

ARKANSAS DEPARTMENT OF TRANSPORTATION

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

PURSUANT TO

49 CODE OF FEDERAL REGULATIONS, PART 26

Nondiscrimination Statement

The Arkansas Department of Transportation (Department) complies with all civil rights provisions of federal statutes and related authorities that prohibit discrimination programs and activities receiving federal financial assistance. Therefore, the Department does not discriminate on the basis of race, sex, color, age, national origin, religion or disability, in admission or access to and treatment in the Department programs and activities, as well as the Department's hiring or employment practices. Complaints of alleged discrimination and inquiries regarding the Department's nondiscrimination policies may be directed to Joanna P. McFadden, Section Head - EEO/DBE Program (ADA/504/Title VI Coordinator), P. O. Box 2261, Little Rock, AR 72203, (501) 569-2298, (Voice/TTY 711) or the following email address: joanna.mcfadden@ardot.gov.

This notice is available from the ADA/504/Title VI Coordinator in large print, audiotape or as an electronic audio file, and Braille.

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**ARKANSAS DEPARTMENT OF TRANSPORTATION
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

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ARKANSAS DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

Chapter I – General

Section 1 – Objectives

The purpose of this manual is to set forth the objectives and procedures for implementing a Disadvantaged Business Enterprise (DBE) Program for the Arkansas Department of Transportation (Department). The intent of the DBE Program, hereafter referred to as the Arkansas Unified DBE Certification Program (ACP) is to comply with Federal laws, regulations, and guidance, and to provide reasonable opportunities for DBEs to compete for and perform on contracts financed in whole or part with federal financial assistance, in an effort to achieve the level of DBE participation that would be achieved absent discrimination. The authority for this program is Title 49 United States Code, as implemented by 49 Code of Federal Regulations, Part 26 (49 CFR 26).

- a. The Department seeks to achieve the following:
 - i. To ensure nondiscrimination in the award and administration of United States Department of Transportation (USDOT) assisted contracts in the Department's highway, transit and airport programs;
 - ii. To create a level playing field on which DBEs can compete fairly for contracts;
 - iii. To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
 - iv. To ensure that only firms that fully meet the eligibility standards are permitted to participate as DBEs;
 - v. To help remove barriers to the participation of DBE firms in USDOT contracts administered by the Department;
 - vi. To promote the use of DBEs in all types of federally-assisted contracts and procurement activities by the Department;
 - vii. To assist in the development of firms that can compete successfully in the marketplace outside the DBE program; and
 - viii. To provide appropriate flexibility in the Department establishing and providing opportunities for DBEs.

Ref: 49 CFR Part 26.1

Section 2 – Authority and Scope

As a recipient of Federal funds, the Department required to administer and participate in the USDOT DBE Program in compliance with all laws, regulations, Executive Orders, and guidance.

- a. The Department is a recipient of certain types of Federal-aid funding including:
 - i. Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 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), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Fixing America’s Surface Transportation (FAST) Act funds authorized by 1109; 23 U.S.C. 133, Pub. L. 114-94.
 - ii. Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Fixing America’s Surface Transportation (FAST) Act funds authorized by 1109; 23 U.S.C. 133, Pub. L. 114-94.
 - iii. Airport funds authorized by 49 U.S.C. 47101, et seq.

Ref: 49 CFR Part 26.3

Section 3 – Uniform Report of DBE Awards or Commitments and Payments

This report is prepared by the Department and is submitted to Federal Highway Administration (FHWA) and Federal Transit Administration (FTA). This report includes the awards/commitments made during the reporting period, broken down by ethnicity, gender and includes actual payments for ongoing contracts and contracts completed. This report is completed twice per year, and is due June 1 and December 1.

Ref: 49 CFR Part 26.11(a)

Section 4 – Bidders List

The Department will create and maintain a bidders list.

- a. The purpose of this list is to provide the Department as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on the Department’s Federally-assisted contracts for use in helping the Department set overall goals.

- b. Each year, the Department will update the bidders list by obtaining information on 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 bidders list in calculating overall goals. The following information will be collected:
 - i. Firm name;
 - ii. Firm address;
 - iii. Firm's status as a DBE or non-DBE;
 - iv. Age of the firm; and
 - v. The annual gross receipts of the firm. The Department will obtain the information by asking each firm to indicate into what gross receipts bracket they fit (e.g., less than \$500,000; \$500,000-\$1 million; \$1-2 million; \$2-5 million; etc.) rather than requesting an exact figure from the firm.
- c. Information on firms submitting proposals for projects will be obtained from the proposal holders list and prequalified contractors list.

Ref: 49 CFR Part 26.11(c)

Section 5 – Recordkeeping and Reports

- a. The Department will maintain records documenting the firm's compliance. At a minimum, the Department will keep a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews for the length of time they are certified. Other certification or compliance related records, and files from decertified firms will be retained for a minimum of three years.
- b. The Department will submit to the USDOT Office of Civil Rights on or before January 1 of each year the percentage and location of DBE firms in the UCP Directory controlled by the following:
 - i. Women;
 - ii. Socially and economically disadvantaged individuals (other than women); and
 - iii. Individuals who are women and are otherwise socially and economically disadvantaged individuals.

Ref: 49 CFR Part 26.11(d) & (e)

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Chapter II – Administrative Requirements

Section 1 – Program Development and Updates

- a. As the Department receives funds from at least one of the following operating administrations and lets USDOT-assisted contracts, the Department must have a DBE program meeting the requirements of 49 CFR Part 26:
 - iv. FHWA funds authorized by a statute to which 49 CFR Part 26 applies;
 - v. FTA funds for planning, capital and/or operating assistance, and who will award prime contracts (excluding transit vehicle purchases) exceeding \$250,000 in a federal fiscal year;
 - vi. Federal Aviation Administration (FAA) grants for airport planning or development, and who will award prime contracts exceeding \$250,000 in a federal fiscal year.
- b. The Department is eligible to receive USDOT financial assistance because USDOT has approved the ACP. The approval counts for all DOT-assisted programs (except that goals are reviewed by the particular operating administration that provides funding for DOT-assisted contracts). The Department is in compliance with 49 CFR Part 26. The Department will continue to carry out its DBE Program until all funds from USDOT financial assistance have been expended. The Department will submit significant changes in the program to the operating administration for approval.
- c. Sub-recipients must comply with the Department’s plan and may not have an independent plan.

Ref. 49 CFR Part 26.21

Section 2 – DBE Liaison Officer

- a. DBE Liaison Officer
 - i. The Deputy Director and Chief Engineer, has been designated as the DBE Liaison Officer (DBELO) for the Department and reports directly to the Director of Highways and Transportation concerning DBE matters. The DBELO may be contacted at 501-569-2214 or P. O. Box 2261, Little Rock, AR 72203.
 - ii. The DBELO, by order of the Director, has overall responsibility for development, direction, and day-to-day operations of the ACP. This position oversees DBE supportive service activities and the dissemination of information to ensure that small, socially and economically disadvantaged businesses and women business enterprises are afforded an equal opportunity to bid on all DOT-assisted Department contracts and participate in other contracting activities. The DBELO also has full responsibility for

implementation of the DBE policy, monitoring of resulting programs and procedures, and compliance with established goals.

- iii. The DBELO is assisted in carrying out the DBE Program responsibilities by members of the EEO/DBE Section, Program Management Division and Construction Division staffs. Additional support is provided by various other Department personnel as needed. Any information relating to DBE functions and activities is brought to the attention of the DBELO, who will review the information and initiate appropriate action through the responsible Department personnel.

b. EEO/DBE Section

- i. The DBELO is responsible for oversight of ACP activities within the EEO/DBE Section. The EEO/DBE Section Head is responsible for many functions of the ACP, including maintenance of certification files, performance of comprehensive compliance and on-site certification reviews, coordination of ACP Certification Committee and ACP Hearing Committee activities, maintenance of the DBE Directory, administration of the supportive services program, tracking DBE participation, and coordinating with the Program Management Division in setting the Department's overall goal. Assisting in these functions are the External Equal Employment Opportunity (EEO) Coordinator, DBE Supportive Services Specialist and Office Administrative Assistant II.
- ii. The DBE Supportive Services Program (DBE/SSP) is outsourced. The purpose of the DBE/SSP is to seek, enhance and increase minority- and female-owned firms for participation in the highway construction industry in Arkansas. This is done by identifying, assisting and promoting DBEs capable of performing work on federal-aid highway construction projects as contractors, subcontractors and suppliers.

