its attendance within 10 days of the notice and will have forfeited its certification if it does not acknowledge the notice within 15 days. The show-cause hearing must be conducted as a video conference on a standard commercial platform that the DBE may readily access at no cost.

(3) **Response.** The DBE may provide information and arguments concerning its continuing eligibility until the 15th day following the suspension notice or the day of the hearing, if any, whichever is later. The DBE must email any written response it provides. Email submissions correctly addressed are effective when sent. The certifier may permit additional submissions after the hearing, as long as the extension ends on a business day that is not more than 30 days after the notice.

(4) **Scope and burdens.**

(i) Suspension proceedings are limited to the suspension ground specified in the notice.

(ii) The certifier may not amend its reason(s) for summarily suspending certification, nor may it electively suspend the firm again during the 12-month period following the notice.

(iii) The DBE has the burden of producing information and/or making arguments concerning its continued eligibility, but it need only contest the reason cited.

(iv) The certifier has the burden of proving its case by a preponderance of the evidence. It must issue an NOD within 30 days of the suspension notice or lift the suspension. Any NOD must rely only on the reason given in the summary suspension notice.

(v) The DBE's failure to provide information contesting the suspension does not impair the certifier's ability to prove its case. That is, the uncontested evidence upon which the certifier relies in its notice, if substantial, will constitute a preponderance of the evidence for purposes of the NOD.

(5) [Reserved]

(6) **Duration.** The DBE remains suspended during the proceedings described in this section but in no case for more than 30 days. If the certifier has not lifted the suspension or provided a rule-compliant NOD by 4:30 p.m. on the 30th day, then it must lift the suspension and amend applicable DBE lists and databases by 12 p.m. the following business day.

(e) **Recourse –**

(1) **Appeal.** The DBE may appeal a final decision under paragraph (c)(5)(iv) of this section, as provided in § 26.89(a), but may *not* appeal the suspension itself, unless paragraph (d)(2) of this section applies.

(2) **Enforcement.**

(i) The DBE may immediately petition the Department for an order to vacate a certifier's action if:

(A) The certifier sends a second elective SSN within 12 months, or

(B) Cites multiple reasons in an elective SSN contrary to paragraph (d)(1)(i) of this section.

(ii) The DBE may also petition to the Department for an order to compel if the certifier fails to act within the time specified in paragraph (c)(6) of this section.

(3) In either case, the DBE must:

(i) Email the request under the subject line, "REQUEST FOR ENFORCEMENT ORDER" in all caps;

(ii) Limit the request to a one-page explanation that includes:

(A) The certifier's name and the suspension dates;

(B) Contact information for the certifier, the DBE, and the DBE's SEDO(s); and

- (C) The general nature and date of the firm's response, if any, to the second suspension notice; and
- (D) The suspension notice(s).

[89 FR 24977, Apr. 9, 2024]

§ 26.89 Appeals to the Department.

(a)

- (1) Applicants and decertified firms may appeal adverse NODs to the Department.
- (2) An ineligibility complainant or applicable Operating Administration (the latter by the terms of § 26.87(c)) may appeal to the Department if the certifier does not find reasonable cause to issue an NOI to decertify or affirmatively determines that the DBE remains eligible.
- (3) Appellants must email appeals as directed in the certifier's decision letter within 45 days of the date of the letter. The appeal must at a minimum include a narrative that explains fully and specifically why the firm believes the decision is in error, what outcome-determinative facts the certifier did not consider, and/or what part 26 provisions the certifier misapplied.
- (4) The certifier's decision remains in effect until the Department resolves the appeal or the certifier reverses itself.

(b) When it receives an appeal, the Department requests a copy of the certifier's complete administrative record including a video, audio, or transcript of any hearing, which the certifier must provide within 20 days of the Department's request. The Department may extend this time period when the certifier demonstrates good cause. The certifier must ensure that the administrative record is well organized, indexed, and paginated and the certifier must provide the appellant a copy of any supplemental information it provides to DOT.

(c)

(1) The Department may accept an untimely or incomplete appeal if it determines, in its sole discretion, that doing so is in the interest of justice.

(2) The Department may dismiss non-compliant or frivolous appeals without further proceedings.

(d) The Department will avail itself of whatever remedies for noncompliance it considers appropriate.

(e) The Department decides only the issue(s) presented on appeal. It does not conduct a *de novo* review of the matter, assess all eligibility requirements, or hold hearings. It considers the administrative record and any additional information that it considers relevant.

(f)

(1) The Department affirms the certifier's decision if it determines that the decision is consistent with applicable rules and supported by substantial evidence.

(2) The Department reverses decisions that do not meet the standard in paragraph (f)(1) of this section.

(3) The Department need not reverse if an error or omission did not result in fundamental unfairness or undue prejudice.

- (4) The Department may remand the case with instructions for further action. When the Department specifies further actions, the certifier must take them without delay.
- (5) The Department generally does not uphold the certifier's decision based on grounds not specified in its decision.
- (6) The Department resolves appeals on the basis of facts demonstrated, and evidence presented, at the time of the certifier's decision.
- (7) The Department may summarily dismiss an appeal. Reasons for doing so include, but are not limited to, non-compliance, abuse of process, appellant or certifier request, and failure to state a claim upon which relief can be granted.
- (g) The Department does not issue advisory opinions.
- (h) All decisions described in paragraph (f) of this section are administratively final unless they say otherwise.
- (i) DOOCR posts final decisions to its website, available at <https://www.transportation.gov/DBEDecisions>.

[89 FR 24978, Apr. 9, 2024]

§ 26.91 What actions do certifiers take following DOT certification appeal decisions?

- (a) If you are the certifier from whose action an appeal under § 26.89 is taken, the decision is binding. It is not binding on other certifiers.
- (b) If you are a certifier to which a DOT determination under § 26.89 is applicable, you must take the following action:
 - (1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 26.87(j) take effect.
 - (2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.87.
 - (3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.
 - (4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.
 - (5) If the Department affirms your determination, no further action is necessary.
- (c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other certifiers with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.87. Such certifiers must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other certifiers must take the DOT action into account in any certification action involving the firm. However, other certifiers are not required to certify the firm based on the DOT decision.

[64 FR 5126, Feb. 2, 1999, as amended at 89 FR 24979, Apr. 9, 2024]

Subpart F—Compliance and Enforcement

§ 26.101 What compliance procedures apply to recipients?

- (a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under § 26.103 or § 26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.
- (b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

§ 26.103 What enforcement actions apply in FHWA and FTA programs?

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

- (a) **Noncompliance complaints.** Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in § 26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.
- (b) **Compliance reviews.** The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.
- (c) **Reasonable cause notice.** If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, return receipt requested, a written notice advising you that there is reasonable cause to find you in noncompliance. The notice states the reasons for this finding and directs you to reply within 30 days concerning whether you wish to begin conciliation.
- (d) **Conciliation.**
 - (1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.
 - (2) If you and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as complying. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.

- (3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.
- (4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.
- (e) **Enforcement actions.**
 - (1) Enforcement actions are taken as provided in this subpart.
 - (2) Applicable findings in enforcement proceedings are binding on all DOT offices.

[64 FR 5126, Feb. 2, 1999, as amended at 89 FR 24979, Apr. 9, 2024]

§ 26.105 What enforcement actions apply in FAA programs?

- (a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.
- (b) The provisions of § 26.103(b) and this section apply to enforcement actions in FAA programs.
- (c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

§ 26.107 What enforcement actions apply to firms participating in the DBE program?

- (a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.
- (b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.
- (c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.
- (d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.
- (e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5101, Jan. 28, 2011]

§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

(a) *Availability of records.*

- (1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.
- (2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, 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) ***Confidentiality of information on complainants.*** Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

(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).

(d) ***Intimidation and retaliation.*** If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003; 76 FR 5101, Jan. 28, 2011]

Appendix A to Part 26—Guidance Concerning Good Faith Efforts

- I. When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make sufficient good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps

to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

- II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix.

The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

- III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (*i.e.*, obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

- IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

- A.

- (1) Conducting market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.

- (2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

- B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

- C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.

D.

- (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional Agreements could not be reached for DBEs to perform the work.
- (2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E.

- (1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.
- (2) A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you

may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in § 26.53(b)(2)(vi), you must also require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

- VI. A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts except in design-build procurement.

[79 FR 59600, Oct. 2, 2014, as amended at 89 FR 24979, Apr. 9, 2024]

Appendix B to Part 26 [Reserved]

Appendix C to Part 26—DBE Business Development Program Guidelines

The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from the recipient.

- (A) Each firm that participates in a recipient's business development program (BDP) program is subject to a program term determined by the recipient. The term should consist of two stages; a developmental stage and a transitional stage.
- (B) In order for a firm to remain eligible for program participation, it must continue to meet all eligibility criteria contained in part 26.
- (C) By no later than 6 months of program entry, the participant should develop and submit to the recipient a comprehensive business plan setting forth the participant's business targets, objectives and goals. The participant will not be eligible for program benefits until such business plan is submitted and approved by the recipient. The approved business plan will constitute the participant's short and long term goals and the strategy for developmental growth to the point of economic viability in non-traditional areas of work and/or work outside the DBE program.
- (D) The business plan should contain at least the following:
 - (1) An analysis of market potential, competitive environment and other business analyses estimating the program participant's prospects for profitable operation during the term of program participation and after graduation from the program.
 - (2) An analysis of the firm's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts other than those in traditional areas of DBE participation.
 - (3) Specific targets, objectives, and goals for the business development of the participant during the next two years, utilizing the results of the analysis conducted pursuant to paragraphs (C) and (D)(1) of this appendix;

- (4) Estimates of contract awards from the DBE program and from other sources which are needed to meet the objectives and goals for the years covered by the business plan; and
 - (5) Such other information as the recipient may require.
- (E) Each participant should annually review its currently approved business plan with the recipient and modify the plan as may be appropriate to account for any changes in the firm's structure and redefined needs. The currently approved plan should be considered the applicable plan for all program purposes until the recipient approves in writing a modified plan. The recipient should establish an anniversary date for review of the participant's business plan and contract forecasts.
- (F) Each participant should annually forecast in writing its need for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (E) of this appendix. Such forecast should be included in the participant's business plan. The forecast should include:
 - (1) The aggregate dollar value of contracts to be sought under the DBE program, reflecting compliance with the business plan;
 - (2) The aggregate dollar value of contracts to be sought in areas other than traditional areas of DBE participation;
 - (3) The types of contract opportunities being sought, based on the firm's primary line of business; and
 - (4) Such other information as may be requested by the recipient to aid in providing effective business development assistance to the participant.
- (G) Program participation is divided into two stages;
 - (1) a developmental stage and
 - (2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.
- (H) The length of service in the program term should not be a pre-set time frame for either the developmental or transitional stages but should be figured on the number of years considered necessary in normal progression of achieving the firm's established goals and objectives. The setting of such time could be factored on such items as, but not limited to, the number of contracts, aggregate amount of the contract received, years in business, growth potential, etc.
- (I) Beginning in the first year of the transitional stage of program participation, each participant should annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations in areas other than traditional areas of DBE participation after graduation from the program. The transition management plan should be submitted to the recipient at the same time other modifications are submitted pursuant to the annual review under paragraph (E) of this section. The plan should set forth the same information as required under paragraph (F) of steps the participant will take to continue its business development after the expiration of its program term.

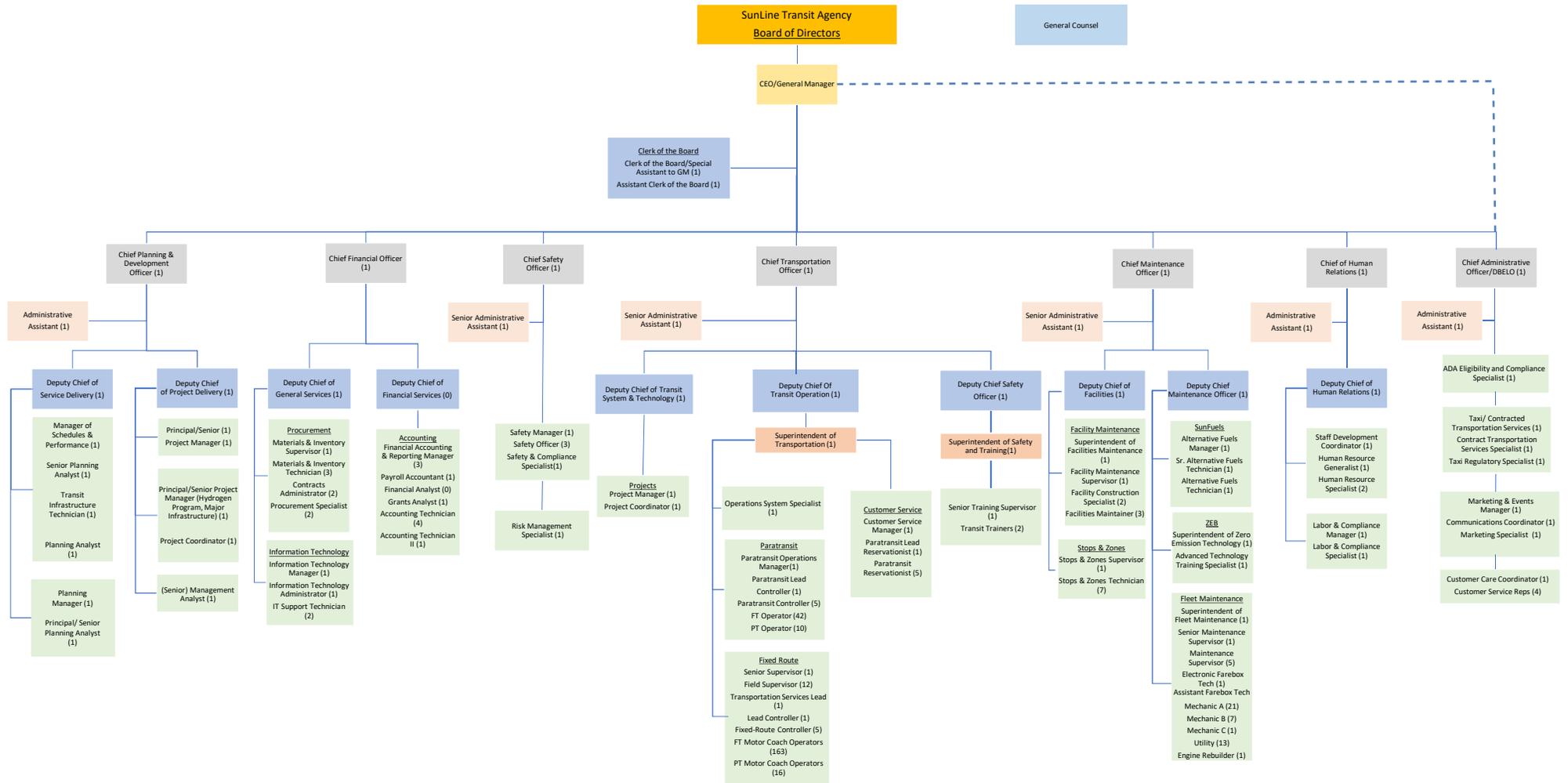
- (J) When a participant is recognized as successfully completing the program by substantially achieving the targets, objectives and goals set forth in its program term, and has demonstrated the ability to compete in the marketplace, its further participation within the program may be determined by the recipient.
- (K) In determining whether a concern has substantially achieved the goals and objectives of its business plan, the following factors, among others, should be considered by the recipient:
 - (1) Profitability;
 - (2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;
 - (3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;
 - (4) Ability to obtain bonding;
 - (5) A positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category; and
 - (6) Good management capacity and capability.
- (L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient should notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification should set forth findings, based on the facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification should also provide the participant 45 days from the date of service of the letter to submit in writing information that would explain why the proposed basis of graduation is not warranted.
- (M) Participation of a DBE firm in the program may be discontinued by the recipient prior to expiration of the firm's program term for good cause due to the failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance. Also, the recipient can discontinue the participation of a firm that does not actively pursue and bid on contracts, and a firm that, without justification, regularly fails to respond to solicitations in the type of work it is qualified for and in the geographical areas where it has indicated availability under its approved business plan. The recipient should take such action if over a 2-year period a DBE firm exhibits such a pattern.

Appendix D to Part 26—Mentor-Protégé Program Guidelines

- (A) The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from other firms. To operate a mentor-protégé program, a recipient must obtain the approval of the concerned operating administration.
- (B)
 - (1) Any mentor-protégé relationship shall be based on a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.

(2) To be eligible for reimbursement, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts. The recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement.

(C) DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified *before* it begins participation in a mentor-protégé arrangement. If the recipient chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/ subcontractor mentor-protégé agreement.



DBE Directory

SunLine participates in the **(CUCP)** CALIFORNIA UNIFIED CERTIFICATION PROGRAM and utilizes the DBE query forms available on the Caltrans website.

<https://caltrans.dbesystem.com/>

<https://californiaucp.dbesystem.com/>

Enforcement Mechanisms/Legal Remedies

SunLine has available several remedies to enforce the DBE requirements contained in its contracts, including, but not limited to the following:

- Breach of contract action, pursuant to the terms of the contract
- Breach of contract action, pursuant to California Civil Code § 3300 et seq.
- The California Whistleblower Act authorizes the California State Auditor to receive complaints from state employees and members of the public

In addition, the federal government has available several enforcement mechanisms that it may pursue , including, but not limited to the following:

- Suspension or debarment proceedings pursuant to 49 CFR part 26
- Enforcement action pursuant to 49 CFR part 31
- Prosecution pursuant to 18 USC 1001

SunLine Transit Agency

DISADVANTAGED BUSINESS ENTERPRISE

TRIENNIAL GOAL FEDERAL FISCAL YEARS 2025-2027

As required by Federal Regulations 49 CFR Part 26.45, public agencies receiving Federal Department of Transportation-assisted funds who anticipate awarding \$250,000 or more in DOT-assisted contracts must adopt a three-year DBE goal.

The goal-setting process consists of two steps. Step one determines the base figure for the relative availability of DBEs. Step two determines what adjustment, if any, may be needed.

STEP ONE

1. ANTICIPATED PROJECTS FOR FEDERAL FISCAL YEARS 2025-2027

The following projects represent the anticipated federally funded contracting opportunities for the Federal Fiscal Year beginning October 1, 2024, through September 30, 2027. ~~The AgencySunLine~~ has projected ~~\$1,485,532~~\$13,957,465.00 federal dollars ~~are~~will be available for DBE contracting opportunities over the three-year term; see Exhibit A.

2. GOAL METHODOLOGY

A base figure is calculated by first determining the number of ready, willing and able DBEs using the North American Industry Classification System (NAICS) and the ~~Local-local Market-market Areaarea~~. NAICS is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing and publishing statistical data related to the U.S. business economy. The NAICS codes included in ~~this-SunLine's~~ methodology represent specific types of work ~~the AgencySunLine~~ anticipates will be performed on its DOT-assisted contracts over the next three fiscal years.

The local market area for each NAICS code reflects the area in which the majority of the contractors and subcontractors with which ~~the AgencySunLine~~ does business are located and the area in which the majority of the federal contracting dollars are spent.

Exhibit A identifies the NAICS codes for each of ~~the Agency'sSunLine's~~ DOT-assisted contracts with DBE contracting opportunities and the local market area for each NAICS code.

To determine the number of all ready, willing, and able firms, ~~the Agency~~SunLine used the six-digit level NAICS information available from the U.S. Census Censtats Database, *County Business Patterns Data*, for the local market area of Imperial, Riverside, San Bernardino, Los Angeles, and San Diego Counties.

~~The Agency~~SunLine queried the relative NAICS codes in the DBE Firm Search listed in the California Unified Certification Program (CUCP) database accessible on the Caltrans website ~~who have, which~~ indicated an ~~interest in doing~~ability to do business in Riverside County.

DBE regulations require the use of the most refined data available to avoid overestimating the number of firms in the DBE goal calculation.

3. **WEIGHTING**

To help ensure the step one base figure is as accurate as possible, ~~the Agency~~SunLine weighted the relative availability calculation discussed above. To calculate the percentage of weight, the sum of DOT-assisted contracts for each NAICS code was divided by the sum of all DOT-assisted contracts; see Exhibit A.

4. **ROUNDED, WEIGHTED STEP ONE BASE FIGURE**

Based on the above analysis, ~~the Agency's~~SunLine's step one base figure is ~~0.06340~~0.0245, or ~~6.342~~2.5%; see Exhibit A.

STEP TWO

1. **ADJUSTMENTS TO THE BASE FIGURE**

Step two of the goal setting process is intended to adjust the step one base figure. Once the base figure is calculated, all evidence available in the jurisdiction must be examined to determine if an adjustment to the base figure is needed to arrive at the overall goal.

Several factors as outlined ~~underin~~ 49 CFR Part 26.45 were ~~considered to see if there~~analyzed to determine whether was a need to adjust the step one b~~Base goal~~Figure should be adjusted. Evidence considered in making an adjustment to the Base Figure included an evaluation of SunLine's P~~past~~ DBE Goal Attainments and other evidence, as follows.

- Past DBE Goal Attainments
~~SunLine analyzed As historical DBE participation attainments provide demonstrable evidence of DBE availability and capacity to perform,~~ past DBE participation attainments for the ~~five three~~ (35) federal fiscal years, for which DBE attainment data is available. The table below reflects the demonstrated capacity of DBEs on FTA-assisted contracts awarded by SunLine within the last ~~three five~~ (35) federal fiscal years.

Federal Fiscal Year (FFY)	<u>FTA DBE Goal</u>	<u>FTA-Actual DBE Goal Attainment-%</u>
2016		7.3%
2017		7.8%
2018 2021	<u>6%</u>	11.35 .4%
2019 2022	<u>6.3%</u>	6.06 .3%
2020 2023	<u>6.3%</u>	24.04 .3%
Median DBE Attainment Within the Last Five Three (53) Years		7.85.4%

The reporting periods shown above, along with SunLine's ~~the~~ median DBE past participation percentage, ~~represent~~provide past evidence of successful DBE participation ~~in the Agency's program~~on SunLine's federally assisted contracts. DBE Goals from other ~~agencies~~federal recipients were not utilized as an adjustment factor for SunLine's overall goal, since as no other U.S. DOT recipients having substantially similar contracting opportunities were identified in the local market area. One disparity study, Advancement Project California 2022 Caltrans FTA Disparity Study; Race Counts, racecounts.org 2021, Riverside County prepared by BBC Research & Consulting, was reviewed. The study did not use NAICS codes to determine the types of businesses referenced and whether they would apply to the upcoming projects. SunLine determined that the disparity study did not specifically address DBE issues within SunLine's jurisdiction and local market area. The study did not use NAICS codes to determine the types of businesses referenced to assess if they would apply to upcoming projects. The disparity study also looked at California as a whole and did not break down its findings by county. Additionally, SunLine did not find other disparity studies within ~~their's~~ jurisdiction and ~~or~~ local market area to consider in this second step of the DBE goal-setting analysis.

SunLine's analysis concluded that the DBE goal established in step one did not require adjustment. In reviewing the information presented above, Accordingly, staff recommends (no adjustment) be made to the proposed SunLine's proposed overall annual Agency DBE goal for federal fiscal years 2025-2027 is **62.5%**.

UTILIZATION OF RACE/GENDER-NEUTRAL METHOD

~~The Agency~~SunLine will ~~annually meet its overall goal by using~~utilize race-neutral methods to facilitate DBE participation on its federally assisted contracts. ~~The~~

~~AgencySunLine~~ actively seeks to solicit procurement participation from ~~DBE certified~~DBE-certified firms and affirmatively ensures the same in its public notices.

~~SunLine's R~~race-neutral methods include, but are not ~~necessarily~~ limited to, the following:

- DBE participation through a prime contract obtained through competitive procurement procedures
- DBE participation through a subcontract on a prime contract without a DBE goal
- DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in its award process
- AgencySunLine participation in local area DBE outreach events

~~The AgencySunLine~~ will also make efforts to ensure that Requests for Proposals (RFPs), Invitation for Bids (IFBs) and all corresponding contracting requirements facilitate participation to DBEs and other small businesses. ~~The AgencySunLine~~ encourages prime contractors to subcontract portions of the work to DBEs. ~~Formal~~All SunLine RFPs and IFBs made publicly ~~are~~ available on ~~the Agency'sSunLine's~~ website, ~~as is the Agency'sSunLine's~~ DBE policy and general information about "how to do business" with ~~the AgencySunLine~~ are also made publicly available on SunLine's website.

PUBLIC PARTICIPATION

In accordance with 49 CFR Part 26.45(g), ~~as amended by the Final Rule effective November 3, 2014,~~ to establish its overall goal, ~~the AgencySunLine~~ must provide for consultation and publication.

1. CONSULTATION

The consultation must include a scheduled, direct, interactive exchange with minority, women's, and general contractor groups, community organizations, and other officials or organizations that could be expected to have information concerning:

- The availability of disadvantaged and non-disadvantaged businesses
- The effects of discrimination on opportunities for DBEs
- ~~The Agency'sSunLine's~~ efforts to establish a level playing field for DBE participation

To comply with this requirement, SunLine met with DBE and non-DBE businesses, public agencies, community organizations, and affected groups during the following workshops:

- ~~Greater Coachella Valley Chamber of Commerce Chamber Connect; June 4, 2021~~

- ~~SunLine Transit Agency Virtual DBE & Small Business Outreach; June 8, 2021~~
- ~~SunLine Transit Agency DBE & Small Business Workshop; November 15, 2021~~
- ~~Greater Coachella Valley Chamber of Commerce Annual Joint Mixer; May 17, 2023~~
- ~~Coachella Valley Local Government Vendor Fair; April 17, 2024~~

~~SunLine also met with the following groups via Zoom during the workshops listed above. No comments were received regarding the proposed DBE.~~

- ~~A Fair Way Mediation Center~~
- ~~BBSI La Quinta~~
- ~~California Behavioral Health~~
- ~~Dandelion Consulting Group~~
- ~~Flower Market~~
- ~~Food Now – Desert Hot Springs~~
- ~~Friends of the Indio Senior Center~~
- ~~G-Aries Visions~~
- ~~LASR-INK – Corp dba Central Printer Resources~~
- ~~Metrics Bookkeeping & Taxes~~
- ~~R. IZZO Strategic Solutions~~
- ~~Resort Opportunities~~
- ~~Service Zoom WebDesign and Marketing Agency~~
- ~~Spectrum Reach~~
- ~~Thryv~~

2. PUBLICATION

SunLine issued notice on their website of the SunLine draft proposed FTA overall DBE Goal Methodology for FFY 2025 – 2027. This notice informed the public that the proposed DBE goal and rationale ~~are~~were available for inspection at the offices of SunLine during normal business hours and that SunLine would accept comments on the DBE goal analysis for 30 days from the date of the Public Notice. **No comments were received during this comment period.**

ESTABLISHMENT OF GOAL

Based upon the information and methodology presented above, ~~it is proposed that the Agency's SunLine's~~ overall annual DBE goal for the Federal Fiscal Years 2025 – 2027 ~~be established at~~ is ~~6.0%~~2.5%.

RACE-NEUTRAL MEASURES

In conformance with 49 CFR Part 26 and in further response to FTA notices issued to Public Transportation Providers regarding DOT's DBE Program and Race-Neutral Policy Implementation Guidance, SunLine is required to submit and implement a **strictly Race-Neutral Overall Annual DBE Goal for FFY 2025 – 2027**, due to the absence of readily available evidence of discrimination and its effects in its marketplace.

SunLine will implement Race-Neutral measures to meet its Overall Annual DBE Goal objectives in accordance with 49 CFR Part 26.51, including but are not limited to:

- Arranging timely solicitations, ~~times for the presentation of bids, quantities, specifications and times for the presentation of bids, quantities, specifications,~~ and delivery schedules in ways that facilitate DBEs and other small business firms' participation.
- Unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own workforces.
- Providing information and communications programs on contracting procedures and specific contract opportunities.

EXHIBIT A

DOT-ASSISTED CONTRACTS WITH DBE CONTRACTING OPPORTUNITIES FOR FEDERAL FISCAL YEARS 2025 – 2027

Projects	Federal Share	NAICS US Census	Weighted Value = Project Value/Total Federal Dollars	No. Vendors	No. DBE Vendors	Relative Availability of DBE's = DBE Vendors/Total Vendors	Weighted Base Figure = Weighted Value x Relative Availability of DBE's	Dollars Available to DBE's = Federal Share x Weighted Base Figure
Radio Replacements & ITS - Phase 2 (CAD/AVL)	\$ 2,238,400	541511	0.1604	3700	74	0.0200	0.0032	\$ 7,179.58
Public Hydrogen Station Expansion - Division 1	\$ 5,960,000	332420	0.4270	14	0	0.0000	0.0000	\$ -
Public Hydrogen Station Expansion - Electrical	\$ 620,000	238210	0.0444	4139	74	0.0179	0.0008	\$ 492.39
Public Hydrogen Station Expansion - Concrete	\$ 250,000	238110	0.0179	780	72	0.0923	0.0017	\$ 413.34
Public Hydrogen Station Expansion - Grading	\$ 170,000	238910	0.0122	976	89	0.0912	0.0011	\$ 188.81
Liquid Hydrogen Station - Division 2	\$ 950,648	332420	0.0681	14	0	0.0000	0.0000	\$ -
Liquid Hydrogen Station - Division 2 - Electrical	\$ 190,000	238210	0.0136	4139	74	0.0179	0.0002	\$ 46.24
Liquid Hydrogen Station - Division 2 - Concrete	\$ 100,000	238110	0.0072	780	72	0.0923	0.0007	\$ 66.13
Liquid Hydrogen Station - Division 2 - Grading	\$ 50,000	238910	0.0036	976	89	0.0912	0.0003	\$ 16.33
Bus Stop Improvements	\$ 588,680	238910	0.0422	976	89	0.0912	0.0038	\$ 2,264.08
Asphalt & Concrete Upgrade	\$ 800,000	324121	0.0573	42	3	0.0714	0.0041	\$ 3,275.26
Design & Construction of New Storage Building	\$ 640,000	238910	0.0459	976	89	0.0912	0.0042	\$ 2,676.05
Upgrade Gate & Guard Shack	\$ 221,720	238910	0.0159	976	89	0.0912	0.0014	\$ 321.18
Facility Improvements	\$ 67,600	238910	0.0048	976	89	0.0912	0.0004	\$ 29.86
Facility Improvements - A/C Contractors	\$ 97,600	333415	0.0070	5139	15	0.0029	0.0000	\$ 1.99
Facility Improvements - Electrical	\$ 30,000	238210	0.0021	4139	74	0.0179	0.0000	\$ 1.15
Repair of Division 1 Maintenance Roof	\$ 160,000	238160	0.0115	993	1	0.0010	0.0000	\$ 1.85
Software Expansion - Equipment	\$ 480,000	423430	0.0344	525	6	0.0114	0.0004	\$ 188.65
Information & Technology - Services	\$ 257,771	541519	0.0185	413	44	0.1065	0.0020	\$ 507.18
Access Control Surveillance	\$ 85,046	238210	0.0061	4139	74	0.0179	0.0001	\$ 9.26
Total	\$ 13,957,465		1.0000	34812	1117	1.0166	0.0245	\$ 17,679.35
Median DBE Attainment for Last 3 Years		5.4%				Goal Percent	2.5	
Weighted (2.5+5.4)/2		3.9%				Goal Dollar Amount	\$ 17,679.35	



EXHIBIT B

SunLine Transit Agency

DISADVANTAGE BUSINESS ENTERPRISE

TRIENNIAL GOAL FEDERAL FISCAL YEARS 2025 – 2027

In accordance with 49 CFR Part 26, SunLine Transit Agency, announces a proposed Federal Transit Administration (FTA) Disadvantaged Business Enterprise (DBE) overall goal of ~~6%~~2.5% during the 2025 – 2027 federal fiscal years beginning October 1, 2024. This race-neutral goal represents the percentage of work to be performed by certified DBE firms on SunLine FTA-assisted projects during each federal fiscal year of the project period.

~~The methodology used to determine the proposed goal will be available for public inspection for thirty (30) days from the date of this notice, Monday through Friday from 8:00 AM to 5:00 PM at the following location:~~

~~SunLine Transit Agency
32505 Harry Oliver Trail
Thousand Palms, CA 92276
Tel: (760) 343-3456~~

~~SunLine will accept comments on this proposed goal for 30 days from the date of this notice. Written comments to the SunLine DBE Liaison Officer, Tina Hamel, may be sent to the address above and/or emailed to thamel@sunline.org.~~

Posted ~~6/9/2024~~7/25/2024



U.S. Department of Transportation

OMB APPROVAL NO: 2105-0586
EXPIRATION DATE: (05/31/2027)**OMB CONTROL NUMBER: 2105-0586**
EXPIRATION DATE: (05/31/2027)

Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2105-0586. Public reporting for this collection of information is estimated to be approximately 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information.

All responses to this collection of information are mandatory under 49 CFR §§ 23.39 and 26.83; the nature and extent of confidentiality to be provided, if any under 49 CFR §§ 26.83(d) and 26.109(b). Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, (your agency name and address), Washington, D.C. 20590.

Privacy Act Statement (5 U.S.C. § 552a, as amended):

AUTHORITY: [42 U.S.C. 2000d et seq.](#), [§ 12101 et seq.](#), [42 U.S.C. 6101 et seq.](#); [29 U.S.C. 794, 749d](#); [49 U.S.C. 47113](#); [42 U.S.C. 12101](#); [49 CFR Part 23](#); [49 CFR Part 26](#), and [Executive Order 13160](#).

PURPOSE(S): DOT will use the information collected to respond to Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) inquiries and adjudicate appeals.

ROUTINE USE(S): In accordance with DOT's system of records notice, DOT/ALL-24 Departmental Office of Civil Rights System, 76 FR 71108 (Nov. 16, 2011), the information provided may be disclosed to the U. S. Department of Justice, including United States Attorney's Offices, or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation. A comprehensive list of routine uses can be found in DOT/ALL 24 and DOT's General Statement of Routine uses, 75 FR 82138 (Dec. 29, 2010). 77 FR 42796 (July 20, 2012), 84 FR 55222 (Oct. 15, 2019).

DISCLOSURE: Provision of the requested information is voluntary; however, failure to furnish the requested information may result in the denial of a DBE or ACDBE application and an inability of the Department to process an appeal or inquiry from any party.



**UNIFORM CERTIFICATION APPLICATION
DISADVANTAGED BUSINESS ENTERPRISE (DBE)/AIRPORT CONCESSIONS
DISADVANTAGED BUSINESS ENTERPRISE (ACDBE) PROGRAMS 49 CFR Parts 23 and 26**

1. Should I apply?

You may be eligible to participate in the DBE/ACDBE programs if:

(1) The firm is a for-profit business that performs or seeks to perform transportation-related work (or an airport concession activity) for a recipient of Federal Aviation Administration, Federal Highway Administration, or Federal Transit Administration funds.

- The firm is at least 51% owned and controlled by a socially and economically disadvantaged individual(s) who is a U.S. citizen(s) or lawfully admitted permanent U.S. resident(s).
 - Refer to § 26.5 of 49 CFR Part 26 for the definition of “socially and economically disadvantaged individual.”
 - Refer to <https://www.transportation.gov/DBEPNW> for “personal net worth cap.”
 - Refer to § 26.69 and 26.70 of 49 CFR Part 26 to determine whether you meet the ownership and control requirements.
- The firm meets the Small Business Administration’s (SBA) and the DBE/ACDBE program’s size standards at <https://www.transportation.gov/DBESizeStandards>

It is the applicant firm’s responsibility to provide sufficient evidence to demonstrate that, more likely than not, it meets all eligibility requirements.

2. How do I apply?

Firms applying for DBE/ACDBE certification in their home state, i.e., the state in which the firm maintains its principal place of business, must submit to a certifying agency in their home state a completed Uniform Certification Application and all required documents (see attached checklist) and participate in an on-site interview. Failure to timely submit documents may result in delayed processing or denial of your application.

Firms already certified as a DBE/ACDBE in their home state do not have to complete this form. Section 26.85 of 49 CFR Part 26 explains the process for obtaining certification in additional states, i.e., interstate certification.

3. Where can I send my application?

Transportation agencies in each state perform DBE and ACDBE certification functions. DOT’s website has a table of certifying agency contacts at <https://www.transportation.gov/DBEPOC>. Click on the link to access contact information for your state/territory and obtain details on how to submit your application.

4. What happens after I apply?

A transportation agency in your state that performs certification functions will contact you.

5. Where can I find more information?

Visit the USDOT website at <https://www.transportation.gov/DBE> for links to the DBE/ACDBE program rules and regulations (including those for interstate certification), answers to frequently asked questions, points of contact, and more.

SBA Small Business Size Standards matched to the North American Industry Classification System (NAICS): <http://www.census.gov/eos/www/naics/> and <http://www.sba.gov/content/table-small-business-size-standards>.

Under 49 CFR § 26.107, if, at any time, the Department or a recipient has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, the Department may initiate suspension or debarment proceedings against the person or firm under 2 CFR Parts [180](#) and [1200](#). No procurement Suspension and Department, take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, and/or refer the matter to the Department of Justice for criminal prosecution under 18 USC 1001, which prohibits false statements in federal programs



INSTRUCTIONS

NOTE: All participating firms must be for-profit enterprises with current business operations. If your firm is not for profit, or is not conducting business, then you do NOT qualify for the DBE/ACDBE program and should not complete this application. If you require additional space for any question in this application, please attach additional sheets or copies as needed, taking care to indicate on each attached sheet/copy the section and number of this application to which it refers.

Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information

- (1) Enter the name and title of the person completing this application who will serve as your firm's contact for this application.
- (2) Enter the legal name of your firm, as indicated in your firm's Articles of Incorporation (if any) or similar document.
- (3) Enter the primary phone number of your firm.
- (4) Enter a secondary phone number, if any.
- (5) Enter your firm's fax number, if any.
- (6) Enter the contact person's email address.
- (7) Enter your firm's website address, if any.
- (8) Enter the street address of the firm where its offices are physically located (not a P.O. Box).
- (9) Enter the mailing address of your firm, if it is different from your firm's street address.

B. Prior/Other Certifications and Applications

Indicate whether your firm or any firms owned by the persons listed has ever been denied certification as a DBE/ACDBE, 8(a), or Small Disadvantaged Business (SDB) firm, or state and local MBE/WBE firm. Indicate if the firm has ever been decertified from one of these programs. Indicate if the application was withdrawn or whether the firm was debarred, suspended, or otherwise had its bidding privileges denied or restricted by any state or local agency, or Federal entity. If your answer is yes, identify the name of the agency, and explain fully the nature of the action in the space provided. Indicate if you have ever appealed this decision to the Department and if so, attach a copy of USDOT's final agency decision(s).

Section 2: GENERAL INFORMATION

A. Business profile:

- (1) Give a concise description of the firm's primary activities, the product(s) or services the company provides, or type of construction. If your company offers more than one product/service, list primary product or service first (attach additional sheets if necessary). This description may be used in states' online directories of certified firms.
- (2) If you know the appropriate North American Industry Classification System (NAICS) code for the type(s) of work you identified in your business profile, enter the codes in the space provided.

- (3) State the date on which your firm was established as stated in your firm's Articles of Incorporation (if any) or similar document.
- (4) State the date each person became a firm owner. Check the appropriate box describing the manner in which you and each other owner acquired ownership of your firm. If you checked "Other," explain in the space provided.
- (5) Check the appropriate box that indicates whether your firm is "for profit." **If you checked "No," then you do NOT qualify for the DBE/ACDBE program** and should not complete this application. All participating firms must be for-profit enterprises. Provide the Federal Tax ID number as stated on your firm's Federal tax return.
- (6) Check the appropriate box that describes the type of legal business structure of your firm, as indicated in your firm's Articles of Incorporation or similar document. If you checked "Other," briefly explain in the space provided.
- (7) Indicate in the spaces provided how many employees your firm has, specifying the number of employees who work on a full-time, part-time, and seasonal basis. Attach a list of employees, their job titles, and dates of employment to your application.
- (8) Specify the firm's gross receipts for each of the **past five years**, as stated in your firm's filed federal tax returns. You must submit all portions of federal tax returns related to gross receipts and signature pages, as filed. If there is no federal tax return yet filed for the most recent taxable year, you may provide an income statement signed by a CPA who attests to its accuracy and completeness. If there are any affiliates or subsidiaries of the applicant firm or owners, you must provide documentation these firms' gross receipts also as described above. Affiliation is defined in 49 C.F.R. §26.5 and 13 C.F.R. Part 121.

B. Relationships and Dealings with Other Businesses

- (1) Check the appropriate box that indicates whether your firm is co-located at any of its business locations, or whether your firm shares a telephone number(s), a post office box, any office space, a yard, warehouse, other facilities, any equipment, financing, or any office staff and/or employees with any other business, organization or entity of any kind. If you answered "Yes," then specify the name of the other firm(s) and fully explain the nature of your relationship with these



other businesses by identifying the business or person with whom you have any formal, informal, written, or oral agreement. Provide an explanation of any items shared with other firms in the space provided.

- (2) Check the appropriate box indicating whether any other firm currently has or had an ownership interest in your firm at present or at any time in the past. If you checked yes, please explain.
- (3) Check the appropriate box that indicates whether at present or at any time in the past your firm:
 - (a) ever existed under different ownership, a different type of ownership, or a different name;
 - (b) existed as a subsidiary of any other firm;
 - (c) existed as a partnership in which one or more of the partners are/were other firms;
 - (d) owned any percentage of any other firm; and
 - (e) had any subsidiaries of its own.
 - (f) served as a subcontractor with another firm constituting more than 25% of your firm's receipts.

If you answered "Yes" to any of the questions in (3)(a-f), you may be asked to explain the arrangement in detail.

Section 3: MAJORITY OWNER INFORMATION

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below (if your firm has more than one owner, provide completed copies of this section for each owner):

A. Identify the majority owner of the firm holding 51% or more ownership interest:

- (1) Enter the full name of the owner.
- (2) Enter the owner's title or position.
- (3) Give the owner's phone number.
- (4) Enter the owner's home (street) address.
- (5) Indicate the owner's gender.
- (6) Identify the owner's ethnic group membership. If you checked "Other," specify this owner's ethnic group/identity not otherwise listed.
- (7) Check the appropriate box to indicate whether this owner is a U.S. citizen or a lawfully admitted permanent resident. If this owner is neither a U.S. citizen nor a lawfully admitted permanent resident of the U.S., then the firm may not rely on this owner's social and economic disadvantaged status for DBE certification eligibility.
- (8) Enter the number of years this owner has been an owner of your firm.
- (9) Indicate the percentage of the total ownership this person holds and the date acquired, including (if appropriate), the class of stock owned.
- (10) Indicate the dollar value of this owner's initial investment to acquire an ownership interest in your firm, broken down by cash, real estate, equipment, gift and/or other investment. Describe

how the owner acquired the business and attach documentation substantiating this investment.

- (11) List additional investments.

B. Additional Owner Information

- (1) Describe the familial relationship of this owner to each other owner of your firm and employees.
- (2) Indicate whether this owner performs a management or supervisory function for any other business. If you checked "Yes," state the name of the other business and this owner's function/title held in that business.
- (3) (a) Check the appropriate box that indicates whether this owner owns or works for any other firm(s) that has any relationship with your firm. If you checked "Yes," identify the name of the other business, the nature of the business relationship, and the owner's function at the firm.
(b) If the owner works for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week, please explain this activity.
- (4) (a) Provide the personal net worth of the owner claiming social and economic disadvantage in the space provided. Complete and attach the accompanying "Personal Net Worth Statement for DBE/ACDBE Program Eligibility" with your application. Complete this section and accompanying statement only for each owner claiming to be socially and economically disadvantaged.
(b) Check the appropriate box that indicates whether any trust has been created for the benefit of the disadvantaged owner(s). If you answered "Yes," you may be asked to provide a copy of the trust instrument.
- (5) Check the appropriate to indicate whether any of your immediate family members, managers, or employees, own, manage, or are associated with another company. Immediate family member is defined in 49 C.F.R. §26.5. If you answered "Yes," provide the name of each person, your relationship to that person, , the name of the company, the type of business, and whether that person owns or manages the company.

Section 4: CONTROL

A. Identify the firm's Officers and Board of Directors

- (1) In the space provided, state the name, title, date of appointment, group membership, and gender of each officer.
- (2) In the space provided, state the name, title, date of appointment, group membership , and gender of each individual serving on your firm's Board of Directors.
- (3) Check the appropriate box to indicate whether any of your firm's officers and/or directors listed above performs a management or supervisory function for any other business. If you answered "Yes," identify each such individual by name and , provide the name of the other business in which that individual is involved, and describe the



nature of that individual's role in the other business.

- (4) Check the appropriate box that indicates whether any of your firm's officers and/or directors listed above own or work for any other firm(s) that has a relationship with your firm. (e.g., ownership interest, shared office space, financial investments, equipment leases, personnel sharing, etc.) If you answered "Yes," identify the name of the firm, the individual's name, and the nature of the individual's relationship with that other firm.