c. Program Management Division

- i. The Program Management Division coordinates with the EEO/DBE Section in setting the Department's overall goal. This Division is also responsible for reviewing all federally-assisted highway construction projects and, if needed to supplement race-neutral measures to achieve the Department's overall goal, establishing reasonable DBE goals for participation in each specific project. The EEO/DBE Section Staff provides assistance in this process.
- ii. In establishing a project goal, Program Management Division Head, Assistant Division Head, Staff Construction Contract Procurement Engineer, and EEO/DBE Section Head review the total estimated cost of the project, type of work to be accomplished, estimated dollar value of individual items of work with potential for DBE participation, location, and availability and capabilities of DBEs. The goal is then set as a percentage of the contract award amount expected to be committed to DBEs.
- iii. The Division is responsible for including appropriate DBE contract specifications in individual project bid proposal and contract documents. Specifications vary

depending on whether the project has no goal or has a percentage goal. This Division provides assistance in revising DBE specifications as necessary.

d. Construction Division

- i. The State Construction Engineer is responsible for enforcing DBE contract requirements on federal-aid projects. District Engineers, District Construction Engineers, and Resident Engineers (RE) are advised of monitoring responsibilities in the Resident Engineer's Manual, Section 107.08.
- ii. The State Construction Engineer also monitors the accomplishment of contract goals by contractors and initiates the enforcement of contract sanctions against contractors failing to meet contract goals and not receiving a waiver or reduction in the goals. Data on the award of subcontracts and purchase orders is maintained by the Construction Division. This information is used in setting the overall goal and tracking of payments to subcontractors.

e. Certification Committee

- i. The Certification Committee is an established panel whose function is to review information furnished by applicants for DBE status and the On-Site Review report (furnished by the DBE Supportive Services Specialist or the applicant's home state DOT) to determine if the business meets eligibility criteria for participation in the DBE Program. The Committee is composed of seven members. Five voting members are Department employees appointed by the Director, one member who votes on Airport Concession matters who is employed by one of the Arkansas Public Airports that receives USDOT funding, and a non-voting member from the FHWA-Arkansas Division. The Committee meets monthly or as necessary. Department representatives are from Legal Division, Transportation Planning and Policy Division, Internal Audit, Construction Division, and the EEO/DBE Section Head.
- ii. The Committee also reviews the DBE's annual affidavit to determine if it meets the criteria to remain eligible for the program. If the Committee determines the firm does not meet the eligible standards or if the firm fails to submit its annual affidavit, the Committee will submit to the DBE an intent to decertify.

f. Hearing Committee

- i. The Hearing Committee is an established panel whose function is to review DBE information furnished by the Certification Committee or the DBE firm to determine if the firm should remain eligible for the ACP. The current Committee consists of representatives from Legal Division, Program Management Division, and Construction Division. There is a non-voting member from the FHWA-Arkansas Division.

g. Others with DBE Program Responsibilities

- i. The Assistant Chief Engineer - Design is responsible for reviewing each consultant contract for DBE subcontracting potential and for maintaining records on total participation.
- ii. The Transportation Planning and Policy Division Head is responsible for monitoring and reporting requirements relative to DBE utilization for Federal Transit Administration projects.
- iii. Administrators, supervisors and other employees are responsible for effective implementation of the DBE policy within their respective jurisdictions.
- iv. The DBE Advisory Committee discusses the experiences encountered by DBEs in complying with the DBE Special Provisions of the contract; makes recommendations designed to strengthen the DBE Program; reviews the proposed DBE goal and methodology and provides their comments prior to the goals being publicly announced; and investigates ways to improve opportunities for participation by DBEs. The Committee consists of personnel from the Department, highway and DBE contractors, and a representative from the Arkansas-Mississippi Minority Business Council.
- v. The DBE Good Faith Effort Committee assesses a contractor's documentation of good faith efforts to achieve DBE participation goals when the information is submitted to satisfy contract bid requirements. The Committee consists of the DBELO, State Construction Engineer, Division Head of Program Management, Staff Attorney and Section Head-EEO/DBE.

Ref. 49 CFR Part 26.25

Section 3 – DBE Financial Institutions

It is the policy of the Department 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 USDOT assisted contracts to make use of these institutions. The Department has thoroughly investigated the full extent of services offered by banks owned and controlled by DBEs in the community. Based on this search there are no DBE owned banks in the State of Arkansas. The Department will investigate any new banks established in the area in the future that are owned by DBEs and use their services when feasible.

- a. Use by the State
The Department identifies any banks which are owned and controlled by socially and economically disadvantaged individuals, ascertains the services offered, and utilizes them to the greatest feasible extent.
- b. Use by the Contractors
The Department will encourage bidders and contractors to consider the services offered by banks in their communities which are owned and controlled by disadvantaged individuals,

and to utilize such services whenever feasible and beneficial. Banks owned and controlled by disadvantaged individuals will be listed in the DBE Directory.

c. Credit Toward Goals

At the present time, there is no provision which allows utilization of banks owned and controlled by disadvantaged individuals to be credited toward goal requirements of 49 CFR 26.

Ref. 49 CFR Part 26.27

Section 4 – Prompt Payment and Retainage

- a. The contractor shall pay all subcontractors their respective subcontract amount within 10 calendar days after the contractor receives payment from the Department. The payment amount shall be according to the terms of the subcontract, except that the contractor shall not require or withhold a retainage in excess of 10 percent of the amount due to the subcontractor. Amounts withheld as retainage from subcontractors must be returned within thirty days after the subcontractor's work is satisfactorily completed, whether the contractor's work is complete or not. The term "satisfactorily completed" for the purpose of this prompt return of retainage provision is defined as when: 1) the Engineer finds the subcontractor's work completed in accordance with the plans and specifications; 2) any required paperwork, including material certifications, payrolls, etc., has been received and approved by the Engineer; 3) the subcontractor does not have past due balances with suppliers for work associated with this project; and 4) the Engineer has determined the final quantities for the subcontractor's portion of the work. Delay or postponement of payment to a subcontractor may only be affected after the contractor has established good cause and received written approval from the Engineer. If the contractor fails to pay the subcontractors within the required periods, all or any portion of subsequent payments due the contractor may be withheld by the Engineer. Internal controls to expedite the determination and processing of the final quantities for the satisfactorily completed portions of the contract will be provided.
- b. Contractors must include in their subcontract agreements notice to subcontractors of their right to prompt payment and return of retainage, and provisions that require the subcontractor to pay second tier subcontractors as provided above, with the same restrictions on withholding.
- c. Failure to comply with the prompt payment provision of the contract may result in sanctions under the contract, including: refusal to issue proposals, liquidated damages, suspension of work on the project, holding of progress estimates, suspension of pre-qualification.
- d. Any delay or postponement of payment among the parties may take place only for good cause, with the Department's written approval. The explanation from the contractor must be made in writing to the Engineer.

Ref. 49 CFR Part 26.29

Section 5 – DBE Directory

The Department maintains and makes available to interested persons a directory identifying all firms eligible to participate as DBEs in the Department’s DBE Program and includes the firm’s name, address, telephone number and the type(s) of work that the firm is certified to perform as a DBE. The directory is available online at www.ardot.gov.

Ref. 49 CFR Part 26.31

Section 6 – Overconcentration

- a. If ACP determines that certified DBE firms are overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in that type of work, it will devise appropriate measures to address the overconcentration and submit them to the Operating Administration for approval.
- b. Measures may include, but are not limited to, 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 the Department has determined that non-DBEs are unduly burdened. The Department may also consider varying its use of contract goals, to the extent consistent with 49 CFR 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.
- c. If the Department determines that there is overconcentration, measures as stated immediately above will not be used until such are approved by the Operating Administration. If such approval is obtained, the measures will become part of the Department’s DBE Program.

Ref. 49 CFR Part 26.33

Section 7 – Monitoring and Enforcement

- a. Each contract the Department signs with a contractor (and each subcontract the contractor signs with a subcontractor) will include the following assurance:
 - i. It is the policy of the Department to ensure nondiscrimination in the award and administration of Department contracts and to create a level playing field on which DBEs can compete fairly. Consequently, the following applies to the contract, the DBEs listed in the contractor’s DBE Participation submittal, the DBEs that are later approved as substitutes for those listed to satisfy the contract goal, and DBEs performing on a contract, but which are not used to fulfill a portion of a DBE goal.
 - ii. The contractor, subrecipient, or subcontractor shall not discriminate on the basis of race, color, national origin, disability, age, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR 26 in the award and administration of federally-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 Department deems appropriate.