B. Duties of Owners, Officers, Directors, Managers and Key Personnel

Specify the roles of the majority and minority owners, directors, officers, and managers, and key personnel who are responsible for the functions listed for the firm. Submit résumés for each owner and non-owner identified below. State the name of the individual, title, race and gender and percentage ownership if any. Circle the frequency of each person's involvement as follows: "always, frequently, seldom, or never" in each area.

Indicate whether any of the persons listed in this section perform a management or supervisory function for any other business. Identify the person, business, and their title/function. Identify if any of the persons listed above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investment, equipment, leases, personnel sharing, etc.) If you answered "Yes," describe the nature of his/her business relationship with that other firm.

C. Inventory: Indicate firm inventory in these categories:

(1) Equipment and Vehicles

State the make and model, and current dollar value of each piece of equipment and motor vehicle held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm or owner, whether it is used as collateral, and where this item is stored.

(2) Office Space

State the street address of each office space held and/or used by your firm. Indicate whether your firm or owner owns or leases the office space and the current dollar value of that property or its lease.

(3) Storage Space

State the street address of each storage space held and/or used by your firm. Indicate whether your firm or owner owns or leases the storage space and the current dollar value of that property or its lease. Provide a signed lease agreement for each property.

D. Does your firm rely on any other firm for management functions or employee payroll?

Check the appropriate box that indicates whether your firm relies on any other firm for management functions or for employee payroll. If you answered "Yes," you may be asked to explain the nature of that reliance and the extent to which the other firm carries out such functions.

E. Financial / Banking Information

State the name, city and state of your firm's bank. Identify the individuals authorized to sign checks on this account. Provide bank documentation that shows all individuals who are authorized to sign checks on the firm's behalf.

Bonding Information. State your firm's bonding limits both aggregate and project limits.

F. Sources, amounts, and purposes of money loaned to your firm, including the names of persons or firms guaranteeing the loan.

State the name and address of each source, the name of person securing the loan, original dollar amount and the current balance of each loan, and the purpose for which each loan was made to your firm. Provide copies of signed loan agreements and security agreements

G. Contributions or transfers of assets to/from your firm and to/from any of its owners or another individual over the past two years:

Indicate in the spaces provided, the type of contribution or asset that was transferred, its current dollar value, the person or firm from whom it was transferred, the person or firm to whom it was transferred, the relationship between the two persons and/or firms, and the date of the transfer.

H. Current licenses/permits held by any owner or employee of your firm.

List the name of each person in your firm who holds a professional license or permit, the type of permit or license, the expiration date of the permit or license, and identify the state that issued the license or permit. Attach copies of licenses, license renewal forms, permits, and haul authority forms.

I. Largest contracts completed by your firm in the past three years, if any.

List the name of each owner or contractor for each contract, the name and location of the projects under each contract, the type of work performed on each contract, and the dollar value of each contract.

J. Largest active jobs on which your firm is currently working.

For each active job listed, state the name of the prime contractor and the project number, the location, the type of work performed, the project start date, the



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anticipated completion date, and the dollar value of the contract.

**Section 5: AIRPORT CONCESSION (ACDBE)
APPLICANTS**

Complete the entries in this section if you are applying for ACDBE certification. Indicate in Section A if you operate a concession at the airport, and/or supply a good or service to an airport concessionaire. Indicate in Section B whether the applicant firm owns or operates any off-airport locations, providing the type of business, lease information, address/location, and annual gross receipts generated. Provide similar information in section C for any airport concession locations the firm currently owns or operates. If the applicant firm has any affiliates, provide the requested information in Section D. Indicate whether the ACDBE firm is participating in any joint ventures, and if so, include the original and any amended joint venture agreements.

DECLARATION & SIGNATURE

The Declaration of Eligibility must accompany your application. Carefully read the attached declaration in its entirety. Fill in the required information for each blank space, and sign and date the declaration.



IF YOU ARE ALREADY CERTIFIED AS A DBE/ACDBE, YOU DO NOT HAVE TO COMPLETE THIS APPLICATION FOR OTHER STATES. REFER TO § 26.85 OF 49 CFR PART 26 FOR DETAILS ABOUT THE INTERSTATE CERTIFICATION PROCESS.

Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information:

My firm is applying for certification as _____ DBE ___ ACDBE

(1) Contact person's name and title:

(2) Legal name of firm:

(3) Phone #: _____ (4) Other Phone #: _____ (5) Fax#: _____

(6) E-mail: _____ (7) Firm Websites: _____

(8) Street address of firm (No P.O. Box): _____ City: _____ County/Parish: _____ State: _____ Zip: _____

(9) Mailing address of firm (No P.O. Box): _____ City: _____ County/Parish: _____ State: _____ Zip: _____

B. Prior/Other Certifications and Applications

(10) Indicate whether the firm or any persons listed in this application have ever been:

(a) Denied certification or decertified as a DBE, ACDBE, 8(a), SDB, MBE/WBE firm? __ Yes __ No

(b) Withdrawn an application for these programs, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or federal entity? __ Yes __ No If yes, explain the nature of the action. (If you appealed the decision to DOT or another agency, attach a copy of the decision.)

Section 2: GENERAL INFORMATION

A. Business Profile: (1) Give a concise description of the firm's primary activities and the product(s) or service(s) it provides. If your company offers more than one product/service, list the primary product or service first. Please use additional sheets if necessary. This description may be used in states' online databases and directories of certified firms.

(2) NAICS Codes for this line of work include: _____

(3) This firm was established on: _____

(4) Is the firm "for profit"? __ Yes Federal Tax ID# _____ **NO STOP! If the firm is NOT for-profit, then the firm does NOT qualify for this program and should not fill out this application.**



(3) Home Phone #: _____

(4) Home Address (Street and Number) _____ City _____ State _____ Zip _____

(5) Gender: Male Female Other: _____

(10) Initial investment to acquire ownership in firm:

(6) Group membership (Check all that apply):

Type	Dollar Value
Cash	\$ _____
Real Estate	\$ _____
Equipment	\$ _____
Other	\$ _____

- Black American
- Hispanic American
- Asian-Pacific American
- Native American
- Subcontinent Asian American
- Other: _____

Describe how the majority owner acquired ownership of the firm:

(7) Residency Status:
 U.S. Citizen
 Lawfully Admitted Permanent Resident

- Started business myself
- Received it as a gift from _____
- Bought it from: _____
- Inherited it from: _____
- Other: _____

(8) Number of years as owner: _____

(9) Percentage owned: _____

(a) Class of stock owned (if applicable): _____

(b) Date acquired _____

(Attach documentation substantiating your investment and method of acquisition)

B. Additional Owner Information

(1) Describe familial relationship to other owners and employees: _____

(2) Does this owner perform a management or supervisory function for any other business? Yes No

If yes, identify: Name of Business: _____ Function/Title: _____

(3)(a) Does this owner own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.) Yes No

If yes, identify the name of the business, and the nature of the relationship, and the owner's function at the firm: _____

(b) Does this owner work for any other firm, non-profit organization, or engage in any other activity more than 10 hours per week? Yes No If yes, identify this activity: _____

(4)(a) What is the Personal Net Worth (PNW) of this disadvantaged owner? _____

(b) Has any trust been created for the benefit of this disadvantaged owner(s)? Yes No

(If Yes, you may be asked to provide a copy of the trust instrument).

(5) Do any of your immediate family members, owners, directors, officers, managers, or employees own, manage, or have any association with another company? Yes No If yes, provide their name, relationship, company, type of business, and indicate whether they own or manage the company: (Please attach extra sheets, if needed): _____



(If Yes, you may be asked to provide a copy of the trust instrument).

(5) Do any of your immediate family members, owners, directors, officers, managers, or employees own, manage, or have any association with another company? Yes No If yes, provide their name, relationship, company, type of business, and indicate whether they own or manage the company: (Please attach extra sheets, if needed): _____

Section 4: CONTROL

A. Identify your firm's Officers and Board of Directors (If additional space is required, attach a separate sheet):

	Name	Title	Date Appointed	Ethnicity	Gender
(1) Officers of the Company	(a)				
	(b)				
	(c)				
	(d)				
(2) Board of Directors	(a)				
	(b)				
	(c)				
	(d)				

(3) Do any of the persons listed above perform a management or supervisory function for any other business?

Yes No If yes, identify for each:

Person: _____ Title: _____

Business: _____ Function: _____

Person: _____ Title: _____

Business: _____ Function: _____

(4) Do any of the persons listed in Section A above own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)

Yes No If Yes, identify for each:

(4) Do any of the persons listed in section A above own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)

Yes No If Yes, identify for each:

Firm Name: _____ Person: _____

Nature of Business Relationship: _____

B. Duties of Owners, Officers, Directors, Managers, and Key Personnel

1. Complete for all owners who are responsible for the following functions: (Attach separate sheets as needed)



A= Always F = Frequently	S = Seldom N = Never	Majority Owner (51% or more)				Minority Owner (49% or less)			
		Name: _____				Name: _____			
		Title: _____				Title: _____			
		Percent Owned: _____				Percent Owned: _____			
Sets policy for company direction/scope of operations		A	F	S	N	A	F	S	N
Bidding and estimating		A	F	S	N	A	F	S	N
Major purchasing decisions		A	F	S	N	A	F	S	N
Marketing and sales		A	F	S	N	A	F	S	N
Supervises field operations		A	F	S	N	A	F	S	N
Attend bid opening and lettings		A	F	S	N	A	F	S	N
Perform office management (billing, accounts receivable/payable, etc.)		A	F	S	N	A	F	S	N
Hires and fires management staff		A	F	S	N	A	F	S	N
Hire and fire field staff or crew		A	F	S	N	A	F	S	N
Designates profits spending or investment		A	F	S	N	A	F	S	N
Obligates business by contract/credit		A	F	S	N	A	F	S	N
Purchase equipment		A	F	S	N	A	F	S	N
Signs business checks		A	F	S	N	A	F	S	N

Do any of the persons listed in B1 or B2 perform a management or supervisory function for any other business? If Yes, identify the person, the business, and their title/function:

Do any of the persons listed above own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.) If Yes, describe the nature of the business relationship: _____

C. Inventory: Indicate your firm's inventory in the following categories (Please attach additional sheets if needed):

1. Equipment and Vehicles

Make and Model	Current value	Owned or leased by firm or owner?	Used as collateral?	Where is item stored?

2. Office Space

Address (Street and Number) _____ City _____ State _____ Zip _____
Owned or Leased by Firm or Owner? Yes No (if yes, provide details): _____

Current Value of Property or Lease: _____

3. Storage Space (Provide signed lease agreements for the properties listed)

Address (Street and Number) _____ City _____ State _____ Zip _____
Owned or Leased by Firm or Owner? _____ Yes _____ No (if yes, provide details): _____

Current Value of Property or Lease: _____



D. Does your firm rely on any other firm for management functions or employee payroll? Yes No

E. Financial/Banking Information (Provide bank authorization and signature cards)

Name of bank: _____ City and State: _____

The following individuals are authorized to sign checks on this account: _____

Name of bank: _____ City and State: _____

The following individuals are authorized to sign checks on this account: _____

Name of bank: _____ City and State: _____

The following individuals are authorized to sign checks on this account: _____

Bonding Information: If you have bonding capacity, identify the firm's bonding aggregate and project limits:

Aggregate limit _____ Project limit _____

F. Identify all sources, amounts, and purposes of money loaned to your firm including from financial institutions. Identify whether the owner or any other person or firm loaned money to the applicant DBE/ACDBE. Include the names of any persons or firms guaranteeing the loan, if other than the listed owner. (Provide copies of signed loan agreements and security agreements).

Name of Source	Address of Source	Name of Person Guaranteeing the Loan	Original Amount	Current Balance	Purpose of Loan

G. List all contributions or transfers of assets to/from your firm and to/from any of its owners or another individual over the past two years (Attach additional sheets if needed):

Contribution/Asset	Dollar Value	From Whom Transferred	To Whom Transferred	Relationship	Date of Transfer

H. List current licenses/permits held by any owner and/or employee of your firm (e.g., contractor, engineer, architect, etc.)(Attach additional sheets if needed):

Name of License/Permit Holder	Type of License/Permit	Expiration Date	State

I. List the three largest contracts completed by your firm in the past three years, if any:

Name of Owner/Contractor	Name/Location of Project	Type of Work Performed	Dollar Value of Contract



SECTION 5 - AIRPORT CONCESSION
(ACDBE APPLICANTS ONLY)

A. I am applying for ACDBE certification to: (check all that apply)

_____ Operate a concession at an airport _____ Supply a good or service to an airport concessionaire

B. Does the applicant firm own/operate any off-airport locations? __ Yes ___ No (if yes, identify the following):

Type of Business (e.g., F&B, News & Gift, Retail, Duty Free, Advertising, etc.)	Lease Term (years)	Lease Start Date	Address / Location	Annual Gross Receipts Generated

C. Does the applicant firm currently own/operate any airport concession locations? _ Yes _ No (If yes, supply the following information):

Airport Name	Concession Type (e.g., F&B, News & Gift, Retail, Duty Free, Advertising, etc.)	Number of Leases	Number of Locations	Annual Gross Receipts Generated	Lease Type (e.g., Direct Lease, Subcontract Management Agreement, etc. enter all that apply to the leases listed)

D. Does the applicant firm have any affiliates? ___Yes ___No If Yes, provide the following information concerning any locations owned/operated by affiliate firms.

Airport Name	Concession Type (e.g., F&B, News & Gift, Retail, Duty Free, Advertising, etc.)	Number of Leases	Number of Locations	Annual Gross Receipts Generated	Lease Type (e.g., Direct Lease, Subcontract Management Agreement, etc. enter all that apply to the leases listed)

E. Is the ACDBE applicant firm a participant in any joint ventures? ___ Yes ___ No If Yes, attach all original and any amended Joint Venture Agreements and any amendments to the agreements.



DECLARATION OF ELIGIBILITY

This form must be signed by *EACH OWNER* upon whose disadvantaged status the firm relies for certification.

A FALSE STATEMENT OR MATERIAL OMISSION MADE IN CONNECTION WITH THIS SUBMISSION IS SUFFICIENT CAUSE FOR DENIAL OF CERTIFICATION, DECERTIFICATION, OR SUSPENSION OR DEBARMENT PROCEEDINGS, AND MAY SUBJECT THE PERSON OR ENTITY MAKING THE FALSE STATEMENT TO ANY AND ALL CIVIL AND CRIMINAL PENALTIES AVAILABLE UNDER FEDERAL AND STATE LAW.

I _____(full name printed), declare under penalty of perjury that I am _____(title) of the firm _____, all of the foregoing information and statements submitted for eligibility are true, correct, and complete to the best of my knowledge. The responses include all material information necessary to fully and accurately identify and explain the operations, capabilities and pertinent history of the named firm as well as the ownership, control, and affiliations thereof.

I recognize that the information submitted in this material is for the purpose of inducing certification by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the material, and I authorize such agency to contact any entity named in certification material, and the named firm's bonding companies, banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility.

I agree to submit to government audit, examination and review of books, records, documents and files, in whatever form they exist, of the named firm and its affiliates inspection of its places(s) of business and equipment, and to permit interviews of its principals, agents, and employees. I understand that refusal to permit such inquiries shall be grounds for denial or decertification.

If awarded a contract, subcontract, concession lease or sublease, as detailed in § 26.55, I agree to promptly and directly provide the prime contractor, if any, and the Department, recipient agency, or federal funding agency, on an ongoing basis, current, complete and accurate information regarding my firm's (1) commercially useful function (CUF) performed on the project or concession lease; (2) payments; and (3) proposed changes, if any, to the foregoing arrangements.

I agree to notify the certifying agency of a material change in circumstances that affects my firm's eligibility within 30 days of its occurrence, explain the change fully, and include a duly executed Declaration of Eligibility (this form) with the notice.

I acknowledge and agree that any misrepresentations in certification materials or in records pertaining to a contract

or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or decertification; suspension and debarment; and for initiating action under federal and/or state law.

I declare that I am a socially and economically disadvantaged individual who is an owner of the above-referenced firm seeking certification as a Disadvantaged Business Enterprise or Airport Concession Disadvantaged Business Enterprise. In support of my application, I declare that I am a member of one or more of the following groups, and that I have held myself out as a member of the group(s): (Check all that apply):

- Women Black American Hispanic American
- Native American Asian-Pacific American
- Subcontinent Asian American
- Other pursuant to 49 CFR § 26.67(d)

I declare that I am socially disadvantaged because I have been subjected to racial or ethnic prejudice or cultural bias, or have suffered the effects of discrimination, because of my identity as a member of one or more of the groups identified above, without regard to my individual qualities.

I further declare that my personal net worth does not exceed the DBE program's limit posted on <https://www.transportation.gov/DBEPNW>, and that I am economically disadvantaged because My ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

PURSUANT TO 28 USC § 1746:

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON _____

**SIGNATURE _____
(OWNER)**



SUPPORTING DOCUMENTS CHECKLIST

Required Documents for All Applicants

- Résumés (that include places of employment with corresponding dates), for all owners, officers, and key personnel of the applicant firm.
- Personal Net Worth Statement for each socially and economically disadvantaged owners who the applicant firm relies upon to satisfy the Regulation's 51% ownership requirement.
- Personal Federal tax returns for the past 3 years, if applicable, for each disadvantaged owner.
- Federal tax returns (and requests for extensions) filed by the firm and its affiliates with related schedules, for the past 5 years, or the number of years in business, if fewer.
- Documented proof of contributions used to acquire ownership for each owner (e.g., both sides of cancelled checks).
- Signed loan and security agreements, and bonding forms.
- List of equipment and/or vehicles owned and leased including VIN numbers, copy of titles, proof of ownership, insurance cards for each vehicle.
- Title(s), registration certificate(s), and U.S. DOT numbers for each truck owned or operated by your firm.
- Licenses, license renewal forms, permits, and haul authority forms.
- Descriptions of all real estate (including office/storage space, etc.) owned/leased by your firm and documented proof of ownership/signed leases.
- Documented proof of any transfers of assets to/from your firm and/or to/from any of its owners over the past 2 years.
- DBE/ACDBE and SBA 8(a), SDB, MBE/WBE certifications, denials, and/or decertification's, if applicable; and any U.S. DOT decisions on these actions.
- Bank authorization and signatory cards.
- Schedule of salaries (or other remuneration) paid to all officers, managers, owners, and/or directors of the firm.
- List of all employees, job titles, and dates of employment.
- Proof of warehouse/storage facility ownership or lease arrangements.

Partnership or Joint Venture

- Original and any amended Partnership or Joint Venture Agreements.

Corporation or LLC

- Official Certificate of Formation and current Operating/Shareholder Agreement, if any.
- Official Articles of Incorporation (signed by the state official).
- Both sides of all corporate stock certificates and your firm's stock transfer ledger.
- Minutes of stockholder, member, partner, and board of director's meetings, if any.
- Company by-laws and any amendments.
- Evidence of signature authority on the firm's bank accounts.

Failure to provide any of these required documents that are applicable to your firm's application may result in denial of your application.

Optional Documents to Be Provided on Request

The certifying agency to which you are applying may require the submission of the following documents. If requested to provide any of these documents, you must supply them with your application or at the on-site visit. Failure to do so may result in denial of your application.

- Proof of citizenship or lawful permanent residence
- Insurance agreements for each truck owned or operated by your firm.
- Audited financial statements (if available)
- Trust agreements held by any owner claiming disadvantaged status.

Suppliers

- List of product lines carried and list of distribution equipment owned and/or leased.



DBE/ACDBE PNW Statement

Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2105-0586. Public reporting for this collection of information is estimated to be approximately 8 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information.

All responses to this collection of information are mandatory 49 CFR § § 26.67, 26.68; the nature and extent of confidentiality to be provided, if any (49 CFR §§ 23.35, 23.39, 26.83(d) and 26.109(b)]. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, (your agency name and address), Washington, D.C. 20590.

Privacy Act Statement (5 U.S.C. § 552a, as amended):

AUTHORITY: [42 U.S.C. 2000d et seq.](#), [§ 12101 et seq.](#), [42 U.S.C. 6101 et seq.](#); [29 U.S.C. 794, 749d](#); [49 U.S.C. 47113](#); [42 U.S.C. 12101](#); [49 CFR Part 23](#); [49 CFR Part 26](#), and [Executive Order 13160](#).

PURPOSE(S): DOT will use the information collected to respond to Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) inquiries and adjudicate appeals.

ROUTINE USE(S): In accordance with DOT's system of records notice, [DOT/ALL-24 Departmental Office of Civil Rights System, 76 FR 71108 \(Nov. 16, 2011\)](#), the information provided may be disclosed to the U. S. Department of Justice, including United States Attorney's Offices, or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation. A comprehensive list of routine uses can be found in DOT/ALL 24 and DOT's General Statement of Routine uses, 75 FR 82138 (Dec. 29, 2010). 77 FR 42796 (July 20, 2012), 84 FR 55222 (Oct. 15, 2019).

DISCLOSURE: Provision of the requested information is voluntary; however, failure to furnish the requested information may result in the denial of a DBE or ACDBE application and an inability of the Department to process an appeal or inquiry from any party.



INSTRUCTIONS

An individual's personal net worth according to 49 C.F.R. Parts 23 and 26 includes assets and liabilities that she or he owns or is deemed to own without regard to community property or equitable distribution laws.

If the personal net worth of the majority owner(s) of the firm exceeds the PNW cap posted online at <https://www.Transportation.gov/DBEPNW>, as defined by 49 C.F.R. Parts 23 and 26, the firm is not eligible for DBE or ACDBE certification.

Provide all Worksheets. Provide documents to support each entry. If you have any questions about completing this form, contact the certifying agency.

Assets

Report assets at their current fair market values as of the date of your PNW form. In cases of joint ownership, report only the value of your ownership unless Worksheet directs otherwise. Do not report the value of the applicant firm.

Cash and Cash Equivalents: Enter total from Worksheet 1.

Investment Accounts and Individual Securities: Enter total from Worksheet 2.

Real Estate: Enter total from Worksheet 3.

Personal Property and Other Assets: Enter total from Worksheet 4.

Ownership in Other Businesses: Enter total from Worksheet 5.

Life Insurance: Enter total from Worksheet 6.

Amounts Owed to You: Enter total from Worksheet 7.

Assets Held in Trust: Enter total from Worksheet 8.

Transfers Within Preceding Two Years: If you transferred assets worth at least \$20,000 in aggregate to related parties within the last two years, enter total from Worksheet 9. *Exclude transfers to applicant or DBE.*

Relatives include your spouse or domestic partner, children (whether biological, adopted, or stepchildren), siblings (including stepsiblings and those of the spouse or domestic partner), and parents (including stepparents and those of the spouse or domestic partner). Related entities include for-profit privately held companies of which any relative is an owner, officer, director, or equivalent; and family or other trusts of which you or any relative is grantor, trustee, or beneficiary, except when the transfer is irrevocable. See 49 C.F.R. 26.68(c)(7)-(9).

Liabilities

Report current balances. Report only your own, direct liabilities. *Do not report* guarantees or other contingent liabilities. *Do not report* business debt, debt secured by retirement assets, or any amount you owe, directly or indirectly, to the applicant or DBE.

Mortgages: Enter total from Worksheet 10.

Loans on Life Insurance: Enter total from Worksheet 11.

Other Liabilities: Enter total from Worksheet 12.

Other Information

Retirement Assets. Complete Worksheet 13 but *do not* enter value on PNW Statement.

Primary Residence. Complete Worksheet 14 but *do not* enter value on PNW Statement.

Declaration

You must sign and date the statement.



Personal Net Worth Statement

As of _____

This form is used by all participants in the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) and Airport Concession DBE (ACDBE) Programs. Each individual owner of a firm applying to participate as a DBE or ACDBE, whose ownership and control are relied upon for DBE certification must complete this form. Each person signing this form authorizes the certifying agency to make inquiries as necessary to verify the accuracy of the statements made. The agency you apply to will use the information provided to determine whether an owner is economically disadvantaged as defined in the DBE program regulations 49 C.F.R. Parts 23 and 26. Return form to appropriate certifying agency, not U.S. DOT.

Name			
Residence (As reported to the IRS) Address, City, State, and Zip Code			
Company's Legal Name		Phone:	
Marital Status: Single <input type="checkbox"/> Married/Domestic Partnership <input type="checkbox"/>		Business Phone:	
Assets	(Omit Cents)	Liabilities	(Omit Cents)
1. Cash and Cash Equivalents (checking and savings accounts, CDs etc.) (Complete Worksheet 1)		10. Mortgages on Real Estate Other Than Primary Residence (Complete Worksheet 10)	
2. Investment Accounts and Individual Securities (Complete Worksheet 2)		11. Loans on Life Insurance (Complete Worksheet 11)	
3. Value of Your Ownership Interest in Real Estate, Excluding Primary Residence (Complete Worksheet 3)		12. Other Liabilities (Complete Worksheet 12)	
4. Personal Property and Other Assets (Complete Worksheet 4)			
5. Ownership in Other Businesses (Complete Worksheet 5)			
6. Life Insurance (Cash Surrender Value) (Complete Worksheet 6)			
7. Amounts Owed to You (Complete Worksheet 7)			
8. Assets Held in Trust (Complete Worksheet 8)			
9. Assets Transferred to Related Parties Within the Past Two Years (Complete Worksheet 9)			
Total Assets:		Total Liabilities:	

Personal Net Worth:



Worksheets

Worksheet 1—List Cash and Cash Equivalents (checking or savings accounts CDs etc.) (Attach additional sheets as necessary)

Cash/Account	Balance

Total _____

Worksheet 2—Investment Accounts and Individual Securities (e.g., Brokerage and Custodial accounts, stocks, bonds) (Full Value) (Attach additional sheets as necessary)

Account or Security Name and Number	Value

Total _____

Worksheet 3—Real Estate Other than Primary Residence (Attach additional sheets as necessary)

	Property 1	Property 2	Property 3
Type of Property			
Address			
Date Acquired			
Purchase Price			
Present Market Value			
Source of Market Valuation			

Total _____



Worksheet 4—Personal Property and Other Assets (Attach additional sheets as necessary)

Type of Property or Asset	Is this asset insured?	Value
Vehicles (e.g., cars, trucks, recreational vehicles, motorcycles, boats, etc.) and titled in your name or of which you are the primary operator. (Itemize)		
Household Property (total value)		
Artwork (total value)		
Jewelry (total value)		
Other collectables (total value)		
Amounts owed to you (e.g., loans to others, including companies) (Itemize)		
Assets subject to the two-year transfer rule (see 49 CFR 26.68 (c)(7)-(9))		
Other (e.g., livestock, farm equipment, greenhouse)		

Total _____



Worksheet 5—Ownership in Other Business Investments (excluding applicant firm) Sole Proprietorships, General Partners, Joint Ventures, Limited Liability Companies, Closely-held and Public Traded Corporations. (Attach additional sheets as necessary)

	Business 1	Business 2	Business 3	Business 4
Business name				
Address				
Value				

Total _____

Worksheet 6— Life Insurance (do not list term life insurance) (Attach additional sheets as necessary)

Policy	Insurance Company	Cash Surrender Amount

Total _____

Worksheet 7—Amounts Owed to You (loans to other individuals and entities including applicant firm) (Attach additional sheets as necessary)

Debtor	Description	Balance

Total _____

Worksheet 8—Assets Held in Trust (Attach additional sheets as necessary)

Trust Name	Description/Additional Information	Value

Total _____



Worksheet 9— Assets Transferred to Related Parties Within the Past Two Years (Attach additional sheets as necessary)

Asset	Description	Value

Total _____

Worksheet 10—Mortgages on Real Estate Other Than Primary Residence (Itemize by loan, attaching additional sheets if necessary)

	Property 1	Property 2	Property 3
Type of Property			
Address			
Name of all Mortgage Holders			
Loan Balance			

Total _____

Worksheet 11— Loan on Life Insurance (do not list term life insurance) (Attach additional sheets as necessary)

Policy	Insurance Company	Loan Amount

Total _____



Worksheet 12—Other Liabilities (Attach additional sheets as necessary)

Type of Debt	Creditor	Amount of Liability (Balance)
Loans on Motor Vehicles (itemize)		
Loans Secured by Property Other Than Real Estate or Vehicles		
Loans Secured by Property Other Than Real Estate or Vehicles		
Unpaid Taxes (fixed in amount and currently due)		
Any Other Amount, Not Reported Above, That You Currently Owe (itemize and describe)		

Total _____



Worksheet 13—Retirement Accounts (Attach additional sheets as necessary)

Account Name	Value

Total _____

Worksheet 14--Primary Residence

Address	
Date Acquired	
Purchase Price	
Market Value	
Source of Market Valuation	

Declaration

I declare under penalty of perjury that the information provided in this personal net worth statement and supporting documents is complete, true and correct. I declare that no assets have been transferred to any beneficiary for less than fair market value in the last two years. I recognize that the information submitted in this application is for the purpose of inducing certification approval by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the application and this personal net worth statement, and I authorize such agency to contact any entity named in the application or this personal financial statement, including the names banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility. I acknowledge and agree that any misrepresentations in this application or in records pertaining to a contract or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or revocation of certification; suspension and debarment; and for initiating action under federal and/or state law concerning false statement, fraud or other applicable offenses.

Signature (DBE/ACDBE Owner)

Date

DISADVANTAGED BUSINESS ENTERPRISE OUT-OF-STATE CERTIFICATION DECLARATIONCALIFORNIA UNIFIED
CERTIFICATION PROGRAM
(CUCP)**California Department of Transportation****Interstate Certification Process**

The California Unified Certification Program has published the **DBE Interstate Application Checklist** and the **DBE Interstate Application Affidavit**. The Interstate Certification process applies to firms already certified in their home state and seeking certification in California. Guidance provided by the US DOT, in the summer of 2014, provided that a firm currently is certified in its home state is not required to submit a **new** uniform certification application as if it were seeking certification for the first time. A DBE firm may simply present a copy of its DBE application among other required documents as submitted to its home State's UCP. The DBE Interstate Application Checklist provides the list of items required. The DBE Interstate Application Affidavit **must** be completed and submitted with the application.

Instructions: As an out-of-state applicant, your firm must be currently certified as a Disadvantaged Business Enterprise (DBE) or Airport Concession Disadvantaged Business Enterprise (ACDBE) pursuant to 49 Code of Federal Regulations Part 23 or 26 in your "home" state before you can apply to the California Unified Certification Program (CUCP). Pursuant to 49 CFR § 26.85(c), the firm's owner(s) (hereinafter "you") acknowledge and agree to comply with the following regulations:

You must provide to the CUCP, along with this declaration form, a completed copy of the application form, all supporting documents, and any other information you have submitted to your home state or any other state related to your firm's DBE or ACDBE 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 your home state, as well as any correspondence you have had with your home state's UCP or any other government entity concerning your application or status as a DBE or ACDBE firm.

You must also provide to the CUCP any notices or correspondence from states other than your home state relating to your status as an applicant or certified DBE in those states, if applicable. For example, if you have been denied certification or decertified by a state UCP other than your home state, or subject to a decertification action there, you must inform the CUCP of this fact and provide all documentation concerning this action to the CUCP.

If you have filed a certification appeal with the U.S. Department of Transportation (DOT) (see § 26.89), you must inform the CUCP of this fact and provide your letter of appeal and DOT's response to the CUCP.

You must submit this declaration form executed under penalty of perjury of the laws of the United States.

This declaration 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 your home state. If the on-site report from your home state supporting your certification in your home state is more than three years old, as of the date of your application to the CUCP, please acknowledge in your declaration that you also affirm that the facts in the on-site report remain true and correct.

DISADVANTAGED BUSINESS ENTERPRISE OUT-OF-STATE CERTIFICATION DECLARATION

CALIFORNIA UNIFIED CERTIFICATION PROGRAM (CUCP)



Is your firm currently certified as a DBE or ACDBE in your home state? (If Yes, check appropriate box and provide requested information. If No, please STOP and apply to your state Unified Certification Program before applying to California.)	Name of Certifying Agency in Firm's State Has your firm's state UCP conducted an on-site visit? <input type="checkbox"/> Yes, on ____/____/____ <input type="checkbox"/> No
<input type="checkbox"/> DBE <input type="checkbox"/> ACDBE	

A. Home State Certification

I affirm that the facts in the on-site report conducted by my state UCP over three years ago from the date of this declaration remain true and correct. Check if applicable

B. Contact Information

(1) Contact Person and Title		(2) Legal Name of Firm	
(3) Phone #	(4) Alternate Phone #	(5) Fax #	
(6) E-mail		(7) Website (If available)	
(8) Street Address of Firm (No P.O. Box)	City	County/Parist	State Zip
(9) Mailing Address of Firm (If different)	City	County/Parist	State Zip

A. Indicate Counties Where You Prefer to Perform Work

- | | | | | | |
|--|---|---------------------------------------|---|---|--------------------------------------|
| <input type="checkbox"/> 01 Alameda | <input type="checkbox"/> 11 Glenn | <input type="checkbox"/> 21 Marin | <input type="checkbox"/> 31 Placer | <input type="checkbox"/> 41 San Mateo | <input type="checkbox"/> 51 Sutter |
| <input type="checkbox"/> 02 Alpine | <input type="checkbox"/> 12 Humboldt | <input type="checkbox"/> 22 Mariposa | <input type="checkbox"/> 32 Plumas | <input type="checkbox"/> 42 Santa Barbara | <input type="checkbox"/> 52 Tehama |
| <input type="checkbox"/> 03 Amador | <input type="checkbox"/> 13 Imperial | <input type="checkbox"/> 23 Mendocino | <input type="checkbox"/> 33 Riverside | <input type="checkbox"/> 43 Santa Clara | <input type="checkbox"/> 53 Trinity |
| <input type="checkbox"/> 04 Butte | <input type="checkbox"/> 14 Inyo | <input type="checkbox"/> 24 Merced | <input type="checkbox"/> 34 Sacramento | <input type="checkbox"/> 44 Santa Cruz | <input type="checkbox"/> 54 Tulare |
| <input type="checkbox"/> 05 Calaveras | <input type="checkbox"/> 15 Kern | <input type="checkbox"/> 25 Modoc | <input type="checkbox"/> 35 San Benito | <input type="checkbox"/> 45 Shasta | <input type="checkbox"/> 55 Tuolumne |
| <input type="checkbox"/> 06 Colusa | <input type="checkbox"/> 16 Kings | <input type="checkbox"/> 26 Mono | <input type="checkbox"/> 36 San Bernardino | <input type="checkbox"/> 46 Sierra | <input type="checkbox"/> 56 Ventura |
| <input type="checkbox"/> 07 Contra Costa | <input type="checkbox"/> 17 Lake | <input type="checkbox"/> 27 Monterey | <input type="checkbox"/> 37 San Diego | <input type="checkbox"/> 47 Siskiyou | <input type="checkbox"/> 57 Yolo |
| <input type="checkbox"/> 08 Del Norte | <input type="checkbox"/> 18 Lassen | <input type="checkbox"/> 28 Napa | <input type="checkbox"/> 38 San Francisco | <input type="checkbox"/> 48 Solano | <input type="checkbox"/> 58 Yuba |
| <input type="checkbox"/> 09 El Dorado | <input type="checkbox"/> 19 Los Angeles | <input type="checkbox"/> 29 Nevada | <input type="checkbox"/> 39 San Joaquin | <input type="checkbox"/> 49 Sonoma | |
| <input type="checkbox"/> 10 Fresno | <input type="checkbox"/> 20 Madera | <input type="checkbox"/> 30 Orange | <input type="checkbox"/> 40 San Luis Obispo | <input type="checkbox"/> 50 Stanislaus | |



California Unified Certification Program (CUCP) DBE Interstate Application Checklist 49 CFR Part 26.85(c)

The California Department of Transportation Office of Civil Rights (OCR) and its certifying agencies (CUCP) do not have reciprocity with other State UCP's. The CUCP, as a whole, chooses not to accept other State's DBE certification of a firm. Therefore, as the applicant, your firm must provide the following information in paragraphs (1) through (5) of this section to the CUCP agency where the interstate application will be submitted.

- 1. You **must** provide **a complete copy** of the application form (*that was provided to your home state*), all supporting documents, and any other information you have submitted to your home State. This includes affidavits of no change, any notices of changes that you have submitted to your home State, as well as any correspondence you have had with your home State's UCP or any other recipient concerning your application or status as a DBE firm.
- 2. You **must** provide a current **Personal Net Worth Statement** for all disadvantaged owners of the firm. Additionally, you must provide the last **3 years** of **personal and business taxes** for the firm and all **affiliated businesses** associated with the firm or firm's owner.
- 3. You **must** provide any notices or correspondence from states other than your home State relating to your status as an applicant or certified DBE in those states. For example, if you have been denied certification or decertified in another State, or subject to a decertification action, you must inform the CUCP Certifying Agency of this fact and provided all documentation concerning this action to the CUCP Certifying Agency, with whom you're applying for Interstate certification.
- 4. If you have filed a certification appeal with the US DOT, you must inform the CUCP Certifying Agency of this fact and provide your letter of appeal, and the US DOT's response to the CUCP Certifying Agency.
- 5. You **must** submit an affidavit sworn to by the firm's owner(s) 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 Part 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.

DISADVANTAGED BUSINESS ENTERPRISE OUT-OF-STATE CERTIFICATION DECLARATIONCALIFORNIA UNIFIED
CERTIFICATION PROGRAM
(CUCP)

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

**California Unified Certification Program
DISADVANTAGED BUSINESS ENTERPRISE
Interstate Application Affidavit**

Business Name:	
Federal Identification No: (EIN)	
Business Address:	
Telephone No:	
Business Contact Email Address:	

I/We the undersigned owner(s) of the above referenced firm submit the enclosed application for Disadvantaged Business Enterprise (DBE) certification in the State of California and do hereby declare and affirm the facts presented herein are true and correct to the best of my/our knowledge:

1. All the information required by 49 CFR 26.85(c) is attached, and complete.
2. The facts set forth in the on-site conducted _____ from _____ (home state) remain true and correct.
3. An identical copy of the application, all supporting documents, and any other information submitted to my/our home state, along with any other state related to this firm's certification, including all affidavits of no change, any notices of changes, as well as all correspondence related to the firm's applications or status as a DBE has been provided with the affidavit.

ANY MATERIAL OR FALSE STATEMENT OR OMISSION MADE IN CONNECTION WITH THIS APPLICATION OR AFFIDAVIT IS SUFFICIENT CAUSE FOR DENIAL OF CERTIFICATION, REVOCATION OF A PRIOR APPROVAL, INITIATION OF SUSPENSION OR DEBARMENT PROCEEDINGS, AND MAY SUBJECT THE PERSON AND/OR ENTITY MAKING THE FALSE STATEMENT TO ANY AND ALL CIVIL AND CRIMINAL PENALTIES AVAILABLE PURSUANT TO APPLICABLE FEDERAL AND STATE LAW.

Owner 1 Signature	Printed Name and Title	Date
Owner 2 Signature	Printed Name and Title	Date
Owner 3 Signature	Printed Name and Title	Date
Owner 4 Signature	Printed Name and Title	Date

DISADVANTAGED BUSINESS ENTERPRISE OUT-OF-STATE CERTIFICATION DECLARATION

CALIFORNIA UNIFIED
CERTIFICATION PROGRAM
(CUCP)



Notary

STATE OF: _____ **COUNTY OF:** _____

Sworn to (or affirmed) and subscribed before me this _____ day _____ 20_____

(NOTARY SEAL)

(Signature of Notary)

(Name of Notary, Typed, Printed, or Seal)

Personally, known or produced identification, _____ (type of identification).

This content is from the eCFR and is authoritative but unofficial.

Title 49 –Transportation

Subtitle A –Office of the Secretary of Transportation

Part 26 Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs

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DBE Business Development Program Guidelines

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PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS

ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

Authority: 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C. 47113, 47123; Sec. 1101(b), Pub. L. 114-94, 129 Stat. 1312, 1324 (23 U.S.C. 101 note); Sec. 150, Pub. L. 115-254, 132 Stat. 3215 (23 U.S.C. 101 note); Pub. L. 117-58, 135 Stat. 429 (23 U.S.C. 101 note).

Source: 64 FR 5126, Feb. 2, 1999, unless otherwise noted.

Subpart A—General

§ 26.1 What are the objectives of this part?

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- (b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- (c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- (e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- (f) To promote the use of DBEs in all types of federally assisted contracts and procurement activities conducted by recipients.
- (g) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- (h) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

[64 FR 5126, Feb. 2, 1999, as amended at 79 FR 59592, Oct. 2, 2014; 89 FR 24963, Apr. 9, 2024]

§ 26.3 To whom does this part apply?

- (a) If you are a recipient of any of the following types of funds, this part applies to you:
 - (1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Public Law 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114-94; and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Public Law 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Public Law 105-178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Public Law 112-141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114-94; and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58), Public Law 117-58.

(3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Mariana Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

[89 FR 24963, Apr. 9, 2024]

§ 26.5 What do the terms used in this part mean?

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

(i) One concern controls or has the power to control the other; or

(ii) A third party or parties controls or has the power to control both; or

(iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

Assets mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

Business, business concern or business enterprise means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

Compliance means that a recipient has correctly implemented the requirements of this part.

Contingent Liability means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

Contractor means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

Days mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

Department or DOT means the U.S. Department of Transportation, including the Office of the Secretary, the Departmental Office of Civil Rights, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged Business Enterprise or DBE means a for-profit small business concern—

- (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged; and
- (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

FTA Tier I recipient means an FTA recipient to whom this part applies that will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds \$670,000 in FTA funds in a Federal fiscal year.

FTA Tier II recipient means an FTA recipient to whom this part applies who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which does not exceed \$670,000 in FTA funds in a Federal fiscal year.

Good faith efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

Indian Tribe or Native American Tribe means any federally or State-recognized Tribe, band, nation, or other organized group of Indians (Native Americans), or an ANC.

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Liabilities mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Notice of decision or NOD means determination that denies a firm's application or decertifies a DBE.

Notice of intent or NOI means recipients letter informing a DBE of a suspension or proposed decertification.

Operating Administration or OA means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

Personal net worth or PNW means the net value of an individual's reportable assets and liabilities, per the calculation rules in § 26.68.

Primary industry classification means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available online on the U.S. Census Bureau website: www.census.gov/naics/.

Primary recipient means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business. The term does not include construction trailers or other temporary construction sites.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

Recipient means any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or that has applied for such assistance.

Secretary means DOT's Secretary of Transportation or the Secretary's designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or SBA means the United States Small Business Administration.

SBA certified firm refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in § 26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a group and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.
- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
 - (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (iii) "Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
 - (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Mariana Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, Maldives, Nepal or Sri Lanka;

- (vi) Women;
 - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
- (3) Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

Spouse means a married person, including a person in a domestic partnership or a civil union recognized under State law.

Transit vehicle manufacturer (TVM) means any manufacturer whose primary business purpose is to manufacture vehicles built for mass transportation. Such vehicles include, but are not limited to buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Businesses that perform retrofitting or post-production alterations to vehicles so that such vehicles may be used for public transportation purposes are also considered TVMs. Businesses that manufacture, mass-produce, or distribute vehicles primarily for personal use are not considered TVMs.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

Unsworn declaration means an unsworn statement, dated and in writing, subscribed as true under penalty of perjury.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35553, June 16, 2003; 76 FR 5096, Jan. 28, 2011; 79 FR 59592, Oct. 2, 2014; 89 FR 24963, Apr. 9, 2024]

§ 26.7 What discriminatory actions are forbidden?

- (a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.
- (b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

§ 26.9 How does the Department issue guidance and interpretations under this part?

- (a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999 express the official positions and views of the Department of Transportation or any of its operating administrations.
- (b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or any of its operating administrations, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.

[72 FR 15617, Apr. 2, 2007]

§ 26.11 What records do recipients keep and report?

- (a) You must submit a report on DBE participation to the concerned Operating Administration containing all the information described in the Uniform Report to this part. This report must be submitted at the intervals required by, and in the format acceptable to, the concerned Operating Administration.
- (b) You must continue to provide data about your DBE program to the Department as directed by DOT Operating Administrations.
- (c) You must obtain bidders list information as described in paragraph (c)(2) of this section and enter it into a system designated by the Department.
 - (1) The purpose of this bidders list information is to compile as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your federally assisted contracts for use in helping you set your overall goals, and to provide the Department with data for evaluating the extent to which the objectives of § 26.1 are being achieved.
 - (2) You must obtain the following bidders list information about all DBE and non-DBEs who bid as prime contractors and subcontractors on each of your federally assisted contracts:
 - (i) Firm name;
 - (ii) Firm address including ZIP code;
 - (iii) Firm's status as a DBE or non-DBE;
 - (iv) Race and gender information for the firm's majority owner;
 - (v) NAICS code applicable to each scope of work the firm sought to perform in its bid;
 - (vi) Age of the firm; and
 - (vii) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (e.g., less than \$1 million; \$1-3 million; \$3-6 million; \$6-10 million; etc.) rather than requesting an exact figure from the firm.
 - (3) You must collect the data from all bidders for your federally assisted contracts by requiring the information in paragraph (c)(2) of this section to be submitted with their bids or initial responses to negotiated procurements. You must enter this data in the Department's designated system no later than December 1 following the fiscal year in which the relevant contract was awarded. In the case of a "design-build" contracting situation where subcontracts will be solicited throughout the contract period as defined in a DBE Performance Plan pursuant to § 26.53(e), the data must be entered no later than December 1 following the fiscal year in which the design-build contractor awards the relevant subcontract(s).
- (d) You must maintain records documenting a firm's compliance with the requirements of this part. At a minimum, you must keep a complete application package for each certified firm and all Declarations of Eligibility, change notices, and on-site visit reports. These records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement. Other

certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient's financial assistance agreement, whichever is longer.