- iii. The Department's Standard Specifications for Highway Construction. Section 103.08, **Disadvantaged Business Enterprise (DBE) in Highway Construction**, applies to all contracts and is made a part of each contract that requires DBE participation.
- b. Additional Statement Required in all Department of Transportation (DOT) Financial Agreements

In addition to the preceding statements relative to policy and DBE obligation, all financial agreements, grant approvals, project approvals, etc., between the DOT and the Department shall contain the following statement: "The Department complies with all civil rights provisions of federal statutes and related authorities that prohibit discrimination programs and activities receiving federal financial assistance and therefore does not discriminate on the basis of race, color, national origin, disability, age, 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 26. The Department shall take all necessary and reasonable steps under 49 CFR 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The ACP, as required by 49 CFR 26 and 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 Department of its failure to carry out its approved program, DOT 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 statement is a part of the Project Agreement forms completed for each project approved by FHWA.

c. Department-required Contract Provisions

- i. All proposals and contracts in which DBE participation is prescribed as a condition to award of contract will contain a Special Provision to prescribe the actual percentage goal to be awarded DBEs. This Special Provision sets forth the percentage goal established for the contract and also includes a requirement for the contractor to complete a Certificate of Payments to DBEs form and submit to the Resident Engineer within 35 calendar days following the end of each estimate period. A Certificate of Final Payments to DBEs must be completed at the completion of the project to track amounts paid to each DBE.
- ii. The proposal/contract will contain the DBE Participation form. By signing the proposal and completing the DBE Participation form, the bidder gives written commitment to meet, exceed, or demonstrate good-faith efforts to meet or exceed goals and to comply with all other requirements of the contract. The DBE firm(s) named by the contractor to fulfill the goal must certify on the form that the firm will perform as shown.
- iii. The proposal/contract for all federal-aid contracts will contain a bidders list. The bidder is requested to complete the bidders list by listing every subcontractor, material supplier, or trucking firm that bid or provided quotes on any item on the project, regardless of whether the quotes were used in preparing the bidder's proposal or not.

Information to be shown includes the firm's name, address, and whether the firm is a DBE or non-DBE. The data collected from each contractor along with information on each contractor submitting a proposal for a project, will be utilized in compiling a master bidders list for the Department, as required by 49 CFR 26. The information must be provided before the Contractor will be issued proposals for future lettings.

iv. The FHWA 1273 will be included in all Federal aid contracts.

d. Subcontracting and Approval to Sublet

- i. In addition to the bidder/contractor's commitment made prior to award of a contract, the contractor is required to submit to the Department any portion(s) of the contract the contractor will sublet, identifying the specific portion(s) or item(s) to be sublet, the agreed subcontract price, and the name of the proposed subcontractor. Acknowledgment of the subcontract must be obtained from the Assistant Chief Engineer - Operations, before any subcontractor is allowed to commence any work on the project.
- ii. The Department reviews each subletting request to ensure that the proposed subcontract is in accordance with Department standards and in compliance with contract provisions. Where the particular contract contains specific goals for DBE participation, the sublet request will be reviewed for evidence of fulfillment of the contractor's DBE participation commitment on which the contract award was based.
- iii. In reviewing a sublet request for fulfillment of DBE participation, the Department will note and verify, as a minimum, the following:
 1. Review the request to subcontract and determine if the contractor has committed the items to be subcontracted to DBE participation in the contract.
 2. If the items have been committed to DBE participation in the contract, the contractor must honor this commitment or document that the DBE designated in the contract for the item(s) is unable or unwilling to perform. Adequate documentation is a letter from the DBE designated to perform the work stating the reason the DBE cannot perform. If unable to obtain such a letter from the DBE, the contractor will be required to fully explain, in writing, the reason the DBE is deemed unable to perform, efforts made by the contractor to get the DBE to perform, and other relevant facts.
- iv. When a DBE is unable or unwilling to fulfill the subcontract, the contractor will make good faith efforts to find another DBE subcontractor to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal established for the contract. The substitute DBE or any other person will not be permitted to commence work until satisfactory evidence of the original DBE's inability to perform and evidence of good faith effort to replace with another DBE, as appropriate, is submitted to and approved by the Department. The contractor will not perform the work with its own workforce in lieu of subcontracting without approval of the Department. The 49 CFR 26, Appendix A,

describes the scope and nature of "good faith efforts" as including, but not limited to, the following:

1. Soliciting through all reasonable and available means (e.g., attendance at a pre-bid meeting, advertising, and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
2. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the contractor might otherwise prefer to perform these work items with its own forces.
3. 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.
4. Negotiating in good faith with interested DBEs.
 - a. 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 name, address, and telephone number of DBEs that were contacted; 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.
 - b. A bidder using good business judgment will consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and will 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 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. Contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
5. 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 employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

6. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by the Department or contractor.
 7. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
 8. 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.
 9. In determining whether a bidder has made good faith efforts, the Department may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, there is the question of whether, with additional reasonable 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, this may be viewed, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.
- v. In making determinations of good faith efforts, the Department will consider the quality, quantity, and intensity of the different kinds of efforts that the bidder made. The efforts employed should be those that one could reasonably expect a bidder to take if the bidder was 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.
 - vi. Should the contract not have DBE goals or the items to be sublet are not committed to DBE participation, the contractor's sublet request will be reviewed by the Construction Division for compliance with other Department requirements.
- e. Subrecipients - Contract Award and Administration of Projects Under Department Jurisdiction
- i. Subrecipients, most generally cities and counties, which serve as the contracting agency for projects funded by the Surface Transportation Block Grant Program (STBGP), its set-aside programs such as the STBGP off-system Bridge Program, Transportation Alternatives Program, or Recreational Trails Program, and similar programs in which funds "flow through" the Department to the local unit, are required to follow the Department's contract award procedures when engaged in projects over which the Department has jurisdiction. The subrecipient's assignment of contract goals, its project advertising, its bid letting and contract award procedures, and its subletting procedures are subject to the Department's approval, whenever the project is under Department jurisdiction. This holds true even if the subrecipient is also a direct and/or primary recipient of DOT funds under another program not subject to Department scrutiny and thereby is required to have its own DBE Program pursuant to 49 CFR 26.

- ii. Forms and contract documents used by the subrecipient in administration of DBE contract matters in the situation(s) outlined above shall be similar in format and content to those used by the Department.

- iii. The DBEs used by the subrecipient in fulfillment of requirements of contracts over which the Department has jurisdiction must be ACP-certified.

f. Cooperation

All participants in the ACP, including, but not limited to 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 federal and state compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be grounds for appropriate action against the party involved, including but not limited to findings of noncompliance, denial or removal of certification, withholding of payments, suspension or debarment.

g. Commercially Useful Function

The regulations require DBEs to perform a commercially useful function in the work of the contract. A DBE is considered to have performed a commercially useful function when it is responsible for execution of the work of a contract and carries out the responsibilities by actually 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 material, installing (where applicable) and paying for material. The contractor is required to complete a DBE Participation form to designate DBEs to be used to fulfill the goal on the contract and the DBE must certify on the form that it will perform the work listed. The DBEs listed on this form must perform the work proposed unless prior written approval has been obtained from the Department.

h. Enforcement

Project personnel are responsible for enforcing DBE contract provisions with the same vigor as all other contract provisions. The DBE Participation form should be reviewed by project personnel to familiarize themselves with the DBEs listed and the work they are to perform on the project. Project personnel will monitor whether the DBE is performing a commercially useful function and what assistance, if any, the contractor or any other contractors are providing to DBEs. They will observe contractor and DBE activities on projects during construction and report any irregularities or questionable practices concerning DBE operations to the RE for action. REs should notify the District Construction Engineer, State Construction Engineer, and EEO/DBE Section Head of any problems relating to DBE firms.

i. Monitoring Procedures

- i. The following procedures have been developed as a means for Department field personnel to monitor compliance by contractors with DBE regulations:

1. The RE's EEO Field Inspector/Labor Compliance Officer is responsible for reporting irregularities between the contractor's DBE commitments and the actual control and performance of subcontractor DBEs at the job site. Therefore, this individual should conduct a job site inspection at the start of work by a DBE. During this inspection, it should be determined if workers are full-time employees of the DBE and equipment is owned by the DBE. A DBE should not be allowed to use employees or equipment of another company without prior approval by the Department. The RE may give approval for the DBE to use another contractor's employees or equipment for temporary use with documentation in the RE's diary. Approval of these types of arrangements should only be for emergency situations where lack of personnel or equipment would impose an unreasonable hardship on the DBE. An example would be an equipment breakdown during a concrete pour.
2. If a DBE desires to use equipment owned by another company or contractor in normal circumstances, the agreement for such usage must be a written lease agreement or purchase order. The RE will review the agreement and, if signed by both parties and otherwise in order, may give verbal approval with documentation in the diary. Continued or repetitive use of another contractor's personnel or equipment for a significant portion of a DBE's work on a project may be an indication that a commercially useful function is not being served.
3. In addition to monitoring the DBE's construction activity, occasional reviews should also be made of delivery tickets, invoices, and similarities between the DBE and other contractors in payroll format and personnel. This will enable project personnel to determine irregularities that may exist in the relationship between the DBE and contractor.
4. The RE's personnel shall monitor payments made by the contractor to the DBE to verify that payment is made within ten days after the contractor receives payment from the Department. Contractors are also required to pay DBEs the amount of any retainage withheld upon the Department's determination that the DBE's work has been satisfactorily completed. The RE's personnel shall review the information submitted by the contractor on the Certificates of Payment and verify that payments agree with current estimates paid to the contractor.
5. The DBE contract provisions will be discussed at each preconstruction conference. At this meeting, the contractor should be prepared to discuss all financial or other assistance the DBE will need, any personnel and equipment the DBE will obtain from the contractor, and how materials will be purchased. The contractor should receive prior approval for any arrangements for assistance prior to the start of work. By receiving the Department's approval of these and other arrangements that appear to conflict with DBE regulations and by performing in the approved manner, the contractor will not be found in noncompliance during the project. Additionally, the contractor and DBE subcontractors will notify the RE at the earliest moment of any problems that arise that may impede attainment of the goal. The RE will then notify the District Engineer, State Construction Engineer, and EEO/DBE Section Head.

j. Irregularities

- i. If the DBE is not performing a commercially useful function or if the contractor or another subcontractor performs any portion of the work without prior written approval by the Department, the Department may withhold payment on items of work committed to a DBE subcontractor.
- ii. Should the RE become aware of a questionable arrangement between a contractor and a DBE after work begins, the RE will verbally notify the contractor and DBE immediately. The contractor and DBE will then be notified in writing. This notification will set forth the nature of the suspected irregular activity and state that payments for the work in question will be withheld until the matter is resolved. A copy of the letter will be transmitted to the District Engineer, State Construction Engineer, and EEO/DBE Section Head. A meeting of all parties involved may be requested. The purpose of the meeting is to discuss the situation and allow the contractor and DBE the opportunity to correct any problems. The RE will document the problem(s) in the project diary. If the parties involved cannot agree on a course of action, the contractor may be found in noncompliance with contract provisions.
- iii. If a contractor is believed to be in noncompliance, a review of the situation will be conducted by the State Construction Engineer. The Engineer may request, through the EEO/DBE Section Head, that a verification review be performed by the External EEO Coordinator. The Coordinator will review project and business records and conduct interviews to determine whether the DBE was performing a commercially useful function on the project. A report and recommendation will be provided to the State Construction Engineer who will review the report and make a determination of commercially useful function.
- iv. If it is determined that a commercially useful function has been served, payments previously withheld will be released. If it is determined the DBE did not perform a commercially useful function, the contractor must submit a corrective action plan to achieve the goal. Payments for the affected work will continue to be withheld until the contractor has satisfied the contract goal or may, with the concurrence of the State Construction Engineer, be released upon approval of the corrective action plan.

k. Achievement of Goals

- i. The contractor will submit a Certification of Actual Payments to DBEs each estimate period a DBE performs work. This form must be submitted to the RE within 35 days following the end of the estimate period. The RE should compare the submittal to current estimate data and enter the payment data into the Site Manager Access Reports System (SARS) within 10 days of receipt. A Certificate of Payment to DBEs will be submitted by the contractor for each federal-aid project regardless of whether a DBE goal had been established.
- ii. A Final Certificate of Payment to DBEs will be submitted by the contractor for each project regardless of whether a DBE goal had been established. This form will show the total amount paid to each DBE subcontractor and work performed by a DBE prime

contractor. The certification is submitted to the RE who will attach it to the original copy of the final estimate.

- iii. If the goal was not met, an explanation for the deficiency must be shown. Failure to meet the goal, unless acceptable good-faith efforts exist, will result in decreasing the final contract amount by the dollar amount of the unmet portion, or other appropriate action.

l. Counting and Crediting DBE Participation Toward Goals

- i. When a DBE participates in a contract, only the value of the work actually performed by the DBE is counted toward the contract goal.
- ii. Only ACP-certified DBEs may be utilized in fulfillment of contract goals.
- iii. The entire amount of that portion of a contract or subcontract that is performed by the DBE's own forces will be counted, including supplies and materials purchased or equipment leased by the DBE (except supplies, materials and equipment the DBE subcontractor purchases or leases from the contractor or its affiliates).
- iv. 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, count toward the goal, provided those fees are determined to be reasonable and not excessive compared with fees customarily allowed for similar services.
- v. When a DBE performs as a participant in a joint venture, the portion of the total dollar value of the contract equal to the clearly defined portion of the work that the DBE performs with its own forces may be counted toward the goal.
- vi. Only expenditures to a DBE contractor that performs a commercially useful function may be counted toward a DBE goal.
- vii. The contractor may count toward the DBE goal only payments made to DBEs for work or services performed or material furnished after the DBE has been approved, either on the list in the contractor's original participation submittal or later as a substitute, and an executed subcontract or purchase order has been acknowledged by the Department. Payments made to a DBE for work, services, or materials performed or furnished prior to approval and acknowledgment of a subcontract will not be counted toward the DBE goal.

m. Substitution or Replacement of DBEs

- i. Substitution or replacement of a DBE will only be permitted after award and execution of a contract.
- ii. The DBE subcontractor or an approved substitute DBE can be terminated only with the Department's written consent for good cause that includes the following; the DBE fails or refuses to execute a written contract; fails or refuses to perform the work of its

subcontract consistent with normal industry standards; fails to meet reasonable, nondiscriminatory bond requirements; bankrupt, insolvent, or exhibits credit unworthiness; ineligible to work because of suspension and debarment proceedings; not a responsible contractor; voluntarily withdraws from the project and provides written notices; ineligible to receive DBE credit for the type of work required; owner dies or becomes disabled and is unable to complete its work; or documentation of good cause that compels termination. Good cause does not exist where refusal to perform the work of the subcontract is a result of bad faith or discriminatory action of the prime contractor. The prime contractor must give written notice of the proposal, including the reason for the request to the DBE with a copy to the Department. The DBE has up to five days to respond. The notice period may be reduced if required by public necessity (safety).

- iii. If a DBE subcontractor is unable or unwilling to perform the work of the subcontract, the contractor must make good faith efforts to find another DBE to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work (not necessarily the same work) under the contract as the terminated DBE, to the extent needed to meet the goal established in the contract.
 - iv. The contractor must submit to the Resident Engineer a written plan to achieve DBE participation equal to or exceeding the goal or documentation of good faith efforts.
 - v. If a contractor fails to comply with this section, appropriate contract sanctions may be taken, including but not limited to: holding of progress payments, refusal to issue proposals, suspension of work on the project, or suspension of pre-qualification.
 - vi. If at the completion of the project, the contractor has failed to meet the DBE goal and has not demonstrated good faith efforts to meet the goal, the contractor will be assessed liquidated damages for the difference between the contract goal and the actual DBE participation achieved. The Department shall deduct the amount from subsequent progress or final estimate payments. In the event insufficient amounts remain for the deduction of the damages, the Department may make a claim against the contractor's bond, suspend the contractor, withhold further proposals, or suspend pre-qualification.
 - vii. In those instances, when the goal is not met due to a change in quantity which occurs through no fault of the contractor but due to Department decisions, change orders or design, a brief explanation must be made by the contractor on the Final Certification of Payments to DBEs prior to submission to the RE. The RE will review the explanation and if satisfactory, will concur.
- n. Overall Goal – Highway Funds
- i. The overall goal will be based on the availability of DBE firms relative to the availability of all contractors (i.e., certified DBEs, subcontractors who have competed on projects to the extent such information is available, and all contractors who have bid on projects).