- (e) The State department of transportation in each Unified Certification Program (UCP) established pursuant to § 26.81 must report to DOT's Departmental Office of Civil Rights each year, the following information:
 - (1) The number and percentage of in-state and out-of-state DBE certifications by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);
 - (2) The number of DBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;
 - (3) The number of decertified firms:
 - (i) Total in-state and out-of-state firms decertified;
 - (ii) Names of in-state and out-of-state firms decertified because SEDO exceeded the personal net worth cap;
 - (iii) Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard.
 - (4) The number of in-state and out-of-state firms summarily suspended;
 - (5) The number of in-state and out-of-state applications received for an individualized determination of social and economic disadvantage status;
 - (6) The number of in-state and out-of-state firms certified whose owner(s) made an individualized showing of social and economic disadvantaged status.

[89 FR 24964, Apr. 9, 2024]

§ 26.13 What assurances must recipients and contractors make?

- (a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance: The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).
- (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.

[79 FR 59593, Oct. 2, 2014]

§ 26.15 How can recipients apply for exemptions or waivers?

- (a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.
- (b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:
 - (1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.
 - (2) Your application must show that—
 - (i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;
 - (ii) Conditions in your jurisdiction are appropriate for implementing the proposal;
 - (iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and
 - (iv) Your proposal is consistent with applicable law and program requirements of the concerned operating administration's financial assistance program.
 - (3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

- (i) DBE eligibility is determined as provided in subparts D and E of this part, and DBE participation is counted as provided in § 26.49;
 - (ii) Your level of DBE participation continues to be consistent with the objectives of this part;
 - (iii) There is a reasonable limitation on the duration of your modified program; and
 - (iv) Any other conditions the Secretary makes on the grant of the waiver.
- (4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

Subpart B—Administrative Requirements for DBE Programs for Federally Assisted Contracting

§ 26.21 Who must have a DBE program?

- (a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:
 - (1) All FHWA primary recipients receiving funds authorized by a statute to which this part applies;
 - (2) All FTA recipients receiving planning, capital and/or operating assistance must maintain a DBE program.
 - (i) FTA Tier I recipients must have a DBE program meeting all the requirements of this part.
 - (ii) Beginning 180 days after the publication of the final rule, FTA Tier II recipients must maintain a program locally meeting the following requirements of this part:
 - (A) Reporting and recordkeeping under § 26.11;
 - (B) Contract assurances under § 26.13;
 - (C) Policy statement under § 26.23;
 - (D) Fostering small business participation under § 26.39; and
 - (E) Transit vehicle procurements under § 26.49.
 - (3) FAA recipients receiving grants for airport planning or development that will award prime contracts the cumulative total value of which exceeds \$250,000 in FAA funds in a Federal fiscal year.
- (b)
 - (1) You must submit a conforming DBE program to the concerned Operating Administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except goals that are reviewed by the relevant OA).
 - (2) You do not have to submit regular updates of your DBE program plan if you remain in compliance with this part. However, you must submit significant changes to the relevant OA 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 DBE program until all funds from DOT financial assistance have been expended.

[89 FR 24965, Apr. 9, 2024]

§ 26.23 What is the requirement for a policy statement?

You must issue a signed and dated policy statement that expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation. You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

§ 26.25 What is the requirement for a liaison officer?

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part.

§ 26.27 What efforts must recipients make concerning DBE financial institutions?

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

§ 26.29 What prompt payment mechanisms must recipients have?

- (a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.
- (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 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 include the mechanisms you will use for proactive monitoring and oversight of a prime contractor's compliance with subcontractor prompt payment and return of retainage requirements in this part. Reliance on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is not a sufficient monitoring and oversight mechanism.
- (e) Your DBE program must provide appropriate means to enforce the requirements of this section. These means must be described in your DBE program and should 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.
- (f) Prompt payment and return of retainage requirements in this part also apply to lower-tier subcontractors.
- (g) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:
 - (1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.
 - (2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.
 - (3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

[68 FR 35553, June 16, 2003, as amended at 89 FR 24965, Apr. 9, 2024]

§ 26.31 What information must a UCP include in its DBE/ACDBE directory?

- (a) In the directory required under § 26.81(g), you must list all firms eligible to participate as a DBE and/or ACDBE in your program. In the listing for each firm, you must include its business address, business phone number, firm website(s), and the types of work the firm has been certified to perform as a DBE and/or ACDBE.
- (b) You must list each type of work a DBE and/or ACDBE is eligible to perform by using the most specific NAICS code available to describe each type of work the firm performs. Pursuant to § 26.81(n)(1) and (3), your directory must allow for NAICS codes to be supplemented with specific descriptions of the type(s) of work the firm performs.
- (c) Your directory may include additional data fields of other items readily verifiable in State or locally maintained databases, such as State licenses held, Prequalifications, and Bonding capacity.
- (d) Your directory must be an online system that permits the public to search and/or filter for DBEs by:
 - (1) Physical location;
 - (2) NAICS code(s);
 - (3) Work descriptions; and

- (4) All optional information added pursuant to paragraph (c) of this section. The directory must include a prominently displayed disclaimer (e.g., large type, bold font) that states the information within the directory is not a guarantee of the DBE's capacity and ability to perform work.
- (e) You must make any changes to your current directory entries by November 5, 2024.

[89 FR 24965, Apr. 9, 2024]

§ 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?

- (a) If you determine that DBE firms are so overconcentrated 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.

§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?

- (a) You may or, if an operating administration directs you to, you must establish a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program. You may require a DBE firm, as a condition of receiving assistance through the BDP, to agree to terminate its participation in the DBE program after a certain time has passed or certain objectives have been reached. See Appendix C of this part for guidance on administering BDP programs.
- (b) As part of a BDP or separately, you may establish a "mentor-protégé" program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm.
 - (1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protégé program are eligible to participate in the mentor-protégé program.
 - (2) In the mentor-protégé relationship, you must:
 - (i) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than one half of its goal on any contract let by the recipient; and
 - (ii) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.
 - (3) For purposes of making determinations of business size under this part, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program. See Appendix D of this part for guidance concerning the operation of mentor-protégé programs.

- (c) Your BDPs and mentor-protégé programs must be approved by the concerned operating administration before you implement them. Once approved, they become part of your DBE program.

[64 FR 5126, Feb. 2, 1999, as amended at 89 FR 24966, Apr. 9, 2024]

§ 26.37 What are a recipient's responsibilities for monitoring?

- (a) A recipient must implement appropriate mechanisms to ensure compliance with the requirements in this part by all program participants (e.g., applying legal and contract remedies available under Federal, State, and local law). The recipient must set forth these mechanisms in its DBE program.
- (b) A recipient's DBE program must also include a monitoring and enforcement mechanism to ensure that work committed, or in the case of race-neutral participation, the work subcontracted, to all DBEs at contract award or subsequently is performed by the DBEs to which the work was committed or subcontracted to, and such work is counted according to the requirements of § 26.55. This mechanism must include a written verification that you have reviewed contracting records and monitored the work site to ensure the counting of each DBE's participation is consistent with its function on the contract. The monitoring to which this paragraph (b) refers may be conducted in conjunction with monitoring of contract performance for other purposes such as a commercially useful function review.
- (c) You must effectively implement the following running tally mechanisms:
 - (1) With respect to achieving your overall goal, you must use a running tally that provides for a frequent comparison of cumulative DBE awards/commitments to DOT-assisted prime contract awards to determine whether your current implementation of contract goals is projected to be sufficient to meet your annual goal. This mechanism should inform your decisions to implement goals on contracts to be advertised according to your established contract goal-setting process.
 - (2) With respect to each DBE commitment, you must use a running tally that provides for a frequent comparison of payments made to each listed DBE relative to the progress of work, including payments for such work to the prime contractor to determine whether the contractor is on track with meeting its DBE commitment and whether any projected shortfall exists that requires the prime contractor's good faith efforts to address to meet the contract goal pursuant to § 26.53(g).

[89 FR 24966, Apr. 9, 2024]

§ 26.39 Fostering small business participation.

- (a) Your DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.
- (b) This element must be submitted to the appropriate DOT operating administration for approval as a part of your DBE program. As part of this program element you may include, but are not limited to, the following strategies:
 - (1) Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million).

- (2) In multi-year design-build contracts or other large contracts (e.g., for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.
 - (3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.
 - (4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.
 - (5) To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.
- (c) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your DBE program.

[76 FR 5097, Jan. 28, 2011, as amended at 89 FR 24966, Apr. 9, 2024]

Subpart C—Goals, Good Faith Efforts, and Counting

§ 26.41 What is the role of the statutory 10 percent goal in this program?

- (a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.
- (b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.
- (c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

§ 26.43 Can recipients use set-asides or quotas as part of this program?

- (a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.
- (b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

§ 26.45 How do recipients set overall goals?

- (a) **General rule.**
 - (1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.
 - (2) If you are an FTA Tier II recipient or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) \$670,000 or less in FTA or \$250,000 or less in FAA funds in prime contracts in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA respectively for that fiscal year.

- (b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.
- (c) **Step 1.** You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.
- (1) **Use DBE Directories and Census Bureau Data.** Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market that perform work in the same NAICS codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site, <https://www.census.gov/programs-surveys/cbp.html>;) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.
 - (2) **Use a bidders list.** Determine the number of DBEs that have bid or quoted (successful and unsuccessful) on your DOT-assisted prime contracts or subcontracts in the past three years. Determine the number of all businesses that have bid or quoted (successful and unsuccessful) on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all businesses to derive a base figure for the relative availability of DBEs in your market. When using this approach, you must establish a mechanism (documented in your goal submission) to directly capture data on DBE and non-DBE prime and subcontractors that submitted bids or quotes on your DOT-assisted contracts.
 - (3) **Use data from a disparity study.** Use a percentage figure derived from data in a valid, applicable disparity study.
 - (4) **Use the goal of another DOT recipient.** If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.
 - (5) **Alternative methods.** Except as otherwise provided in this paragraph, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market. The exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of paragraph (c)(2) of this section, is not an acceptable alternative means of determining the availability of DBEs.
- (d) **Step 2.** Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at your overall goal. If the evidence does not suggest an adjustment is necessary, then no adjustment shall be made.

- (1) There are many types of evidence that must be considered when adjusting the base figure. These include:
 - (i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;
 - (ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and
 - (iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.
 - (2) If available, you must consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:
 - (i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;
 - (ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.
 - (3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the “but for” factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.
- (e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:
- (1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming three fiscal years.
 - (2) If you are an FTA or FAA recipient, as a percentage of all FT or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the three forthcoming fiscal years.
 - (3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.
 - (i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.
 - (ii) A project goal covers the entire length of the project to which it applies.
 - (iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.
 - (iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

(f)

(1)

- (i) If you set your overall goal on a fiscal year basis, you must submit it to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency's website.
 - (ii) You may adjust your three-year overall goal during the three-year period to which it applies, in order to reflect changed circumstances. You must submit such an adjustment to the concerned operating administration for review and approval.
 - (iii) The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.
 - (iv) While you are required to submit an overall goal to FHWA, FTA, or FAA only every three years, the overall goal and the provisions of Sec. 26.47(c) apply to each year during that three-year period.
 - (v) You may make, for informational purposes, projections of your expected DBE achievements during each of the three years covered by your overall goal. However, it is the overall goal itself, and not these informational projections, to which the provisions of section 26.47(c) of this part apply.
- (2) If you are a recipient and set your overall goal on a project or grant basis as provided in paragraph (e)(3) of this section, you must submit the goal for review at a time determined by the FHWA, FTA or FAA Administrator, as applicable.
- (3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence you relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see § 26.51(c)).
- (4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you. In evaluating the adequacy or soundness of the methodology used to derive the overall goal, the operating administration will be guided by goal setting principles and best practices identified by the Department in guidance issued pursuant to § 26.9.
- (5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:
 - (i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and
 - (ii) Avoid imposing undue burdens on non-DBEs.
- (6) Timely submission and operating administration approval of your overall goal is a condition of eligibility for DOT financial assistance.

(7) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive DOT financial assistance.

(g)

(1) In establishing an overall goal, you must provide for consultation and publication. This includes:

(i) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before you are required to submit your methodology to the operating administration for review pursuant to paragraph (f) of this section. You must document in your goal submission the consultation process you engaged in. Notwithstanding paragraph (f)(4) of this section, you may not implement your proposed goal until you have complied with this requirement.

(ii) A published notice announcing your proposed overall goal before submission to the operating administration on August 1st. The notice must be posted on your official Internet Web site and may be posted in any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the operating administration, the revised goal must be posted on your official Internet Web site.

(2) At your discretion, you may inform the public that the proposed overall goal and its rationale are available for inspection during normal business hours at your principal office and for a 30-day comment period. Notice of the comment period must include addresses to which comments may be sent. The public comment period will not extend the August 1st deadline set in paragraph (f) of this section.

(h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 65 FR 68951, Nov. 15, 2000; 68 FR 35553, June 16, 2003; 75 FR 5536, Feb. 3, 2010; 76 FR 5097, Jan. 28, 2011; 79 FR 59593, Oct. 2, 2014; 89 FR 24966, Apr. 9, 2024]

§ 26.47 Can recipients be penalized for failing to meet overall goals?

(a) You cannot be penalized, or treated by the Department as being in noncompliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith.

(b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

- (c) If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your DBE program in good faith:
- (1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;
 - (2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;
 - (3)
 - (i) If you are a state highway agency; one of the 50 largest transit authorities as determined by the FTA; or an CORE 30 airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (c)(1) and (2) of this section to the appropriate operating administration for approval. If the operating administration approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.
 - (ii) As a transit authority or airport not meeting the criteria of paragraph (c)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to FTA or FAA on request for their review.
 - (4) FHWA, FTA, or FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.
 - (5) You may be regarded as being in noncompliance with this Part, and therefore subject to the remedies in § 26.103 or § 26.105 of this part and other applicable regulations, for failing to implement your DBE program in good faith if any of the following things occur:
 - (i) You do not submit your analysis and corrective actions to FHWA, FTA, or FAA in a timely manner as required under paragraph (c)(3) of this section;
 - (ii) FHWA, FTA, or FAA disapproves your analysis or corrective actions; or
 - (iii) You do not fully implement the corrective actions to which you have committed or conditions that FHWA, FTA, or FAA has imposed following review of your analysis and corrective actions.
- (d) If, as recipient, your Uniform Report of DBE Awards or Commitments and Payments or other information coming to the attention of FTA, FHWA, or FAA, demonstrates that current trends make it unlikely that you will achieve DBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FHWA, FTA, or FAA, as applicable, may require you to make further good faith efforts, such as by modifying your race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011; 89 FR 24966, Apr. 9, 2024]

§ 26.49 What are the requirements for transit vehicle manufactures (TVMs) and for awarding DOT-assisted contracts to TVMs?

- (a) If you are an FTA recipient, you must require in your DBE program that each TVM, as a condition of being authorized to bid or propose on FTA assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.
 - (1) Only those TVMs listed on FTA's list of eligible TVMs, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved at the time of solicitation are eligible to bid.
 - (2) A TVM that fails to follow the requirements of this section and this part will be deemed as non-compliant, which will result in removal from FTA's eligible TVMs list and ineligibility to bid.
 - (3) An FTA recipient's failure to comply with the requirements set forth in paragraph (a) of this section may result in formal enforcement action or appropriate sanction as determined by FTA (e.g., FTA declining to participate in the vehicle procurement).
 - (4) Within 30 days of becoming contractually required to procure a transit vehicle, an FTA recipient must report to FTA:
 - (i) The name of the TVM that was the successful bidder; and
 - (ii) The Federal share of the contractual commitment at that time.
- (b) If you are a TVM, you must establish and submit to FTA an annual overall percentage goal for DBE participation.
 - (1) In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts on which you will bid on during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by your own forces.
 - (i) You must consider and include in your base figure all domestic contracting opportunities made available to non-DBEs.
 - (ii) You must exclude from this base figure funds attributable to work performed outside the United States and its territories, possessions, and commonwealths.
 - (iii) In establishing an overall goal, you must provide for public participation. This includes consultation with interested parties consistent with § 26.45(g).
 - (2) The requirements of this part with respect to submission and approval of overall goals apply to you as they do to recipients, except that TVMs set and submit their goals annually and not on a triennial basis.
- (c) TVMs must comply with the reporting requirements of § 26.11, including the requirement to submit the Uniform Report of DBE Awards or Commitments and Payments, in order to remain eligible to bid on FTA assisted transit vehicle procurements.
- (d) TVMs must implement all other requirements of this part, except those relating to UCPs and DBE certification procedures.

- (e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of the equipment must meet the same requirements (including goal approval by FHWA or FAA) that TVMs must meet in FTA assisted procurements.
- (f) Recipients may establish project-specific goals for DBE participation in the procurement of transit vehicles from specialized manufacturers when a TVM cannot be identified.
 - (1) Project-specific goals established pursuant to this section are subject to the same review and approval and must be established as prescribed in the project goal provisions of § 26.45.
 - (2) FTA must approve the decision to use a project goal before the recipient issues a public solicitation for the vehicles in question.
 - (3) To support the request to develop a project goal, recipients must demonstrate that no TVMs are available to manufacture the vehicle.

[89 FR 24966, Apr. 9, 2024]

§ 26.51 What means do recipients use to meet overall goals?

- (a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.
- (b) Race-neutral means include, but are not limited to, the following:
 - (1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.
 - (2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);
 - (3) Providing technical assistance and other services;
 - (4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
 - (5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
 - (6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

- (7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
 - (8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
 - (9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.
- (c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.
- (d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.
- (e) The following provisions apply to the use of contract goals:
- (1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.
 - (2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.
 - (3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.
 - (4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.
- (f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:
- (1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year, unless it becomes necessary in order meet your overall goal.

Example to paragraph (f)(1): Your overall goal for Year 1 is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year 1. However, if part way through Year 1, your DBE awards or commitments are not at a level that would permit you to achieve your overall goal for Year 1, you could begin setting race-conscious DBE contract goals during the remainder of the year as part of your obligation to implement your program in good faith.

- (2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

Example to paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

- (3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

- (4) If you obtain DBE participation that exceeds your overall goal in two consecutive years using contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

Example to paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the

contract goal projection by 25 percent (*i.e.*, from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two *consecutive* years of exceeding overall goals.

- (g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011; 79 FR 59595, Oct. 2, 2014; 89 FR 24967, Apr. 9, 2024]

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

- (a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:
 - (1) Documents that it has obtained enough DBE participation to meet the goal; or
 - (2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.
- (b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:
 - (1) Award of the contract will be conditioned on meeting the requirements of this section;
 - (2) All bidders or offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:
 - (i) The names and addresses of DBE firms that will participate in the contract;
 - (ii) A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
 - (iii) The dollar amount of the participation of each DBE firm participating;
 - (iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and
 - (v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment. Each DBE listed to perform work as a regular dealer or distributor must confirm its participation according to the requirements of paragraph (c)(1) of this section.

- (vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and
- (3)
- (i) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—
 - (A) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or
 - (B) No later than 7 days after bid opening as a matter of responsibility. The 7 days shall be reduced to 5 days beginning January 1, 2017.
 - (ii) Provided that, in a negotiated procurement, such as a procurement for professional services, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient. This paragraph (b)(3)(ii) does not apply to a design-build procurement, which must follow the provisions in paragraph (e) of this section.
- (c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.
- (1) For each DBE listed as a regular dealer or distributor you must make a preliminary counting determination to assess its eligibility for 60 or 40 percent credit, respectively, of the cost of materials and supplies based on its demonstrated capacity and intent to perform as a regular dealer or distributor, as defined in § 26.55(e)(2)(iv)(A), (B), and (C) and (e)(3) under the contract at issue. Your preliminary determination shall be made based on the DBE's written responses to relevant questions and its affirmation that its subsequent performance of a commercially useful function will be consistent with the preliminary counting of such participation. Where the DBE supplier does not affirm that its participation will meet the specific requirements of either a regular dealer or distributor, you are required to make appropriate adjustments in counting such participation toward the bidder's good faith efforts to meet the contract goal. The bidder is responsible for verifying that the information provided by the DBE supplier is consistent with the counting of such participation toward the contract goal.
 - (2) [Reserved]
- (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.

- (3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.
 - (4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.
 - (5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.
- (e) In a design-build contracting situation, in which the recipient solicits proposals to design and build a project with minimal-project details at time of letting, the recipient may set a DBE goal that proposers must meet by submitting a DBE Open-Ended DBE Performance Plan (OEPP) with the proposal. The OEPP replaces the requirement to provide the information required in paragraph (b) of this section that applies to design-bid-build contracts. To be considered responsive, the OEPP must include a commitment to meet the goal and provide details of the types of subcontracting work or services (with projected dollar amount) that the proposer will solicit DBEs to perform. The OEPP must include an estimated time frame in which actual DBE subcontracts would be executed. Once the design-build contract is awarded, the recipient must provide ongoing monitoring and oversight to evaluate whether the design-builder is using good faith efforts to comply with the OEPP and schedule. The recipient and the design-builder may agree to make written revisions of the OEPP throughout the life of the project, e.g., replacing the type of work items the design-builder will solicit DBEs to perform and/or adjusting the proposed schedule, as long as the design-builder continues to use good faith efforts to meet the goal.
- (f)
- (1)
 - (i) You must require that a prime contractor not terminate a DBE or any portion of its work listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm per paragraph (g) of this section) without your prior written consent, unless you cause the termination or reduction. A termination includes any reduction or underrun in work listed for a DBE not caused by a material change to the prime contract by the recipient. This requirement applies to instances that include, but are not limited to, when a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.
 - (ii) You must include in each prime contract a provision stating that:
 - (A) The contractor must utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains your written consent as provided in this paragraph (f); and
 - (B) Unless your consent is provided under this paragraph (f), the prime contractor must not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.
 - (2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the listed DBE or any portion of its work.