- ii. A two-step process is required for setting the overall goal. The first step is to establish a base figure for the relative availability of DBEs. Data will be accumulated by federal fiscal year for use in analyzing the number of firms providing quotes and the dollar value of work performed by both DBE and non-DBE firms. The second step is to adjust the base figure based on factors including past participation and evidence from disparity studies.
 - iii. The Department will estimate the percentage of DBE firms available to perform work on upcoming federal-aid projects relative to the available pool of all contractors. This percentage will be the baseline annual goal for DBE participation.
 - iv. The available pool of all contractors will be derived from a master bidders' list maintained by the Department. This is a list of all firms attempting to participate on federally-assisted projects. When a prime contractor submits a formal bid on a project, the contractor is required to provide a list of all subcontractors, truckers and/or material suppliers that bid or provided quotes on any item in the project, regardless of whether or not the quotes were used in preparing the proposal.
 - v. In order to determine the proposed overall goal, adjustments may be made to the baseline goal considering circumstances affecting the contractors competing or changes in the volume and distribution of contract dollars. The Department will utilize information on the capacity of DBE and non-DBE firms and historical dollar volume of DBE participation in federal-aid contracts. Adjustments will be made for situations such as DBE firms which graduate from the ACP, DBE firms no longer eligible to participate in the program, and other factors as found in 49 CFR 26.45(d). If data is being used from years administered under prior regulations, which includes anything before 2000, adjustments will be made to account for the means of counting participation toward goals under the new regulations (i.e., second-tier subcontracts with non-DBE firms, DBE prime contractors executing subcontracts with non-DBE firms, and other previously counted items no longer eligible for participation goals will be discounted).
 - vi. Due to the fact that the federal-aid construction program and DBE participation are dynamic, the Department will monitor the data available on an ongoing basis. Every three years, the overall goal will be developed based on the latest data available and include consultation with minority, women and general contractors concerning the availability of DBE and non-DBE businesses, effects of discrimination on opportunities for DBEs, and efforts to establish a level playing field for the participation of DBEs.
 - vii. If the Department fails to meet its overall DBE goal at the end of the Federal Fiscal Year (FFY), the Department will analyze the reasons for the shortfall and establish specific steps and milestones to correct the problems in order for the Department to meet its goal in the next FFY. The Department will submit its analysis and corrective actions plan to FHWA within 90 days after the end of the FFY.
- o. Attaining the Overall Goal

- i. The Department will meet the maximum feasible portion of the overall goal through race-neutral means of facilitating DBE participation. Upon determination of the proposed overall goal, the Department will determine what part of the goal should be met through race-neutral means. Race-neutral includes prime contracts awarded to DBEs through competitive bidding, subcontracts awarded to DBEs on projects without DBE goals, and subcontracts awarded to DBEs not used to meet a project goal. The remainder of the proposed overall goal which is not expected to be met through race-neutral DBE participation should be met through race-conscious means (i.e., setting DBE participation goals for individual contracts).
 - ii. In addition, the Department will utilize the means prescribed by 49 CFR 26.51 to maximize the portion of the goal to be met through race-neutral DBE participation. Some means included in 49 CFR 26.51 are providing technical assistance and other services to DBEs; ensuring wide distribution of the DBE directory to prime contractors; and providing services to help DBEs develop and improve their businesses. These services are available through the Department's DBE Supportive Services Program.
- p. Project Goals
- i. As required by 49 CFR 26, the Department will meet that portion of the overall goal remaining after deducting the portion to be achieved through race-neutral means with race-conscious means. Race-conscious includes DBE goals on those federally-assisted projects with subcontracting opportunities.
 - ii. The Program Management Division analyzes each federally-assisted highway construction project following the preparation of plans, specifications and engineering cost estimates. Each line-item of work in the estimate is evaluated for its potential to support DBE subcontracting. The results of such line-item analysis, plus the anticipated availability of DBEs capable of performing the work and the location, type and size of the project, are the basis for prescribing a DBE goal and percentage value. The Program Management Division Head, Assistant Division Head, Staff Project Development Engineer, and the Section Head – EEO/DBE will review this information and recommend the project goal before it is specified in the Special Provisions of the contract.
 - iii. Contracts awarded to DBE contractors and subcontracts committed to DBE subcontractors in each letting will be tracked to determine the amount of the goal achieved through race-neutral and race-conscious means. This information will be made available to the Program Management Division to assist in determining the amount of race-conscious goals necessary to achieve the overall goal.
 - iv. If, during the year, it is determined that the overall goal will be exceeded, contract goals will be reduced or eliminated to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If it is determined that the Department will fall short of its overall goal, then appropriate modifications will be made in the use of race-neutral and/or race-conscious measures to best achieve the goal.

Section 8 – Fostering Small Business

In order to foster small business participation, the Department developed a Small Business Provision (SBP), as required by 49 CFR Part 26.39. A small business is defined as an independent for profit business, which performs a commercially useful function and has total gross receipts of not more than \$28.48 million (over a three-year average) and not more than \$1.32 million in personal net worth.

a. Program Components:

i. Definition of Small Business:

A Small Business is defined as an independent business whose viability does not depend on its relationship with another firm or firms. It must be a for profit firm, which performs a commercially useful function and is ready, willing and able to perform work on U.S. DOT assisted contracts. The firm must also have total gross receipts of **not more than** \$28.48 million (over three-year average) and **not more than** \$1.32 million in personal net worth. Firms must be established businesses with sufficient assets and resources to perform the work of their contracts.

ii. Contract Requirements:

1. Facilitate competition
2. Eliminate obstacles
3. Unbundling of contracts
4. Race-neutral small business set-aside
5. Multi-year design build contract

iii. Certification Requirements:

1. Complete verification application for SBP and provide all requested supporting documentation.
2. Once approved, the organization will be added to the on-line SBP list with all organization codes listed.

b. Goal:

The Department's program goal award amount will be \$4-6 million. Set aside projects will be utilized as needed to achieve program goals.

All DBE's will automatically be considered on the SBP list, but all Small Businesses must apply and meet all requirements for the Department's program in order to participate on these contracts. There will be a separate listing of all certified Small Businesses and all certified DBE's will be included in that list. Department codes will also be listed with the

business. Each firm must perform a commercially useful function in their specific work category.

Selection of projects will include, but are not limited to the location of the project and number of firms available that perform the scope of work involved in the project. The projects will be in areas where there is competition.

In order for a firm to bid on a Small Business set-aside project the firm must submit an application and the firm's tax returns for the past three years. The certified firms are required to submit annual affidavits to affirm the status of their business.

Presentations at various meetings will be conducted as needed in order to share the program element. The program requirements will be listed on the Department's website and other publications.

- c. The Department is responsible for implementing and monitoring the SBP program. Site Manager will be used for tracking participation.
- d. An on-line listing of all SBP participants will be posted and updated four-weeks prior to every letting.

Ref. 49 CFR Part 26.39

**ARKANSAS DEPARTMENT OF TRANSPORTATION
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

Chapter III – Goals, Good Faith Efforts, and Counting

Section 1 – Overall Goals

- a. The Department submits its overall goal to DOT on August 1, on a triennial basis. The next submission of the Departments' FHWA Goal Setting Methodology is due August 1, 2019 for the 2020-2022 fiscal years. The next submission of the Departments' FTA Goal Setting Methodology is due August 1, 2020 for the 2021-2023 fiscal years.

Prior DBE Goal setting methodology can be accessed online at: www.ardot.gov.

Ref. 49 CFR Part 26.45

Section 2 – Shortfall Analysis

- a. If the awards and commitments reported on the Uniform Report of Awards and Commitments and Payments at the end of any federal fiscal year are less than the overall goal applicable to that federal fiscal year, the Department will do the following:
 - i. Analyze the reasons for the difference between the overall goal and the actual achievement;
 - ii. Establish steps and milestones to correct the deficiencies identified in order to meet the goal in the new federal fiscal year; and
 - iii. This analysis and corrective actions will be submitted to the Operating Administration within 90 days of the end of the federal fiscal year for approval.

If the Uniform Report of DBE Awards or Commitments and Payments or other information demonstrates that current trends make it unlikely that the Department will achieve DBE awards and commitments that would be necessary to allow the Department to meet the overall goal at the end of the federal fiscal year, the Operating Administration may require the Department to make further good faith efforts, such as by modifying the race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the federal fiscal year.

- b. If the awards and commitments reported on the Uniform Report of Awards and Commitments and Payments at the end of any federal fiscal year for FTA projects is less than the overall goal applicable to that federal fiscal year, the Department will do the following:
 - i. Analyze the reasons for the difference between the overall goal and the actual achievement; and

- ii. Establish steps and milestones to correct the deficiencies identified in order to meet the goal in the new federal fiscal year.

The Department will retain the analysis and correction action on file for three years.

Ref. 49 CFR Part 26.47

Section 3 – Transit Vehicle Manufacturers (TVM)

The Department 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, the Department may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

The Department will be required to submit, within 30 days of making an award, the name of the successful bidder for transit vehicles and the total dollar value of the contract to the appropriate FTA channels.

Ref. 49 CFR Part 26.49

Section 4 – Project Goals

- a. The Department will meet the maximum feasible portion of the overall goal through race-neutral means of facilitating DBE participation. Upon determination of the proposed overall goal, the Department will determine what part of the goal should be met through race-neutral means. Race-neutral includes prime contracts awarded to DBEs through competitive bidding, subcontracts awarded to DBEs on projects without DBE goals, and subcontracts awarded to DBEs not used to meet a project goal. The remainder of the proposed overall goal which is not expected to be met through race-neutral DBE participation should be met through race-conscious means (i.e., setting DBE participation goals for individual contracts).
- b. In addition, the Department will utilize the means prescribed by 49 CFR 26.51 to maximize the portion of the goal to be met through race-neutral DBE participation. These include providing technical assistance and other services to DBEs; ensuring wide distribution of the DBE directory to prime contractors; and providing services to help DBEs develop and improve their businesses. These services are available through the Department's DBE Supportive Services Program.
- c. An apparent successful bidder shall furnish the DBE participation form(s). This documentation may be submitted with the bid or within seven (7) calendar days after the bid opening. The seven days shall be reduced to five (5) days beginning January 1, 2017. All contractors will be notified of the change via the Notice to Contractors document which is sent by postal mail and posted on the Department's website.

Ref. 49 CFR Part 26.51

Section 5 – Good Faith Efforts

- a. Bid openings will be conducted in accordance with the Department's established procedures.
- b. For contracts having DBE goals, the apparent successful bidder shall submit to the Department (either with the bid or within five calendar days after the conditional award of the contract) the proposed participation by Disadvantaged Business Enterprises. This information may be submitted on the form provided in the proposal (DBE Participation form) or other form specified by the Arkansas Highway Commission. The bidder shall list the names and addresses of the DBE subcontractors to be used to satisfy the percentage goal. The DBE's certification by the ACP must be fully in effect and without reservation at this time. The bidder shall also provide an itemized description of the work each DBE subcontractor is to perform, the dollar value of each item to be included in the DBE subcontract, written documentation of the bidder's commitment to use a DBE subcontractor to meet a contract goal, and written confirmation from the DBE that it is participating in the contract as provided in the contractor's commitment. An apparent low bidder intending to use a DBE supplier, manufacturer, lessor, or non-construction service provider in or toward fulfillment of a contract goal shall indicate such on the DBE Participation form, giving the name of the supplier, lessor, etc.; type of service; total value of service; and creditable value of the service.
- c. Only the value of work actually performed by a DBE will be counted toward the DBE goal. If the apparent successful bidder is a certified DBE, the bidder must propose participation in the contract by DBEs to achieve the goal. Work actually performed by the DBE bidder will be credited toward the goal. If a DBE subcontractor is proposed to fulfill a goal, only the work actually performed by the DBE subcontractor will be counted toward the goal. Any work the DBE subcontractor further subcontracts to a non-DBE firm will not count toward a goal, but work subcontracted to another DBE will.
- d. The overall DBE goal shall be credited for the federal share of work performed by DBEs on the contract.
- e. After a conditional award is made and the apparent successful bidder has submitted the required DBE information, the Department will determine the adequacy of the bidder's efforts to meet the contract goal, as outlined above. If those requirements are met, the conditional status will be removed and the contract will be forwarded to the bidder for execution.
- f. The bidder must show that it took all necessary and reasonable steps to achieve a DBE goal 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. **Only those efforts made by the bidder to obtain DBE participation prior to the letting will be considered in the evaluation of good faith efforts.** If the Department accepts a good faith effort, the contractor is expected to continue efforts throughout the life of the project to attain the DBE participation goal and to document such efforts.

- g. If it is determined that the goal was not met or a good faith effort made, the bidder will be notified and provided an opportunity for administrative reconsideration prior to the execution of the contract. As part of the reconsideration, the bidder may provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. A written request for administrative reconsideration must be submitted within two days to the Deputy Director and Chief Engineer, P. O. Box 2261, Little Rock AR 72203, (501) 569-2214.
 - i. The decision on the reconsideration will be made by the Deputy Director and Chief Engineer and the bidder will have the opportunity to meet with the Deputy Director and Chief Engineer in person to discuss the issues.
 - ii. The bidder will be provided a written decision on the 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 of the reconsideration is not administratively subject to appeal to the U.S. Department of Transportation.
- h. If the bidder to whom the contract is conditionally awarded refuses, neglects, or fails to meet the DBE goals or to furnish acceptable documentation of efforts to meet these goals, the bidder will not be provided a contract for execution, and the proposal guaranty filed with the bid shall become the property of the Arkansas Highway Commission, not as a penalty, but as liquidation of damages to the ACP.
- i. The DBE staff with assistance from the Construction Division, if necessary, will review each DBE Participation form to ensure each DBE listed is currently certified to perform the items of work indicated, the negotiated price is reasonable, and the value of the work to be performed fulfills the prescribed contract goal.
- j. Determination of apparent low bidder, acceptability of offered price, and/or rejection of bids and readvertisement will be governed by existing standards of the Department. All bid conditions having been met, the Department will proceed with award of the contract according to normal procedures.
- k. The contractor's fulfillment of DBE obligations and commitments will be monitored throughout the life of the contract by review of requests to subcontract, compliance reviews conducted on the project, and reports of actual payments to DBEs.
- l. The contractor awarded the contract shall make available upon request a copy of all DBE subcontracts.

Ref. 49 CFR Part 26.53

Section 6 – Substitution or Replacement of DBEs

- a. Substitution or replacement of a DBE will only be permitted after award and execution of a contract.
- b. The DBE subcontractor or an approved substitute DBE can be terminated only with the Department's written consent for good cause that includes the following; the DBE fails or

refuses to execute a written contract; fails or refuses to perform the work of its subcontract consistent with normal industry standards; fails to meet reasonable, nondiscriminatory bond requirements; bankrupt, insolvent, or exhibits credit unworthiness; ineligible to work because of suspension and debarment proceedings; not a responsible contractor; voluntarily withdraws from the project and provides written notices; ineligible to receive DBE credit for the type of work required; owner dies or becomes disabled and is unable to complete its work; or documentation of good cause that compels termination. Good cause does not exist where refusal to perform the work of the subcontract is a result of bad faith or discriminatory action of the prime contractor. The prime contractor must give written notice of the proposal, including the reason for the request to the DBE with a copy to the Department. The DBE has up to five days to respond. The notice period may be reduced if required by public necessity (safety).

- c. If a DBE subcontractor is unable or unwilling to perform the work of the subcontract, the contractor must make good faith efforts to find another DBE to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work (not necessarily the same work) under the contract as the terminated DBE, to the extent needed to meet the goal established in the contract.
- d. The contractor must submit to the Resident Engineer a written plan to achieve DBE participation equal to or exceeding the goal or documentation of good faith efforts.
- e. If a contractor fails to comply with this section, appropriate contract sanctions may be taken, including but not limited to: holding of progress payments, refusal to issue proposals, suspension of work on the project, or suspension of pre-qualification.
- f. If at the completion of the project, the contractor has failed to meet the DBE goal and has not demonstrated good faith efforts to meet the goal, the contractor will be assessed liquidated damages for the difference between the contract goal and the actual DBE participation achieved. The Department shall deduct the amount from subsequent progress or final estimate payments. In the event insufficient amounts remain for the deduction of the damages, the Department may make a claim against the contractor's bond, suspend the contractor, withhold further proposals, or suspend pre-qualification.
- g. In those instances, when the goal is not met due to a change in quantity which occurs through no fault of the contractor but due to Department decisions, change orders or design, a brief explanation must be made by the contractor on the Final Certification of Payments to DBEs prior to submission to the Resident Engineer. The Resident Engineer will review the explanation and, if satisfactory, will concur.

Ref. 49 CFR Part 26.53

Section 7 – Counting and Crediting DBE Participation Toward Goals

- a. When a DBE participates in a contract, only the value of the work actually performed by the DBE is counted toward the contract goal.
- b. Only ACP-certified DBEs may be utilized in fulfillment of contract goals.