- (3) Good cause does not exist if the prime contractor seeks to terminate a DBE or any portion of its work that it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged, or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award. For purposes of this paragraph (f)(3), good cause includes the following circumstances:
 - (i) The listed DBE subcontractor fails or refuses to execute a written contract;
 - (ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
 - (iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements;
 - (iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
 - (v) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR parts 180, 215, and 1200 or applicable State law;
 - (vi) You have determined that the listed DBE subcontractor is not a responsible contractor;
 - (vii) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;
 - (viii) The listed DBE is ineligible to receive DBE credit for the type of work required;
 - (ix) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract; and
 - (x) Other documented good cause that you determine compels the termination of the DBE subcontractor.
- (4) Before transmitting to you its request to terminate a DBE subcontractor or any portion of its work, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you sent concurrently, of its intent to request to terminate and the reason for the proposed request.
- (5) The prime contractor's written notice must give the DBE 5 days to respond, advising you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract/or portion thereof and why you should not approve the prime contractor's request. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than 5 days.
- (6) In addition to post-award terminations, the provisions of this section apply to pre-award deletions or changes to DBEs or their listed work put forward by offerors in negotiated procurements.
- (g) When a DBE subcontractor or any portion of its work is terminated by the prime contractor as provided in paragraph (f) of this section, or if work committed to a DBE is reduced due to overestimations made prior to award, the prime contractor must use good faith efforts to include additional DBE participation to the extent needed to meet the contract goal. The good faith efforts shall be documented by the contractor. If the recipient requests documentation under this provision, the contractor shall submit the documentation

within 7 days, which may be extended for an additional 7 days, if necessary, at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

- (h) You must include in each prime contract the contract clause required by § 26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth in that section you deem appropriate if the prime contractor fails to comply with the requirements of this section.
- (i) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.
- (j) You must require the contractor awarded the contract to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011; 79 FR 59595, Oct. 2, 2014; 89 FR 24967, Apr. 9, 2024]

§ 26.55 How is DBE participation counted toward goals?

- (a) When a DBE participates in a contract, you count only the value of the work performed by the DBE toward DBE goals.
 - (1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
 - (2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
 - (3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
- (b) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
- (c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.
 - (1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with

respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is performing and the DBE credit claimed for its performance of the work, and other relevant factors.

- (2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.
 - (3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected within normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.
 - (4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
 - (5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.
- (d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
- (1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
 - (2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
 - (3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
 - (4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
 - (5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT operating administration.

Example to paragraph (d)(5): DBE Firm X uses two of its own trucks on a contract. It leases

two trucks from DBE Firm Y and six trucks equipped with drivers from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

- (6) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

Example to paragraph (d)(6): DBE Firm X uses two of its own trucks on a contract. It leases two additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four trucks.

- (7) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

- (e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)

- (i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies.
- (ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that owns (or leases) and operates a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications. Manufacturing includes blending or modifying raw materials or assembling components to create the product to meet contract specifications. When a DBE makes minor modifications to the materials, supplies, articles, or equipment, the DBE is not a manufacturer. Minor modifications are additional changes to a manufactured product that are small in scope and add minimal value to the final product.

(2)

- (i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies (including transportation costs).
- (ii) For purposes of this section, a regular dealer is a firm that owns (or leases) and operates, a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in sufficient quantities, and regularly sold or leased to the public in the usual course of business.

- (iii) Items kept and regularly sold by the DBE are of the “general character” when they share the same material characteristics and application as the items specified by the contract.
- (iv) You must establish a system to determine that a DBE regular dealer per paragraph (e)(2)(iv)(A) of this section, over a reasonable period of time, keeps sufficient quantities and regularly sells the items in question. This system must also ensure that a regular dealer of bulk items per (e)(2)(iv)(B) of this section owns/leases and operates distribution equipment for the products it sells. This requirement may be administered through questionnaires, inventory records reviews, or other methods to determine whether each DBE supplier has the demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer prior to its participation. The system you implement must be maintained and used to identify all DBE suppliers with capacity to be eligible for 60 percent credit, contingent upon the performance of a CUF. This requirement is a programmatic safeguard apart from that described in § 26.53(c)(1).
 - (A) To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A DBE supplier performs a CUF as a regular dealer and receives credit for 60 percent of the cost of materials or supplies (including transportation cost) when all, or at least 51 percent of, the items under a purchase order or subcontract are provided from the DBE's inventory, and when necessary, any minor quantities delivered from and by other sources are of the general character as those provided from the DBE's inventory.
 - (B) A DBE may be a regular dealer in such bulk items as petroleum products, steel, concrete or concrete products, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in paragraph (e)(2)(ii) of this section if the firm both owns and operates distribution equipment used to deliver the products. Any supplementing of regular dealers' own distribution equipment must be by a long-term operating lease and not on an ad hoc or contract-by-contract basis.
 - (C) A DBE supplier of items that are not typically stocked due to their unique characteristics (e.g., limited shelf life or items ordered to specification) should be considered in the same manner as a regular dealer of bulk items per paragraph (e)(2)(iv)(B) of this section. If the DBE supplier of these items does not own or lease distribution equipment, as described above, it is not a regular dealer.
 - (D) Packagers, brokers, manufacturers' representatives, or other persons who arrange, facilitate, or expedite transactions are not regular dealers within the meaning of paragraph (e)(2) of this section.
- (3) If the materials or supplies are purchased from a DBE distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question, count 40 percent of the cost of materials or supplies (including transportation costs). A DBE distributor is an established business that engages in the regular sale or lease of the items specified by the contract. A DBE distributor assumes responsibility for the items it purchases once they leave the point of origin (e.g., a manufacturer's facility), making it liable for any loss or damage not covered by the carrier's insurance. A DBE distributor performs a CUF when it demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the DBE

distributor. If these conditions are met, DBE distributors may receive 40 percent for drop-shipped items. Terms that transfer liability to the distributor at the delivery destination (e.g., FOB destination), or deliveries made or arranged by the manufacturer or another seller do not satisfy this requirement.

- (4) With respect to materials or supplies purchased from a DBE that is neither a manufacturer, a regular dealer, nor a distributor, count the entire amount of fees or commissions charged that you deem to be reasonable, including transportation charges for the delivery of materials or supplies. Do not count any portion of the cost of the materials and supplies themselves.
- (5) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer, distributor, or a transaction facilitator) on a contract-by-contract basis.
- (f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in § 26.87(j).
- (g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.
- (h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the contractor has paid the DBE the amount being counted.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35554, June 16, 2003; 79 FR 59595, Oct. 2, 2014; 89 FR 24968, Apr. 9, 2024]

Subpart D—Certification Standards

§ 26.61 Burden of proof

- (a) In determining whether to certify a firm, the certifier must apply the standards of this subpart. Unless the context indicates otherwise, singular terms include their plural forms and vice versa.
- (b) The firm has the burden of demonstrating, by a preponderance of the evidence, *i.e.*, more likely than not, that it satisfies all of the requirements in this subpart. In determining whether the firm has met its burden, the certifier must consider all the information in the record, viewed as a whole.
 - (1) **Exception 1.** In a decertification proceeding the certifier bears the burden of proving, by a preponderance of the evidence, that the firm is no longer eligible for certification under the rules of this part.
 - (2) **Exception 2.** If a certifier has a reasonable basis to believe that an individual who is a member of a group in § 26.67(a) of this section is not, in fact, socially and/or economically disadvantaged, the certifier bears the burden of proving, by a preponderance of the evidence, that the individual is not socially and/or economically disadvantaged.

[89 FR 24969, Apr. 9, 2024]

§ 26.63 General certification rules.

- (a) **General rules.** Except as otherwise provided:
 - (1) The firm must be for-profit and engaged in business activities.

- (2) In making eligibility determinations, a certifier may not consider whether a firm performs a commercially useful function (CUF), or the potential effect on goals or counting.
 - (3) A certifier cannot condition eligibility on State prequalification requirements for bidding on contracts.
 - (4) Certification is not a warranty of competence or suitability.
 - (5) A certifier determines eligibility based on the evidence it has at the time of its decision, not on the basis of historical or outdated information, giving full effect to the "curative measures" provisions of this part.
 - (6) Entering into a fraudulent transaction or presenting false information to obtain or maintain DBE certification is disqualifying.
- (b) **Indirect ownership.** A subsidiary (*i.e.*, S) that SEDOs own and control indirectly is eligible, if it satisfies the other requirements of this part and only under the following circumstances.
- (1) **Look-through.** SEDOs own at least 51 percent of S through their ownership of P (*i.e.*, the parent firm) as shown in the examples following.
 - (2) **Control.** SEDOs control P, and P controls S.
 - (3) **One tier of separation.** The SEDOs indirectly own S through P and no other intermediary. That is, no applicant or DBE may be more than one entity (P) removed from its individual SEDOs.
 - (4) **Examples.** The following examples assume that S and its SEDOs satisfy all other requirements in this part.
 - (i) **Example 1 to paragraph (b)(4).** SEDOs own 100 percent of P, and P owns 100 percent of S. S is eligible for certification.
 - (ii) **Example 2 to paragraph (b)(4).** Same facts as Example 1, except P owns 51 percent of S. S is eligible.
 - (iii) **Example 3 to paragraph (b)(4).** SEDOs own 80 percent of P, and P owns 70 percent of S. S is eligible because SEDOs indirectly own 56 percent of S. The calculation is 80 percent of 70 percent or $.8 \times .7 = .56$.
 - (iv) **Example 4 to paragraph (b)(4).** SEDOs own and control P, and they own 52 percent of S by operation of this paragraph (b). However, a non-SEDO controls S. S is ineligible.
 - (v) **Example 5 to paragraph (b)(4).** SEDOs own 60 percent of P, and P owns 51 percent of S. S is ineligible because SEDOs own just 31 percent of S.
 - (vi) **Example 6 to paragraph (b)(4).** P indirectly owns and controls S and has other affiliates. S is eligible only if its gross receipts, plus those of all of its affiliates, do not exceed the applicable small business size cap of § 26.65. Note that all of P's affiliates are affiliates of S by virtue of P's ownership and/or control of S.
- (c) **Indian Tribes, NHOs, and ANCs** –
- (1) **Indian Tribes and NHOs.** A firm that is owned by an Indian Tribe or Native Hawaiian organization (NHO), rather than by Indians or Native Hawaiians as individuals, is eligible if it meets all other certification requirements in this part.
 - (2) **Alaska Native Corporations (ANCs).**

- (i) Notwithstanding any other provisions of this subpart, a subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification if it meets all the following requirements:
 - (A) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;
 - (B) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and
 - (C) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.
- (ii) As a certifier to whom an ANC-related entity applies for certification, a certifier must not use the Uniform Certified Application. The certifier must obtain from the firm documentation sufficient to demonstrate that the entity meets the requirements of paragraph (c)(2)(i) of this section. The certifier must also obtain sufficient information about the firm to allow the certifier to administer its program (e.g., information that would appear in a UCP directory).
- (iii) If an ANC-related firm does not meet all the conditions of paragraph (c)(2)(i) of this section, then it must meet the requirements of paragraph (c)(1) of this section in order to be certified.

[89 FR 24969, Apr. 9, 2024]

§ 26.65 Business Size Determinations.

- (a) **By NAICS Code.** A firm (including its affiliates) must be a small business, as defined by the Small Business Administration (SBA). The certifier must apply the SBA business size limit in 13 CFR part 121 which corresponds to the applicable primary industry classifications (NAICS codes). The firm is ineligible when its affiliated "receipts" (computed on a cash basis), as defined in 13 CFR 121.104(a) and averaged over the firm's preceding five fiscal years, exceed the applicable SBA size cap(s).
- (b) **Statutory Cap.** Even if a firm is a small business under paragraph (a) of this section, it is ineligible to perform DBE work on FHWA or FTA assisted contracts if its affiliated annual gross receipts, as defined in 13 CFR 121.104, over the firm's previous three fiscal years exceed \$30.40 million (as of March 1, 2023). The Department will adjust this amount annually and post the adjusted amount on its website available at <https://www.transportation.gov/DBEsizestandards>.

[89 FR 24970, Apr. 9, 2024]

§ 26.67 Social and economic disadvantage.

- (a) **Group membership –**
 - (1) **General rule.** Citizens of the United States (or lawfully admitted permanent residents) who are women, Black American, Hispanic American, Native American, Asian Pacific American, Subcontinent Asian American, or other minorities found to be disadvantaged by the Small Business Administration

(SBA), are rebuttably presumed to be socially and economically disadvantaged. A firm owner claiming the presumption must specify of which groups in this paragraph (a)(1) she or he is a member on the Declaration of Eligibility (DOE).

- (2) **Native American group membership.** An owner claiming Native American group membership must submit a signed DOE as well as proof of enrollment in a federally or State-recognized Indian Tribe. An owner claiming Native Hawaiian or Alaska Native group membership must submit documentation legally recognized under State or Federal law attesting to the individual's status as a member of that group.
- (3) **Questioning group membership.** (1) Certifiers may not question claims of group membership as a matter of course. Certifiers must not impose a disproportionate burden on members of any particular group. Imposing a disproportionate burden on members of a particular group could violate Title VI of the Civil Rights Act of 1964, paragraph (b) of this section, and/or 49 CFR part 21.
 - (i) If a certifier has a well-founded reason(s) to question an owner's claim of membership in a group in paragraph (a)(1) of this section, it must provide the individual a written explanation of its reason(s), using the most recent email address provided. The firm bears the burden of proving, by a preponderance of the evidence, that the owner is a member of the group in question.
 - (ii) A certifier's written explanation must instruct the individual to submit evidence demonstrating that the individual has held herself/himself/themself out publicly as a member of the group for a long period of time prior to applying for DBE certification, and that the relevant community considers the individual a member. The certifier may not require the individual to provide evidence beyond that related to group membership.
 - (iii) The owner must email the certifier evidence described in paragraph (a)(3)(ii) of this section no later than 20 days after the written explanation. The certifier must email the owner a decision no later than 30 days after receiving timely submitted evidence.
 - (iv) If a certifier determines that an individual has not demonstrated group membership, the certifier's decision must specifically reference the evidence in the record that formed the basis for the conclusion and give a detailed explanation of why the evidence submitted was insufficient. It must also inform the individual of the right to appeal, as provided in § 26.89(a), and of the right to reapply at any time under paragraph (e) of this section.

(b) **Rebuttal of social disadvantage.**

- (1) If a certifier has a reasonable basis to believe that an individual who is a member of a group in paragraph (a)(1) of this section is not, in fact, socially disadvantaged, the certifier must initiate a § 26.87 proceeding, regardless of the firm's DBE status. As is the case in all section § 26.87 proceedings, the certifier must prove ineligibility.
- (2) If the certifier finds that the owner is not socially disadvantaged, its decision letter must inform the firm of its appeal rights.

(c) **Rebuttal of economic disadvantage –**

- (1) **Personal net worth.** If a certifier has a reasonable basis to believe that an individual who submits a PNW Statement that is below the currently applicable PNW cap is not economically disadvantaged, the certifier may rebut the individual's presumption of economic disadvantage.

- (i) The certifier must not attempt to rebut presumed economic disadvantage as a matter of course and it must avoid imposing unnecessary burdens on individual owners or disproportionately impose them on members of a particular group.
- (ii) The certifier must proceed as provided in § 26.87.

(2) ***Economic disadvantage in fact.***

- (i) To rebut the presumption, the certifier must prove that a reasonable person would not consider the individual economically disadvantaged. The certifier may consider assets and income, free use of them or ready access to their benefits, and any other trappings of wealth that the certifier considers relevant. There are no assets (including retirement assets), income, equity, or other exclusions and no limitations on inclusions. A broad and general analysis suffices in most cases: the owner has, or enjoys the benefits of, income of X; two homes worth approximately Y; substantial interests in outside businesses Q, R, and S; four rental properties of aggregate value Z; etc. The certifier need only demonstrate "ballpark" values based on available evidence. The reasonable person is not party to detailed financial information. S/he considers the owner's overall circumstances and lifestyle.
- (ii) The certifier must proceed as provided in § 26.87.

(d) ***Non-presumptive disadvantage.*** An owner who is not presumed to be SED under paragraph (a) of this section may demonstrate that he is SED based on his own experiences and circumstances that occurred within American society.

- (1) To attempt to prove individual SED, the owner provides the certifier a Personal Narrative (PN) that describes in detail specific acts or omissions by others, which impeded his progress or success in education, employment, and/or business, including obtaining financing on terms available to similarly situated, non-disadvantaged persons.
- (2) The PN must identify at least one objective basis for the detrimental discrimination. The basis may be any identifiable status or condition. The PN must describe this objective distinguishing feature(s) (ODF) in sufficient detail to justify the owner's conclusion that it prompted the prejudicial acts or omissions.
- (3) The PN must state how and to what extent the discrimination caused the owner harm, including a full description of type and magnitude.
- (4) The owner must establish that he is economically disadvantaged in fact and that he is economically disadvantaged relative to similarly situated non-disadvantaged individuals.
- (5) The owner must attach to the PN a current PNW statement and any other financial information he considers relevant.
- (6) This rule does not prescribe how the owner must satisfy his burden of proving disadvantage. He need not, for example, have filed any formal complaint, or prove discrimination under a particular statute.

Example 1 to paragraph (d): A White male claiming to have experienced employment discrimination must provide evidence that his employment status and/or limited opportunities to earn income result from specific prejudicial acts directed at him personally because of an ODF, and not, e.g., an economic recession that caused widespread unemployment.

[89 FR 24970, Apr. 9, 2024]

§ 26.68 Personal net worth.

- (a) **General.** An owner whose PNW exceeds the regulation's currently applicable PNW limit is not presumed economically disadvantaged.
- (b) **Required documents.** Each owner on whom the firm relies for certification must submit a DOE and a corroborating personal net worth (PNW) statement, including required attachments. The owner must report PNW on the form, available at <https://www.Transportation.gov/DBEFORMS>. A certifier may require an owner to provide additional information on a case-by-case basis to verify the accuracy and completeness of the PNW statement. The certifier must have a legitimate and demonstrable need for the additional information.
- (c) **Reporting.** The following rules apply without regard to State community property, equitable distribution, or similar rules. The owner reports assets and liabilities that she owns or is deemed to own. Ownership tracks title to the asset or obligor status on the liability except where otherwise provided or when the transaction results in evasion or abuse.
 - (1) The owner excludes her ownership interest in the applicant or DBE.
 - (2) The owner excludes her share of the equity in her primary residence. There is no exclusion when the SEDO does not own the home.

Example 1 to paragraph (c)(2): The owner and her spouse hold joint title to their primary residence, for which they paid \$300,000 and are coequal debtors on a bank mortgage and a home equity line of credit with current combined balances of \$150,000. The owner may exclude her \$75,000 share of the \$150,000 of total equity.

- (3) The owner includes the full value of the contents of her primary residence unless she cohabits with a spouse or domestic partner, in which case she excludes only 50 percent of those assets.
- (4) The owner includes the value of all motor vehicles, including watercraft and ATVs, titled in her name or of which she is the principal operator.
- (5) The owner excludes the liabilities of any other party and those contingent on a future event or of undetermined value as of the date of the PNW Statement.
- (6) The owner includes her proportional share of the balance of a debt on which she shares joint and severable liability with other primary debtors.

Example 2 to paragraph (c)(6): When the owner co-signs a debt instrument with two other individuals, the rule considers her liable for one-third of the current loan balance.

- (7) The owner includes assets transferred to relatives or related entities within the two years preceding any UCA or DOE, when the assets so transferred during the period have an aggregate value of more than \$20,000. Relatives include the owner's spouse or domestic partner, children (whether biological, adopted or stepchildren), siblings (including stepsiblings and those of the spouse or domestic partner), and parents (including stepparents and those of the spouse or domestic partner). Related

entities include for-profit privately held companies of which any relative is an owner, officer, director, or equivalent; and family or other trusts of which the owner or any relative is grantor, trustee, or beneficiary, except when the transfer is irrevocable.

- (8) The owner excludes direct payments, on behalf of immediate family members or their children, to unrelated providers of healthcare, education, or legal services.
- (9) The owner excludes direct payments to providers of goods and services directly related to a celebration of an immediate family member's or that family member's child's significant, normally non-recurring life event.
- (10) The owner excludes from net worth all assets in qualified retirement accounts but must report those accounts, the value of assets in them, and any significant terms and restrictions concerning the assets' use, to the certifier.

(d) **Regulatory adjustments.**

- (1) The Department will adjust the PNW cap by May 9, 2024 by multiplying \$1,600,000 by the growth in total household net worth since 2019 as described by "Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h)" produced by the Board of Governors of the Federal Reserve (<https://www.federalreserve.gov/releases/z1/>), and normalized by the total number of households as collected by the Census in "Families and Living Arrangements" (<https://www.census.gov/topics/families/families-and-households.html>) to account for population growth. The Department will adjust the PNW cap every 3 years on the anniversary of the initial adjustment date described in this section. The Department will post the adjustments on the Departmental Office of Civil Rights' web page, available at <https://www.Transportation.gov/DBEPNW>. Each such adjustment will become the currently applicable PNW limit for purposes of this regulation.
- (2) The Department will use the following formula to adjust the PNW limit:

Future Year PNW Cap =	$\frac{\text{Q1-Q4 Average Household Net Worth of Future Year} / \text{Total Households of Future Year}}{\text{Q1-Q4 Average Household Net worth of 2019} (\$106,722,704 \text{ million} / \text{Total Households of 2019} (128,579))}$
[\$1,600,000] *	

- (e) **Confidentiality.** Notwithstanding any provision of Federal or State law, a certifier must not release an individual's PNW 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 or to any other State to which the individual's firm has applied for certification under § 26.85.

[89 FR 24971, Apr. 9, 2024]

§ 26.69 Ownership.