- c. The entire amount of that portion of a contract or subcontract that is performed by the DBE's own forces will be counted, including supplies and materials purchased or equipment leased by the DBE (except supplies, materials and equipment the DBE subcontractor purchases or leases from the contractor or its affiliates).
- d. 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, count toward the goal, provided those fees are determined to be reasonable and not excessive compared with fees customarily allowed for similar services.
- e. When a DBE performs as a participant in a joint venture, the portion of the total dollar value of the contract equal to the clearly defined portion of the work that the DBE performs with its own forces may be counted toward the goal.
- f. Only expenditures to a DBE contractor that performs a commercially useful function may be counted toward a DBE goal.
- g. The contractor may count toward the DBE goal only payments made to DBEs for work or services performed or material furnished after the DBE has been approved, either on the list in the contractor's original participation submittal or later as a substitute, and an executed subcontract or purchase order has been acknowledged by the Department. Payments made to a DBE for work, services, or materials performed or furnished prior to approval and acknowledgment of a subcontract will not be counted toward the DBE goal.
- h. The dollar value of work performed under a contract with a firm after it has ceased to be certified will not be counted toward the overall goal.
- i. The participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligation on a contract will not count until the amount being counted has actually been paid to the DBE.

Ref. 49 CFR Part 26.55

Section 8 – Commercially Useful Function

- a. A commercially useful function is considered to be performed when a DBE is responsible for execution of the work of a contract and carries out the responsibilities by actually performing, managing, and supervising the work involved. 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, installing (where applicable), and paying for the material. To determine whether a DBE is performing a commercially useful function, the amount of work subcontracted, industry practices, and other relevant factors shall be evaluated on a project by project basis.
- b. No credit will be given toward the DBE goal for any subcontracting arrangement which is contrived to artificially inflate DBE participation. Of particular concern is the interjection of DBE middlemen or passive conduits which are inconsistent with standard industry practices or which serve no commercially useful function and arrangements in

which a DBE subcontractor is acting essentially as a broker. 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 in order to obtain the appearance of DBE participation. Regardless of whether an arrangement between the contractor and a DBE represents standard industry practice, where such an arrangement erodes the ownership or control of the DBE or does not meet the commercially useful function requirement, the contractor shall receive no credit toward the DBE goal.

- c. Consistent with normal industry practices, a DBE may enter into subcontracts. A DBE subcontractor will be deemed to have performed a commercially useful function and the contractor will be allowed DBE goal credit for the work actually performed by the DBE when a DBE subcontractor performs at least 30 percent of the subcontract. This work shall be performed by the DBE's normal workforce.
- d. Determinations of commercially useful function
 - i. When it is determined or presumed that a DBE is not or would not be performing a commercially useful function and the services offered by the DBE are therefore deemed not creditable toward contract goals, the DBE may present evidence to the Department to rebut that presumption.
 - ii. The Department's decision on the rebuttal is subject to review by the U.S. Department of Transportation. During the period pending decision on such rebuttal, the Department's determination regarding non-eligibility for contract goal credit remains valid, and the filing of the rebuttal shall in no manner serve to delay the letting or award of any contract.
- e. Should the contractor fail to meet the DBE goal prescribed in the special provisions, the contractor's good faith efforts will be evaluated. If the contractor's good faith efforts are unacceptable, a sum in like amount to the unmet portion of the goal will be withheld from the final pay estimate.

Ref. 49 CFR Part 26.55

Section 9 – Counting Expenditures to DBEs for Procurement of Supplies, Materials and Services Toward Contract Goals

- a. A contractor may count toward a DBE goal those expenditures for materials and supplies obtained from DBE suppliers and manufacturers, provided the DBEs assume the actual contractual responsibility for the provision of the materials and supplies.
- b. To be counted toward fulfillment of a contract goal, the following applies:
 - i. Expenditures must be to a DBE currently certified by the ACP as a bona fide DBE in accordance with Chapter IV of this program and performing as an independent entity.
 - ii. The DBE must perform a commercially useful function consistent with normal industry practice for which the credit is given. The DBE must be principal party and

signatory to the agreement and not merely the salesperson or agent in the employ of the supplier, manufacturer, or service provider.

- iii. The work or service provided by the DBE must be clearly identified with a federally assisted project and as a discrete portion of the contract work, not simply a service necessary as part of the contractor's general business overhead.
- c. Capital expenditures for tools, equipment, vehicles, field office furniture, and similar property items, even though such items are used on the project and purchased from DBEs, are not creditable toward contract DBE goals. Lease expenditures may be eligible for credit toward contract goals (see paragraph g of this Section).
- d. Expenditures for materials and supplies obtained from DBE suppliers and manufacturers for use in the contractor's general operations are not creditable in whole or part toward contract goals, even though a portion of such items may be used in the administration and/or execution of a project. Examples in this category of expenses are stationary and office supplies, janitorial supplies, health and safety supplies, salvageable and reusable signs, bulletin boards, portable buildings, etc. This does not prohibit the contractor from subcontracting out the "Signs and Barricades" items of a contract to a DBE, in which event the subcontract would count toward the contract goal.
- e. Expenditures for lease of a particular piece or pieces of equipment from DBEs for exclusive use on the project for which DBE participation is to be claimed may be counted 60 percent toward contract goals, provided the DBE actually has ownership or control of the equipment and is considered a regular dealer.
- f. Trucking Services
 - i. Expenditures to and/or use of DBEs to perform trucking services to the particular project will be counted in the following manner toward contract goals, if these services are performed under an agreement (purchase order, subcontract, etc.) between the contractor and the certified DBE providing these services on a specific project.
 - ii. The DBE must be responsible for the management and supervision of the entire trucking operation for the items on its subcontract or purchase order, including scheduling, providing sufficient trucks to accomplish the haul, and coordinating the work with the contractor. There cannot be a contrived arrangement for the purpose of meeting DBE goals.
 - iii. The DBE must own and operate at least one fully licensed, insured, and operational truck used on the project when hauling operations are in progress.
 - iv. 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. The DBE will receive credit for the total dollar value of the transportation services attributable to no more than twice the number of trucks owned by the DBE and leased from another DBE firm. Long-term lease arrangements are an acceptable form of "ownership."

- v. DBEs that haul materials, which are not included in an approved materials estimate, to a contractor's stockpile and are not immediately incorporated into the project may be paid by the prime contractor or first-tier subcontractor, as the case may be, prior to the material being incorporated into the project. However, the prime contractor will not receive payment from the Department until the materials from the stockpile are incorporated into the project. The amount credited toward the DBE goal will be limited to the final contract item amount for the project.

g. Lease Agreements

- i. 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.
- ii. The DBE may also lease trucks from a non-DBE firm or owner-operator. The total value of the transportation services provided by the non-DBE firm or owner-operator will be credited to the DBE so long as the number of trucks provided by the non-DBE or owner-operator does not exceed the number of trucks owned by the DBE or leased by the DBE from other DBE firms. For trucks leased by the DBE in excess of the total number of trucks owned by the DBE or leased by the DBE from other DBE firms, the DBE will receive credit only for the fees or commissions it receives as a result of the lease arrangements for the excess trucks.
- iii. The DBE may lease trucks under a long-term lease arrangement from independent equipment leasing companies. An "independent equipment leasing company" is defined as a company that leases equipment to the public. A "long-term lease" is defined as a twelve-month or longer lease period. The drivers, fuel, minor maintenance responsibility, and full control of the leased trucks must rest solely with the DBE owner, and this must be stipulated in the lease agreement. Drivers must be employees of the DBE, subject to tax withholding, worker's compensation requirements, unemployment, etc. Leased trucks must display the name and identification number of the DBE. The DBE will receive full credit for the full value of the transportation services provided by trucks leased and operated in this manner. A DBE supplier (regular dealer) must utilize this type of lease arrangement to supplement distribution equipment owned by the DBE firm to receive credit for transportation services.
- iv. All lease agreements 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. A copy of each lease agreement must be provided to and approved by the RE before the truck begins hauling. The agreement must reflect the name of the lessor, cab card registration numbers of all leased trucks, the description of the truck(s), the amount and terms of the lease and method of payment (hour, ton, cubic yard, or number of loads hauled), and, if owner-operator, his/her Social Security number. The lease agreement(s) will be maintained in the office of the RE.