- (a) **General rule.** A SEDO must own at least 51 percent of each class of ownership of the firm. Each SEDO whose ownership is necessary to the firm's eligibility must demonstrate that her ownership satisfies the requirements of this section. If not, the firm is ineligible.
- (b) **Overall Requirements.** A SEDO's acquisition and maintenance of an ownership interest meets the requirements of this section only if the SEDO demonstrates the following:

- (1) **Acquisition.** The SEDO acquires ownership at fair value and by one or more “investments,” as defined in paragraph (c) of this section.
- (2) **Proportion.** No owner derives benefits or bears burdens that are clearly disproportionate to their ownership shares.
- (3) **Maintenance.** This section's requirements continue to apply after the SEDO's acquisition and the firm's certification. That is, the SEDO must maintain her investment and its proportion relative to those of other owners.
 - (i) The SEDO may not withdraw or revoke her investment.
 - (ii) When an existing co-owner contributes significant, additional, post-acquisition cash or property to the firm, the SEDO must increase her own investment to a level not clearly disproportionate to the non-SEDO's investment.
 - (A) **Example 1 to paragraph (b)(3)(ii).** SEDO and non-SEDO own DBE 60/40. Their respective investments are approximately \$600,000 and \$400,000. The DBE has operated its business under this ownership and with this capitalization for 2 years. In Year 3, the non-SEDO contributes a \$2 million asset to the business. The SEDO, as a result, owns 60 percent of a \$2 million asset without any additional outlay. Her ownership interest, assuming no other pertinent facts, is worth \$1.2 million more than it was before. Unless the SEDO increases her investment significantly, it is clearly disproportionate to the non-SEDO's investment and to her nominal 60 percent ownership. She has not maintained her investment.
 - (B) **Example 2 to paragraph (b)(3)(ii).** Same facts except that the DBE purchases the asset with a combination of 30 percent operating income and 70 percent proceeds of a bank loan. The SEDO maintains her investment because it remains in proportion to the non-SEDO's investment and to the value of her 60 percent ownership interest.
 - (C) **Example 3 to paragraph (b)(3)(ii).** Same facts except that the non-SEDO, not a bank, is the DBE's creditor. The SEDO has not maintained her investment because the benefits and burdens of her ownership are clearly disproportionate to those of the non-SEDO. The transaction may also raise § 26.71 concerns.
 - (iii) An organic increase in the value of the business does not affect maintenance because the value of the owners' investments remains proportional. In Example 2 above, the SEDO and the non-SEDO own the new asset at 60 percent and 40 percent of its net value of \$60,000.
- (c) **Investments.** A SEDO may acquire ownership by purchase, capital contribution, or gift. Subject to the other requirements of this section, each is considered an “investment” in the firm, as are additional purchases, contributions, and qualifying gifts.
 - (1) Investments are unconditional and at full risk of loss.
 - (2) Investments include a significant outlay of the SEDO's own money.
 - (3) For purposes of this part, title determines ownership of assets used for investments and of ownership interests themselves. This rule applies regardless of contrary community property, equitable distribution, banking, contract, or similar laws, rules, or principles.
 - (i) The person who has title to the asset owns it in proportion to her share of title.

(ii) However, the title rule is deemed not to apply when it produces a certification result that is manifestly unjust.

(4) If the SEDO jointly (50/50) owns an investment of cash or property, the SEDO may claim at least a 51 percent ownership interest only if the other joint owner formally transfers to the SEDO enough of his ownership in the invested asset(s) to bring the SEDO's investment to at least 51 percent of all investments in the firm. Such transfers may be gifts described in paragraph (e) of this section.

(d) **Purchases and capital contributions.**

(1) A purchase of an ownership interest is an investment when the consideration is entirely monetary and not a trade of property or services.

(2) Capital that the SEDO contributes directly to the company is an investment when the contribution is all cash or a combination of cash and tangible property and/or realty.

(3) Contributions of time, labor, services, and the like are not investments or components of investments.

(4) Loans are not investments. The proceeds of loans may be investments to the extent that they finance the SEDO's qualifying purchase or capital contribution.

(5) Debt-financed purchases or capital contributions are investments when they comply with the rules in this section and in § 26.70.

(6) Guarantees are not investments.

(7) The firm's purchases or sales of property, including ownership in itself or other companies, are not the SEDO's investments.

(8) Other persons' or entities' purchases or capital contributions are not the SEDO's investments.

(e) **Gifts.** A gift to the SEDO is an investment when it meets the requirements of this section. The gift rules apply to partial gifts, bequests, inheritances, trust distributions, and transfers for inadequate consideration. They apply to gifts of ownership interests and to gifts of cash or property that the SEDO invests. The following requirements apply to gifts on which the SEDO relies for her investment.

(1) The transferor/donor is or immediately becomes uninvolved with the firm in any capacity and in any other business that contracts with the firm other than as a lessor or provider of standard support services;

(2) The transferor does not derive undue benefit; and

(3) A writing documents the gift. When the SEDO cannot reasonably produce better evidence, a receipt, cancelled check, or transfer confirmation suffices, if the writing identifies transferor, transferee, amount or value, and date.

(f) **Curative measures.** The rules of this section do not prohibit transactions that further the objectives of, and compliance with, the provisions of this part. A SEDO or firm may enter into legitimate transactions, alter the terms of ownership, make additional investments, or bolster underlying documentation in a good faith effort to remove, surmount, or correct defects in eligibility, as long as the actions are consistent with this part.

(1) The certifier may notify the firm of eligibility concerns and give the firm time, if the firm wishes, to attempt to remedy impediments to certification.

- (2) The firm may, of its own volition, take curative action up to the time of the certifier's decision. However, it must present evidence of curation before the certifier's decision.
- (3) The certifier may provide general assistance and guidance but not professional (legal, accounting, valuation, etc.) advice or opinions.
- (4) While the certifier may not affirmatively impede attempts to cure, it may maintain its decision timeline and make its decision based on available evidence.
- (5) The certifier must deny or remove certification when the firm's efforts or submissions violate the rules in paragraph (g) of this section.

(g) **Anti-abuse rules.**

- (1) The substance and not the form of transactions drives the eligibility determination.
- (2) The certifier must deny applications based on sham transactions or false representations, and it must decertify DBEs that engage in or make them. Transactions or representations designed to evade or materially mislead subject the firm to the same consequences.
- (3) Fraud renders the firm ineligible and subjects it to sanctions, suspension, debarment, criminal prosecution, civil litigation, and any other consequence or recourse not proscribed in this part.

Example 1 to paragraph (g)(3): SEDO claims an investment consisting of a contribution of equipment and a significant amount of her own cash. She shows that she transferred title to the equipment and wrote a check from an account she alone owns. She does not disclose that her brother-in-law lent her the money and she must repay him. The firm is ineligible under paragraphs (g)(1) and (2) of this section.

[89 FR 24972, Apr. 9, 2024]

§ 26.70 Debt-financed investments.

- (a) Subject to the other provisions of this subpart, a SEDO may borrow money to *finance* a § 26.69(c) investment entirely or partially if the SEDO has paid, on a net basis, at least 15 percent of the total value of the investment by the time the firm applies for certification.

Example 1 to paragraph (a) introductory text: A SEDO who borrows \$9,000 of her \$10,000 cash investment in Applicant, Inc., must have repaid, from her own funds, at least \$500 of the loan's principal by the time Applicant, Inc. applies for certification.

Example 2 to paragraph (a) introductory text: A SEDO who finances \$8,000 of a \$10,000 investment in Applicant may apply for Applicant's certification at any time.

Example 3 to paragraph (a) introductory text: A SEDO who contributes to the Applicant equipment worth \$40,000, which she purchased with \$10,000 of her own money and \$30,000 of seller financing may apply for Applicant's certification at any time.

- (1) The SEDO pays the net 15 percent portion of the investment to Seller or Applicant (as the case may be) from her own, not borrowed, money.

- (2) Money that the SEDO receives as a § 26.69(e) gift is her own money.
 - (3) The firm, whether Applicant or DBE, does not finance any part of the investment, directly or indirectly.
- (b) The loan is real, enforceable, not in default, not offset by another agreement, and on standard commercial arm's length terms. The following conditions also apply.
- (1) The SEDO is the sole debtor.
 - (2) The firm is not party to the loan in any capacity, including as a guarantor.
 - (3) The SEDO does not rely on the company's credit or other resources to repay any part of the debt or otherwise to finance any part of her investment.
 - (4) The loan agreement requires level, regularly recurring payments of principal and interest, according to a standard amortization schedule, at least until the SEDO satisfies requirements in paragraph (a) of this section.
 - (5) The loan agreement permits prepayments, including by refinancing.
- (c) If the creditor forgives or cancels all or part of the debt, or the SEDO defaults, the entire debt-financed portion of the SEDO's purchase or capital contribution is no longer an investment.

Example 4 to paragraph (c): SEDO finances \$40,000 of a \$50,000 investment, and the firm becomes certified. When the SEDO has repaid half of the loan's principal and associated interest, the creditor forgives the remaining \$20,000 debt. The SEDO's investment is now \$10,000.

- (d) Paragraph (c) of the section does not prohibit refinancing with debt that meets the requirements of this section or preclude prompt curation under § 26.69(f).

[89 FR 24973, Apr. 9, 2024]

§ 26.71 Control.

- (a) **General rules.**
- (1) One or more SEDOs of the firm must control it.
 - (2) Control determinations must consider all pertinent facts, viewed together and in context.
 - (3) A firm must have operations in the business for which it seeks certification at the time it applies. Certifiers do not certify plans or intentions, or issue contingent or conditional certifications.
- (b) **SEDO as final decision maker.** A SEDO must be the ultimate decision maker in fact, regardless of operational, policy, or delegation arrangements.
- (c) **Governance.** Governance provisions may not require that any SEDO obtain concurrence or consent from a non-SEDO to transact business on behalf of the firm.
- (1) **Highest officer position.** A SEDO must hold the highest officer position in the company (e.g., chief executive officer or president).
 - (2) **Board of directors.** Except as detailed in paragraph (c)(4) of this section, a SEDO must have present control of the firm's board of directors, or other governing body, through the number of eligible votes.

- (i) **Quorum requirements.** Provisions for the establishment of a quorum must not block the SEDO from calling a meeting to vote and transact business on behalf of the firm.
 - (ii) **Shareholder actions.** A SEDO's authority to change the firm's composition via shareholder action does not prove control within the meaning of paragraph (c) of this section.
- (3) **Partnerships.** In a partnership, at least one SEDO must serve as a general partner, with control over all partnership decisions.
- (4) **Exception.** Bylaws or other governing provisions that require non-SEDO consent for extraordinary actions generally do not contravene the rules in paragraph (c) of this section. Non-exclusive examples are a sale of the company or substantially all of its assets, mergers, and a sudden, wholesale change of type of business.
- (d) **Expertise.** At least one SEDO must have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature. The requirements of this paragraph (d) vary with type of business, degree of technological complexity, and scale.
- (e) **SEDO decisions.** The firm must show that the SEDO critically analyzes information provided by non-SEDOS and uses that analysis to make independent decisions.
- (f) **Delegation.** A SEDO may delegate administrative activities or operational oversight to a non-SED individual as long as at least one SEDO retains unilateral power to fire the delegate(s), and the chain of command is evident to all participants in the company and to all persons and entities with whom the firm conducts business.
- (1) No non-SED participant may have power equal to or greater than that of a SEDO, considering all the circumstances. Aggregate magnitude and significance govern; a numerical tally does not.
 - (2) Non-SED participants may not make non-routine purchases or disbursements, enter into substantial contracts, or make decisions that affect company viability without the SEDO's consent.
 - (3) Written provisions or policies that specify the terms under which non-SED participants may sign or act on the SEDO's behalf with respect to recurring matters generally do not violate this paragraph (f), as long as they are consistent with the SEDO having ultimate responsibility for the action.
- (g) **Independent business.**
- (1) If the firm receives from or shares personnel, facilities, equipment, financial support, or other essential resources, with another business (whether a DBE or non-DBE firm) or individual on other than commercially reasonable terms, the firm must prove that it would be viable as a going concern without the arrangement.
 - (2) The firm must not regularly use another firm's business-critical vehicles, equipment, machinery, or facilities to provide a product or service under contract to the same firm or one in a substantially similar business.
 - (i) **Exception 1.** Paragraphs (g)(1) and (2) of this section do not preclude the firm from providing services to a single customer or to a small number of them, provided that the firm is not merely a conduit, captive, or unnecessary third party acting on behalf of another firm or individual. Similarly, providing a volume discount to such a customer does not impair viability unless the firm repeatedly provides the service at a significant and unsustainable loss.

(ii) **Exception 2.** A firm may share essential resources and deal exclusively with another firm that a SEDO controls and of which the SEDO owns at least 51 percent ownership.

(h) **Franchise and license agreements.** 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, the certifier 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, if 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.

[89 FR 24973, Apr. 9, 2024]

§ 26.73 NAICS Codes.

(a) A certifier must grant certification to a firm only for specific types of work that the SEDO controls. To become certified in an additional type of work, the firm must demonstrate to the certifier only that its SEDO controls the firm with respect to that type of work. The certifier must not require that the firm be recertified or submit a new application for certification but must verify the SEDO's control of the firm in the additional type of work.

(1) A correct NAICS code is the 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.

(2) If there is not a NAICS code that fully, clearly, or sufficiently narrowly describes the type(s) of work for which the firm seeks certification, the certifier must supplement or limit the assigned NAICS code(s) with a clear, specific, and concise narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is insufficient.

(3) Firms and certifiers 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.

(4) A certifier may change a certification classification or description if there is a factual basis in the record, in which case it must notify the firm 30 days before making the change. Certifiers may not apply such changes retroactively.

(5) In addition to applying the appropriate NAICS code, the certifier may apply a descriptor from a classification scheme of equivalent detail and specificity. Such a descriptor (e.g., a "work code") does not supersede or limit the types of work for which a DBE is eligible under an appropriate NAICS code.

(b) [Reserved]

[89 FR 24974, Apr. 9, 2024]

Subpart E—Certification Procedures

§ 26.81 What are the requirements for Unified Certification Programs?

- (a) You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).
 - (1) All recipients in the same jurisdiction (normally a State) must sign an agreement establishing a UCP and submit the agreement to the Secretary for approval.
 - (2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.
 - (3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.
 - (4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.
- (b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.
 - (1) Certification decisions by the UCP shall be binding on all DOT recipients within the state.
 - (2) The UCP shall provide “one-stop shopping” to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.
 - (3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.
- (c) All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.
- (d) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The “home state” UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm's application.
- (e) Subject to DOT approval as provided in this section, recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.
- (f) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.

- (g) Each UCP must maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other States certified under the provisions of this part), the information required by § 26.31. The UCP must make the directory available to the public electronically, on the internet. The UCP must update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.
- (h) Except as otherwise specified in this section, all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

[89 FR 24974, Apr. 9, 2024]

§ 26.83 What procedures do certifiers follow in making certification decisions?

- (a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.
- (b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.
- (c)
 - (1) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:
 - (i) A certifier must visit the firm's principal place of business, virtually or in person, and interview the SEDO, officers, and key personnel. The certifier must review those persons' résumés and/or work histories. The certifier must maintain a complete audio recording of the interview. The certifier must also visit one or more active job sites (if there is one). These activities comprise the "on-site review" (OSR), a written report of which the certifier must keep in its files.
 - (ii) Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing
 - (iii) Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank account signature cards;
 - (iv) Determine the work history of the firm, including contracts it has received, work it has completed; and payroll records;
 - (v) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any.
 - (vi) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;
 - (vii) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 3 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.

- (viii) Require potential DBEs to complete and submit an appropriate application form, except as otherwise provided in § 26.85 of this part.
- (2) You must use the application form provided in Appendix F to this part without change or revision. However, you may provide in your DBE program, with the written approval of the concerned operating administration, for supplementing the form by requesting specified additional information not inconsistent with this part.
- (3) The certifier must ensure that the SEDO signs the Declaration of Eligibility (DOE) at the end of the Uniform Certification Application (UCA), subscribed to as true under penalty of perjury that all information provided is current, accurate, and complete.
- (4) You must review all information on the form prior to making a decision about the eligibility of the firm. You may request clarification of information contained in the application at any time in the application process.
- (d) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other recipient.
- (e) [Reserved]
- (f) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.
- (g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.
- (h)
 - (1) Once a certifier has certified a firm, the firm remains certified unless and/or until the certifier removes certification, in whole or in part (*i.e.*, NAICS code removal), through the procedures of § 26.87.
 - (2) The certifier may not require a DBE to reapply for certification, renew its certification, undergo a recertification, or impose any functionally equivalent requirement. The certifier may, however, conduct a certification review at any reasonable time and/or at regular intervals of at least two years. The certification review may, at the certifier's discretion, include a new OSR. The certifier may also make an unannounced visit to the DBE's offices and/or job site. The certifier may also rely on another certifier's report of its OSR of the DBE.
- (i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.
 - (1) Changes in management responsibility among members of a limited liability company are covered by this requirement.
 - (2) You must attach supporting documentation describing in detail the nature of such changes.

- (3) The DBE must notify the certifier of a material change in its circumstances that affects its continued eligibility within 30 days of its occurrence, explain the change fully, and include a duly executed DOE with the notice. The DBE's non-compliance is a § 26.109(c) failure to cooperate.
- (j) A DBE must provide its certifier(s), every year on the anniversary of its original certification, a new DOE along with the specified documentation in § 26.65(a), including gross receipts for its most recently completed fiscal year, calculated on a cash basis regardless of the DBE's overall accounting method. The sufficiency of documentation (and its probative value) may vary by business type, size, history, resources, and overall circumstances. However, the following documents may generally be considered "safe harbors," provided that they include all reportable receipts, properly calculated, for the full reporting period: audited financial statements, a CPA's signed attestation of correctness and completeness, or all income-related portions of one or more (when there are affiliates) signed Federal income tax returns as filed. Non-compliance, whether full or partial, is a § 26.109(c) failure to cooperate.
- (k) The certifier must advise each applicant within 30 days of filing whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.
- (l) The certifier must render a final eligibility decision within 90 days of receiving all information required from the applicant under this part. The certifier may extend this time period once, for no more than an additional 30 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. On a case-by-case basis, the concerned OA may give the certifier one deadline extension if it approves a written request explaining why the certifier needs more time. The certifier's failure to issue a compliant decision by the applicable deadline is a constructive denial of the application, appealable to DOT under § 26.89. In this case, the certifier may be subject to enforcement actions described in §§ 26.103 and 26.105.
 - (1) [Reserved]
 - (2) The certifier must make an entry in DOOCR's Online Portal within 5 days of a denial. The certifier must enter the name of the firm, names(s) of the firm's owner(s), date of decision, and the reason(s) for its decision.
- (m)
 - (1) A certifier may notify the applicant about ineligibility concerns and allow the firm to rectify deficiencies within the period in paragraph (l) of this section.
 - (2) If a firm takes curative measures before the certifier renders a decision, the certifier must consider any evidence it submits of having taken such measures. The certifier must not automatically construe curative measures as successful or abusive.
 - (i) **Example 1 to paragraph (m)(2).** The firm may obtain proof of an investment, transaction, or other fact on which its eligibility depends.
 - (ii) **Example 2 to paragraph (m)(2).** An owner or related party may create a legally enforceable document of irrevocable transfer to the SEDO.
 - (iii) **Example 3 to paragraph (m)(2).** The firm may amend an operating agreement, bylaw provision, or other governance document, provided that the amendment accurately reflects the parties' relationships, powers, responsibilities, and other pertinent circumstances.

- (n) Except as otherwise provided in this paragraph (n), if an applicant for DBE certification withdraws its application before the certifier issues a decision, the applicant can resubmit the application at any time. However, the certifier may place the reapplication at the "end of the line," behind other applications that have been made since the firm's previous application was withdrawn. The certifier may apply the § 26.86(c) waiting period to a firm that has established a pattern of withdrawing applications before its decision.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003; 76 FR 5100, Jan. 28, 2011; 79 FR 59598, Oct. 2, 2014; 89 FR 24974, Apr. 9, 2024]

§ 26.85 Interstate certification.

- (a) **Applicability.** This section applies to a DBE certified in any UCP.
- (b) **General rule.** When a DBE applies to another UCP for certification, the new UCP must accept the DBE's certification from its jurisdiction of original certification (JOC). The JOC is the State in which the firm maintains its principal place of business at the time of application unless and until the firm loses certification in that jurisdiction.
- (c) **Application procedure.** To obtain certification by an additional UCP, the DBE must provide:
- (1) A cover letter with its application that specifies that the DBE is applying for interstate certification, identifies all UCPs in which the DBE is certified (including the UCP that originally certified it)
 - (2) An electronic image of the UCP directory of the original UCP that shows the DBE certification; and
 - (3) A new DOE.
- (d) **Confirmation of eligibility.** Within 10 business days of receiving the documents required under paragraph (c) of this section, the additional UCP must confirm the certification of the DBE preferably by reference to the UCP directory of the JOC.
- (e) **Certification.** If the DBE fulfills the requirements of paragraph (c) of this section and the UCP confirms the DBE's certification per paragraph (d) of this section, the UCP must certify the DBE immediately without undergoing further procedures and provide the DBE with a letter documenting its certification.
- (f) **Noncompliance.** Failure of the additional UCP to comply with paragraphs (d) and (e) of this section is considered non-compliance with this part.
- (g) **Post-interstate certification proceedings.**
- (1) After the additional UCP certifies the DBE, the UCP may request a fully unredacted copy of all, or a portion of, the DBE's certification file from any other UCP in which the DBE is certified.
 - (2) A UCP must provide a complete unredacted copy of the DBE's certification materials to the additional UCP within 30 days of receiving the request. Confidentiality requirements of §§ 26.83(d) and 26.109(b) do not apply.
 - (3) Once the new UCP certifies, then it must treat the DBE as it treats other DBEs, for all purposes.
 - (4) The DBE must provide an annual DOE with documentation of gross receipts, under § 26.83(j), to certifying UCPs on the anniversary date of the DBE's original certification by its JOC.
- (h) **Decertifications.**

- (1) If any UCP has reasonable cause to remove a DBE's certification, in whole or in part (*i.e.*, NAICS code removal), it must notify the other UCPs in which the DBE is certified ("other jurisdictions") via email. The notice must explain the UCP's reasons for believing the DBE's certification should be removed.
- (2) Within 30 days of receiving the notice, the other jurisdictions must email the UCP contemplating decertification a concurrence or non-concurrence with the proposed action. The other jurisdictions' responses may provide written arguments and evidence and may propose additional reasons to remove certification. A jurisdiction's failure to timely respond to the reasonable cause notice will be deemed to be a concurrence.
- (3) After a UCP receives all timely responses, it must make an independent decision whether to issue a NOI and what grounds to include.
- (4) Other UCPs may, before the hearing, submit written arguments and evidence concerning whether the firms should remain certified, but may not participate in the hearing.
- (5) If the UCP finds the firm ineligible the firm immediately loses certification in all jurisdictions in which it is certified. The NOD must include appeal instructions provided on the Departmental Office of Civil Rights' web page, available at <https://www.transportation.gov/dbeappeal>. The UCP must email a copy of its decision to the other jurisdictions within 3 business days.
- (6) The rules of this paragraph (h)(6) do not apply to attempts to decertify based upon a DBE's actions or inactions pertaining to §§ 26.83(j) (Declaration of Eligibility) and 26.87(e)(6) (failure to cooperate).
- (7) Decertifications under this paragraph (h) must provide due process to DBEs.
 - (i) If a UCP decides not to issue a NOD removing the DBE's certification, no jurisdiction may initiate decertification proceedings, within one year, on the same or similar grounds and underlying facts.
 - (ii) If a DBE believes a UCP unfairly targets it with repeated decertification attempts, the DBE may file a complaint to the appropriate OA.
- (8) The Department's appeal decisions are binding on all UCPs unless stated otherwise.

[89 FR 24975, Apr. 9, 2024]

§ 26.86 Decision letters.

- (a) When a certifier denies a firm's request for certification or decertifies the firm, the certifier must provide the firm a NOD explaining the reasons for the adverse decision, specifically referencing the evidence in the record that supports each reason. A certifier must also include, verbatim, the instructions found on the Departmental Office of Civil Rights' web page, available at <https://www.transportation.gov/dbeappeal>.
- (b) The certifier must promptly provide the applicant copies of all documents and other information on which it based the denial if the applicant requests them.
- (c) The certifier must establish a waiting period for reapplication of no more than 12 months. That period begins to run the day after the date of the decision letter is emailed. After the waiting period expires, the denied firm may reapply to any member of the UCP that denied the application. The certifier must inform the applicant of that right, and specify the date the waiting period ends, in its decision letter.
- (d) An appeal does not extend the waiting period.

[89 FR 24976, Apr. 9, 2024]

§ 26.87 Decertification.

- (a) **Burden of proof.** To decertify a DBE, the certifier bears the burden of proving, by a preponderance of the evidence, that the DBE does not meet the certification standards of this part.
- (b) **Initiation of decertification proceedings.**
 - (1) A certifier may determine on its own that it has reasonable cause to decertify a DBE.
 - (2) If an OA determines that there is reasonable cause to believe that a DBE does not meet the eligibility criteria of this part, the OA may direct the certifier to initiate a proceeding to remove the DBE's certification.
 - (i) The OA must provide the certifier and the DBE written notice describing the reasons for the directive, including any relevant documentation or other information.
 - (ii) The certifier must immediately commence a proceeding to decertify as provided by paragraph (e) of this section.
 - (3) Any person may file a complaint explaining, with specificity, why the certifier should decertify a DBE. The certifier need not act on a general allegation or an anonymous complaint. The certifier must keep complainants' identities confidential as provided in § 26.109(b).
 - (i) The certifier must review its records concerning the DBE, any material the DBE and/or complainant provides, and any other available information. The certifier may request additional information from the DBE or conduct any other investigation that it deems necessary.
 - (ii) If the certifier determines that there is reasonable cause to decertify the DBE, it initiates a decertification proceeding. If it determines that there is not such reasonable cause, it notifies the complainant and the DBE in writing of its decisions and the reasons for it.
- (c) **Notice of intent (NOI).** A certifier's first step in any decertification proceeding must be to email a notice of intent (NOI) to the DBE.
 - (1) The NOI must clearly and succinctly state each reason for the proposed action, and specifically identify the supporting evidence for each reason.
 - (2) The NOI must notify the DBE of its right to respond in writing, at an informal hearing, or both.
 - (3) The NOI must inform the DBE of the hearing scheduled on a date no fewer than 30 days and no more than 45 days from the date of the NOI.
 - (4) If the ground for decertification is that the DBE has been suspended or debarred for conduct related to the DBE program, the certifier issues a NOD decertifying the DBE. In this case, there is no NOI or opportunity for a hearing or written response.
- (d) **Response to NOI.**
 - (1) If the DBE wants a hearing, it must email the certifier saying so within 10 days of the NOI. If the DBE does not do so, it loses its opportunity for a hearing.
 - (2) The certifier and DBE may negotiate a different hearing date from that stated in the NOI. Parties must not engage in dilatory tactics.

- (3) If the DBE does not want a hearing, or does not give timely notice to the certifier that it wants one, the DBE may still provide written information and arguments to the certifier rebutting the reasons for decertification stated in the NOI.

(e) **Hearings.**

- (1) The purpose of the hearing is for the certifier to present its case and for the DBE to rebut the certifier's allegations.
- (2) The hearing is an informal proceeding with rules set by the hearing officer. The SEDO's attorney, a non-SEDO, or other individuals involved with the DBE may attend the hearing and answer questions related to their own experience or more generally about the DBE's ownership, structure and operations.
- (3) The certifier must maintain a complete record of the hearing, either in writing, video or audio. If the DBE appeals to DOT under § 26.89, the certifier must provide that record to DOT and to the DBE.

(f) **Separation of functions.** The certifier must ensure that the decision in a decertification case is made by an individual who did not take part in actions leading to or seeking to implement the proposal to decertify the DBE and is not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

- (1) The certifier's method of implementing this requirement must be made part of its DBE program and approved by the appropriate OA.
- (2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of this part.

(g) **Notice of decision.** The certifier must send the firm a NOD no later than 30 days of the informal hearing and/or receiving written arguments/evidence from the firm in response to the NOI.

- (1) The NOD must describe with particularity the reason(s) for the certifier's decision, including specific references to the evidence in the record that supports each reason. The NOD must also inform the firm of the consequences of the decision under paragraph (i) of this section and of its appeal rights under § 26.89.
- (2) The certifier must send copies of the NOD to the complainant in an ineligibility complaint or to the OA that directed the certifier to initiate the proceeding.
- (3) When sending a copy of an NOD to a complainant other than an OA, the certifier must not include information reasonably construed as confidential business information, unless the certifier has the written consent of the firm that submitted the information.
- (4) The certifier must make an entry in DOCR's Online Portal within 5 days of the action. The certifier must enter the name of the firm, names(s) of the firm's owner(s), date of decision, and the reason(s) for its decision.

(h) **Status of firm during proceeding.**

- (1) A DBE remains certified until the certifier issues a NOD.
- (2) [Reserved]

(i) [Reserved]

- (j) **Consequences.** Decertification has the following effects on contract and overall goals and DBE participation:
- (1) When a prime contractor has made a commitment to use the decertified firm, but a subcontract has not been executed before the certifier issues the NOD, the certified firm does not count toward the contract goal. The recipient must direct the prime contractor to meet the contract goal with an eligible DBE or demonstrate to the certifier that it has made good faith efforts to do so.
 - (2) When the recipient has made a commitment to using a DBE prime contractor, but a contract has not been executed before a decertification notice provided for in paragraph (g) of this section is issued, the decertified firm does not count toward the recipient's overall DBE goal.
 - (3) If a prime contractor has executed a subcontract with the firm before the certifier has notified the firm of its decertification, the prime contractor may continue to use the firm and may continue to receive credit toward the DBE goal for the firm's work. In this case, however, the prime contractor may not extend or add work to the contract after the firm was notified of its decertification without prior written consent from the recipient.
 - (4) If a prime contractor has executed a subcontract with the firm before the certifier has notified the firm of its decertification, the prime contractor may continue to use the firm as set forth in paragraph (j)(3) of this section; however, the portion of the decertified firm's continued performance of the contract must not count toward the recipient's overall goal.
 - (5) If the recipient executed a prime contract with a DBE that was later decertified, the portion of the decertified firm's performance of the contract remaining after the certifier issued the notice of its decertification must not count toward an overall goal, but the DBE's performance of the contract may continue to count toward satisfying the contract goal.
 - (6) The following exceptions apply to this paragraph (j):
 - (i) If a certifier decertifies a firm solely because it exceeds the business size standard during the performance of the contract, the recipient may continue to count the portion of the decertified firm's performance of the contract remaining after it issued the notice of its decertification toward the recipient's overall goal as well as toward the contract goals.
 - (ii) If the certifier decertifies the DBE because it was acquired by or merged with a non-DBE, the recipient may not continue to count the portion of the decertified firm's performance on the contract remaining after the certifier decertified it toward either the contract goal or the overall goal, even if a prime contractor has executed a subcontract with the firm or the recipient has executed a prime contract with the DBE that was later decertified. In this case, if eliminating the credit of the decertified firm will affect the prime contractor's ability to meet the contract goal, the recipient must direct the prime contractor to subcontract to an eligible DBE to the extent needed to meet the contract goal or demonstrate to the recipient that it has made good faith efforts to do so.

[89 FR 24976, Apr. 9, 2024]

§ 26.88 Summary suspension of certification.

- (a) **Definition.** Summary suspension is an extraordinary remedy for lapses in compliance that cannot reasonably or adequately be resolved in a timely manner by other means.

- (1) A firm's certification is suspended under this part as soon as the certifier transmits electronic notice to its owner at the last known email address.
- (2) During the suspension period, the DBE may not be considered to meet a contract or participation goal on contracts executed during the suspension period.

(b) **Mandatory and elective suspensions** –

- (1) **Mandatory.** The certifier must summarily suspend a DBE's certification when:

- (i) The certifier has clear and credible evidence of the DBE's or its SEDO's involvement in fraud or other serious criminal activity.
- (ii) The OA with oversight so directs.

- (2) **Elective.**

- (i) The certifier has discretion to suspend summarily if it has clear and credible evidence that the DBE's continued certification poses a substantial threat to program integrity.
- (ii) An owner upon whom the firm relies for eligibility does not timely file the declaration and gross receipts documentation that § 26.83(j) requires.

- (c) **Coordination with other remedies.** In most cases, a simple information request or a § 26.87 NOI is a sufficient response to events described in paragraphs (b)(1) and (2) of this section. The certifier should consider the burden to the DBE and to itself in determining whether summary suspension is a more prudent and proportionate, effective response. The certifier may *elect* to suspend the same DBE just once in any 12-month period.

(d) **Procedures** –

- (1) **Notice.** The certifier must notify the firm, by email, of its summary suspension notice (SSN) on a business day during regular business hours. The SSN must explain the action, the reason for it, the consequences, and the evidence on which the certifier relies.
 - (i) Elective SSNs may not cite more than one reason for the action.
 - (ii) Mandatory SSNs may state multiple reasons.
 - (iii) The SSN, regardless of type, must demand that the DBE show cause why it should remain certified and provide the time and date of a virtual show-cause hearing at which the firm may present information and arguments concerning why the certifier should lift the suspension. The SSN must also advise that the DBE may provide written information and arguments lieu of or in addition to attending the hearing.
- (2) **Hearing.** The hearing date must be a business day that is at least 15 but not more than 25 days after the date of the notice. The DBE may respond in writing in lieu of or in addition to attending the hearing; however, it will have waived its right to a hearing if it does not confirm its attendance within 10 days of the notice and will have forfeited its certification if it does not acknowledge the notice within 15 days. The show-cause hearing must be conducted as a video conference on a standard commercial platform that the DBE may readily access at no cost.

(3) **Response.** The DBE may provide information and arguments concerning its continuing eligibility until the 15th day following the suspension notice or the day of the hearing, if any, whichever is later. The DBE must email any written response it provides. Email submissions correctly addressed are effective when sent. The certifier may permit additional submissions after the hearing, as long as the extension ends on a business day that is not more than 30 days after the notice.

(4) **Scope and burdens.**

(i) Suspension proceedings are limited to the suspension ground specified in the notice.

(ii) The certifier may not amend its reason(s) for summarily suspending certification, nor may it electively suspend the firm again during the 12-month period following the notice.

(iii) The DBE has the burden of producing information and/or making arguments concerning its continued eligibility, but it need only contest the reason cited.

(iv) The certifier has the burden of proving its case by a preponderance of the evidence. It must issue an NOD within 30 days of the suspension notice or lift the suspension. Any NOD must rely only on the reason given in the summary suspension notice.

(v) The DBE's failure to provide information contesting the suspension does not impair the certifier's ability to prove its case. That is, the uncontested evidence upon which the certifier relies in its notice, if substantial, will constitute a preponderance of the evidence for purposes of the NOD.

(5) [Reserved]

(6) **Duration.** The DBE remains suspended during the proceedings described in this section but in no case for more than 30 days. If the certifier has not lifted the suspension or provided a rule-compliant NOD by 4:30 p.m. on the 30th day, then it must lift the suspension and amend applicable DBE lists and databases by 12 p.m. the following business day.

(e) **Recourse** –

(1) **Appeal.** The DBE may appeal a final decision under paragraph (c)(5)(iv) of this section, as provided in § 26.89(a), but may *not* appeal the suspension itself, unless paragraph (d)(2) of this section applies.

(2) **Enforcement.**

(i) The DBE may immediately petition the Department for an order to vacate a certifier's action if:

(A) The certifier sends a second elective SSN within 12 months, or

(B) Cites multiple reasons in an elective SSN contrary to paragraph (d)(1)(i) of this section.

(ii) The DBE may also petition to the Department for an order to compel if the certifier fails to act within the time specified in paragraph (c)(6) of this section.

(3) In either case, the DBE must:

(i) Email the request under the subject line, "REQUEST FOR ENFORCEMENT ORDER" in all caps;

(ii) Limit the request to a one-page explanation that includes:

(A) The certifier's name and the suspension dates;

(B) Contact information for the certifier, the DBE, and the DBE's SEDO(s); and

- (C) The general nature and date of the firm's response, if any, to the second suspension notice; and
- (D) The suspension notice(s).

[89 FR 24977, Apr. 9, 2024]

§ 26.89 Appeals to the Department.

(a)

- (1) Applicants and decertified firms may appeal adverse NODs to the Department.
- (2) An ineligibility complainant or applicable Operating Administration (the latter by the terms of § 26.87(c)) may appeal to the Department if the certifier does not find reasonable cause to issue an NOI to decertify or affirmatively determines that the DBE remains eligible.
- (3) Appellants must email appeals as directed in the certifier's decision letter within 45 days of the date of the letter. The appeal must at a minimum include a narrative that explains fully and specifically why the firm believes the decision is in error, what outcome-determinative facts the certifier did not consider, and/or what part 26 provisions the certifier misapplied.
- (4) The certifier's decision remains in effect until the Department resolves the appeal or the certifier reverses itself.

(b) When it receives an appeal, the Department requests a copy of the certifier's complete administrative record including a video, audio, or transcript of any hearing, which the certifier must provide within 20 days of the Department's request. The Department may extend this time period when the certifier demonstrates good cause. The certifier must ensure that the administrative record is well organized, indexed, and paginated and the certifier must provide the appellant a copy of any supplemental information it provides to DOT.

(c)

- (1) The Department may accept an untimely or incomplete appeal if it determines, in its sole discretion, that doing so is in the interest of justice.
- (2) The Department may dismiss non-compliant or frivolous appeals without further proceedings.

(d) The Department will avail itself of whatever remedies for noncompliance it considers appropriate.

(e) The Department decides only the issue(s) presented on appeal. It does not conduct a *de novo* review of the matter, assess all eligibility requirements, or hold hearings. It considers the administrative record and any additional information that it considers relevant.

(f)

- (1) The Department affirms the certifier's decision if it determines that the decision is consistent with applicable rules and supported by substantial evidence.
- (2) The Department reverses decisions that do not meet the standard in paragraph (f)(1) of this section.
- (3) The Department need not reverse if an error or omission did not result in fundamental unfairness or undue prejudice.

- (4) The Department may remand the case with instructions for further action. When the Department specifies further actions, the certifier must take them without delay.
 - (5) The Department generally does not uphold the certifier's decision based on grounds not specified in its decision.
 - (6) The Department resolves appeals on the basis of facts demonstrated, and evidence presented, at the time of the certifier's decision.
 - (7) The Department may summarily dismiss an appeal. Reasons for doing so include, but are not limited to, non-compliance, abuse of process, appellant or certifier request, and failure to state a claim upon which relief can be granted.
- (g) The Department does not issue advisory opinions.
- (h) All decisions described in paragraph (f) of this section are administratively final unless they say otherwise.
- (i) DOCR posts final decisions to its website, available at <https://www.transportation.gov/DBEDecisions>.

[89 FR 24978, Apr. 9, 2024]

§ 26.91 What actions do certifiers take following DOT certification appeal decisions?

- (a) If you are the certifier from whose action an appeal under § 26.89 is taken, the decision is binding. It is not binding on other certifiers.
- (b) If you are a certifier to which a DOT determination under § 26.89 is applicable, you must take the following action:
 - (1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 26.87(j) take effect.
 - (2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.87.
 - (3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.
 - (4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.
 - (5) If the Department affirms your determination, no further action is necessary.
- (c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other certifiers with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.87. Such certifiers must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other certifiers must take the DOT action into account in any certification action involving the firm. However, other certifiers are not required to certify the firm based on the DOT decision.

[64 FR 5126, Feb. 2, 1999, as amended at 89 FR 24979, Apr. 9, 2024]

Subpart F—Compliance and Enforcement

§ 26.101 What compliance procedures apply to recipients?

- (a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under § 26.103 or § 26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.
- (b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

§ 26.103 What enforcement actions apply in FHWA and FTA programs?

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

- (a) **Noncompliance complaints.** Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in § 26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.
- (b) **Compliance reviews.** The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.
- (c) **Reasonable cause notice.** If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, return receipt requested, a written notice advising you that there is reasonable cause to find you in noncompliance. The notice states the reasons for this finding and directs you to reply within 30 days concerning whether you wish to begin conciliation.
- (d) **Conciliation.**
 - (1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.
 - (2) If you and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as complying. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.

- (3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.
 - (4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.
- (e) **Enforcement actions.**
- (1) Enforcement actions are taken as provided in this subpart.
 - (2) Applicable findings in enforcement proceedings are binding on all DOT offices.

[64 FR 5126, Feb. 2, 1999, as amended at 89 FR 24979, Apr. 9, 2024]

§ 26.105 What enforcement actions apply in FAA programs?

- (a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.
- (b) The provisions of § 26.103(b) and this section apply to enforcement actions in FAA programs.
- (c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

§ 26.107 What enforcement actions apply to firms participating in the DBE program?

- (a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.
- (b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.
- (c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.
- (d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.
- (e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5101, Jan. 28, 2011]

§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

(a) **Availability of records.**

- (1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.
- (2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, 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) **Confidentiality of information on complainants.** Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

(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).

(d) **Intimidation and retaliation.** If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003; 76 FR 5101, Jan. 28, 2011]

Appendix A to Part 26—Guidance Concerning Good Faith Efforts

- I. When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make sufficient good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps

to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

- II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix.

The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

- III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (*i.e.*, obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

- IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A.

- (1) Conducting market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.

- (2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

- B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

- C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.

D.

- (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional Agreements could not be reached for DBEs to perform the work.
- (2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E.

- (1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.
- (2) A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you

may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in § 26.53(b)(2)(vi), you must also require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

- VI. A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts except in design-build procurement.

[79 FR 59600, Oct. 2, 2014, as amended at 89 FR 24979, Apr. 9, 2024]

Appendix B to Part 26 [Reserved]

Appendix C to Part 26—DBE Business Development Program Guidelines

The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from the recipient.

- (A) Each firm that participates in a recipient's business development program (BDP) program is subject to a program term determined by the recipient. The term should consist of two stages; a developmental stage and a transitional stage.
- (B) In order for a firm to remain eligible for program participation, it must continue to meet all eligibility criteria contained in part 26.
- (C) By no later than 6 months of program entry, the participant should develop and submit to the recipient a comprehensive business plan setting forth the participant's business targets, objectives and goals. The participant will not be eligible for program benefits until such business plan is submitted and approved by the recipient. The approved business plan will constitute the participant's short and long term goals and the strategy for developmental growth to the point of economic viability in non-traditional areas of work and/or work outside the DBE program.
- (D) The business plan should contain at least the following:
- (1) An analysis of market potential, competitive environment and other business analyses estimating the program participant's prospects for profitable operation during the term of program participation and after graduation from the program.
 - (2) An analysis of the firm's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts other than those in traditional areas of DBE participation.
 - (3) Specific targets, objectives, and goals for the business development of the participant during the next two years, utilizing the results of the analysis conducted pursuant to paragraphs (C) and (D)(1) of this appendix;

- (4) Estimates of contract awards from the DBE program and from other sources which are needed to meet the objectives and goals for the years covered by the business plan; and
 - (5) Such other information as the recipient may require.
- (E) Each participant should annually review its currently approved business plan with the recipient and modify the plan as may be appropriate to account for any changes in the firm's structure and redefined needs. The currently approved plan should be considered the applicable plan for all program purposes until the recipient approves in writing a modified plan. The recipient should establish an anniversary date for review of the participant's business plan and contract forecasts.
- (F) Each participant should annually forecast in writing its need for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (E) of this appendix. Such forecast should be included in the participant's business plan. The forecast should include:
- (1) The aggregate dollar value of contracts to be sought under the DBE program, reflecting compliance with the business plan;
 - (2) The aggregate dollar value of contracts to be sought in areas other than traditional areas of DBE participation;
 - (3) The types of contract opportunities being sought, based on the firm's primary line of business; and
 - (4) Such other information as may be requested by the recipient to aid in providing effective business development assistance to the participant.
- (G) Program participation is divided into two stages;
- (1) a developmental stage and
 - (2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.
- (H) The length of service in the program term should not be a pre-set time frame for either the developmental or transitional stages but should be figured on the number of years considered necessary in normal progression of achieving the firm's established goals and objectives. The setting of such time could be factored on such items as, but not limited to, the number of contracts, aggregate amount of the contract received, years in business, growth potential, etc.
- (I) Beginning in the first year of the transitional stage of program participation, each participant should annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations in areas other than traditional areas of DBE participation after graduation from the program. The transition management plan should be submitted to the recipient at the same time other modifications are submitted pursuant to the annual review under paragraph (E) of this section. The plan should set forth the same information as required under paragraph (F) of steps the participant will take to continue its business development after the expiration of its program term.

- (J) When a participant is recognized as successfully completing the program by substantially achieving the targets, objectives and goals set forth in its program term, and has demonstrated the ability to compete in the marketplace, its further participation within the program may be determined by the recipient.
- (K) In determining whether a concern has substantially achieved the goals and objectives of its business plan, the following factors, among others, should be considered by the recipient:
 - (1) Profitability;
 - (2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;
 - (3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;
 - (4) Ability to obtain bonding;
 - (5) A positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category; and
 - (6) Good management capacity and capability.
- (L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient should notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification should set forth findings, based on the facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification should also provide the participant 45 days from the date of service of the letter to submit in writing information that would explain why the proposed basis of graduation is not warranted.
- (M) Participation of a DBE firm in the program may be discontinued by the recipient prior to expiration of the firm's program term for good cause due to the failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance. Also, the recipient can discontinue the participation of a firm that does not actively pursue and bid on contracts, and a firm that, without justification, regularly fails to respond to solicitations in the type of work it is qualified for and in the geographical areas where it has indicated availability under its approved business plan. The recipient should take such action if over a 2-year period a DBE firm exhibits such a pattern.

Appendix D to Part 26—Mentor-Protégé Program Guidelines

- (A) The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from other firms. To operate a mentor-protégé program, a recipient must obtain the approval of the concerned operating administration.
- (B)
 - (1) Any mentor-protégé relationship shall be based on a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.

(2) To be eligible for reimbursement, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts. The recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement.

(C) DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified *before* it begins participation in a mentor-protégé arrangement. If the recipient chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/ subcontractor mentor-protégé agreement.