- v. The apparent low bidder should include only the value of the transportation services to be performed by DBEs, plus the value of the fee or commission paid to non-DBE firms for hauling services.
 - vi. Counting participation for trucking is determined by application of Section 9f.
- h. Suppliers, manufacturers, and other providers of services
- i. A contractor may count 100 percent of the expenditures to a DBE manufacturer. For purposes of this program, a “manufacturer” is a business that operates or maintains 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.
 - ii. The contractor may count 60 percent of its expenditures to DBE suppliers that are regular dealers. A regular dealer is a firm that owns, operates, or maintains 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 for incorporation into the work are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the business must be an established, regular business that engages in, as its principal business and under its own name, the purchase and sale or lease of the products in question. A trucking firm or owner-operator will not be considered a supplier, nor will a supplier be considered a trucking firm.
 - iii. A regular dealer in such bulk items as asphalt, steel, cement, gravel, petroleum products, or stone must own or lease, and operate a refinery, pit, quarry, concrete plant, or other such facility that sells materials to the public. A person or firm may be a regular dealer in petroleum products or asphalt binder without owning, operating, or maintaining a place of business where these items are bought, kept in stock, and regularly sold to the public, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers’ own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
 - iv. In order for a firm to qualify as a DBE supplier of metal and/or concrete pipe, the firm must also fabricate the pipe. Metal or concrete pipe is specialty pipe which is project-specific and is inspected during the manufacturing process. This arrangement provides for no warehousing of metal or concrete pipe, and essentially requires the manufacturer to be the supplier. Merely ordering pipe from the fabricator, and in turn selling it to contractors is not consistent with normal industry practice. Contractors normally purchase pipe directly from the manufacturer, thus eliminating the middleman. Supplying metal or concrete pipe is viewed as brokering, and is considered inconsistent with DBE program requirements.
 - v. Packagers, brokers, manufacturers’ representatives, or other persons who arrange or expedite transactions are not regular dealers.

- vi. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, will count toward DBE goals, provided the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services. None of the cost of the materials and supplies will count toward the goal, however.
 - vii. Credit will be allowed toward a DBE goal for 100 percent of the 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 federally-funded contract, provided the fee is determined to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- i. Identify on payment logs and proof of DBE utilization
- i. The contractor will be required to furnish the Department, by estimate period, a report certifying to the actual payments made to DBE contractors, suppliers, manufacturers, and/or non-construction services in fulfillment of the DBE goal. These certificates are to be submitted by the contractor to the Resident Engineer and entered into the Site Manager Access Reports System (SARS) by residency staff.
 - ii. The contractor will be required to furnish the Department a final report certifying to the total actual payment(s) made to DBE subcontractors, suppliers, manufacturers and/or non-construction services rendered by DBEs in fulfillment of the contractor's goal commitment on the project. This certificate is to be submitted by the contractor through the Resident Engineer. It will be attached to the original copy of the final estimate. The certificate also requires an explanation from the contractor for failure to meet the specified goal percentage.

Ref. 49 CFR Part 26.55

**ARKANSAS DEPARTMENT OF TRANSPORTATION
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

Chapter IV – DBE Certification Standards

Section 1 – Burdens of Proof

- a. In determining whether to certify a firm as eligible to participate as an ACP DBE, the following standards apply:
 - i. The firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements of 49 CFR 26 concerning group membership or individual disadvantage, business size, ownership, and control.
 - ii. There is a rebuttable presumption that members of designated groups identified in 49 CFR 26.67(a) are socially and economically disadvantaged. This means that members of those groups do not have the burden of proving social and economic disadvantage. In order to obtain the benefit of the rebuttable presumption, individuals must submit a signed, notarized statement that they are a member of one of the groups listed in Section 26.67(a). Applicants are obligated to provide information concerning their economic disadvantage (*see 49 CFR Part 26.67*)
 - iii. Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving, by a preponderance of the evidence, that they are socially and economically disadvantaged.
 - iv. Determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) must be made by considering all the facts in the record, viewed as a whole.

Ref. 49 CFR Part 26.61

Section 2 – Group Membership

- a. If the Department has a well-founded reason to question whether an individual is a member of a group that is presumed socially and economically disadvantaged, requires the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group.
- b. The Department will provide the individual a written explanation of its reasons for questioning his or her group membership and a written request for additional evidence.
- c. In implementing this section, the Department must take special care to ensure that the Department does not impose a disproportionate burden on members of any particular designated group. Imposing a disproportionate burden on members of a particular group

could violate 49 CFR Part 26.7(b) and/or Title VI of the Civil Rights Act of 1964 and 49 CFR Part 21.

- i. To make such a determination, consideration will be given to whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. The applicant may be required to produce appropriate documentation of group membership.
- ii. An individual claiming to be a member of a presumed group who is determined not to be a member of a designated disadvantaged group, must demonstrate social and economic disadvantage on an individual basis.
- iii. Determinations regarding group membership are subject to the Department's appeal procedures.

Ref. 49 CFR Part 26.63

Section 3 – Business Size Determination

- a. The Certification Committee must determine whether an applicant firm (including its affiliates) is an existing small business as defined by Small Business Administration (SBA) standards. If the applicant does not meet the small business standards, it is not eligible to participate as a DBE under 49 CFR 26, and no further determinations need be made.
- b. In determining whether a business is considered small, the standards established by the Small Business Administration in 13 CFR 121 appropriate to the type(s) of work the firm seeks to perform in U.S. DOT-assisted contracts will be applied. Currently, the following business size factors apply:
 - i. Construction: Average annual gross receipts for the three preceding fiscal years shall not exceed \$28.48 million.
 - ii. Special Trade Contractor: Average annual gross receipts for the three preceding fiscal years shall not exceed \$15 million.
 - iii. Land subdivision (Engineering, Architectural, and Surveying Services): Average annual gross receipts for the three preceding fiscal years shall not exceed seven million.
 - iv. Suppliers of Manufactured Goods: The business, including its affiliates, shall not have more than 500 employees.
 1. A firm is not eligible if the firm (including affiliates) has had average annual gross receipts, as defined by SBA regulations (13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$28.48 million. This figure is adjusted by the Secretary of Transportation from time to time.

2. Necessary evidence to determine business size includes the gross receipts of the firm and its affiliates for the last three years.
3. “Affiliates” is defined in 13 CFR 121.103 as: “Concerns are affiliates of each other when either directly or indirectly: (a) one concern controls or has the power to control the other, (b) a third-party (or parties) controls or has the power to control both, or (c) an identity of interest between or among parties exists such that affiliation may be found.” In determining whether affiliation exists, consideration shall be given to such factors as common ownership, common management and contractual relationships.

Ref. 49 CFR Part 26.65

Section 4 –Social and Economic Disadvantage Determination

a. Presumption of Disadvantage

- i. The Department must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and other minorities found to be disadvantaged by the SBA, are presumed to be both socially and economically disadvantaged. Applicants must submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged. Definitions of these groups can be found in Appendix C.
- ii. Each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification must certify that he or she has a personal net worth that does not exceed \$1.32 million.
- iii. The Department must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation, through the submission of Form No. A-1146, without change or revision. Where necessary, the Department in order to accurately determine an individual’s personal net worth, on a case-by-case basis, may require additional financial information from the owner of an application firm (e.g. Information concerning the assets of the owner’s spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner’s spouse is involved in the operation of the company). Requests for additional information shall not be unduly burdensome or intrusive.
- iv. In determining an individual’s net worth, the Department must observe the following requirements:
 1. Exclude an individual’s ownership interest in the application firm.
 2. Exclude the individual’s equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant

firm). The equity is the market value of the residence less any mortgages and home equity loan balances.

3. A contingent liability does not reduce an individual's net worth.
 4. With respect to assets held in vested pension plans, Individual Retirement Accounts, 401 (k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.
 - v. Notwithstanding any provision of Federal or state law, the Department must not release an individual's personal net worth statement or any documentation supporting it to any third party without the written consent of the submitter. Provided, that the Department must transmit this information to USDOT in any certification appeal proceeding under 49 CFR Part 26.89 or to any other state to which the individual's firm has applied for DBE certification.
- b. Rebuttal of presumption of disadvantage
- i. An individual's presumption of economic disadvantage can be rebutted in two ways.
 - ii. If the statement of personal net worth that an individual submits shows the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted. The Department is not required to have a proceeding in order to rebut the presumption of economic disadvantage in this case.
 - iii. If the statement of personal net worth and supporting documentation that an individual submits demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination, the Department may consider factors that include, but are not limited to the following:
 1. Whether the average adjusted gross income of the owner over the most recent three (3) year period exceeds \$350,000.00;
 2. Whether the income was unusual and not likely to occur in the future;
 3. Whether the earnings were offset by losses;
 4. Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;
 5. Other evidence that income is not indicative of lack of economic disadvantage; and
 6. Whether the total fair market value of the owner's assets exceed \$6 million.

- iv. If the Department has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged, the Department may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual.
 - v. In such a proceeding, the Department has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. The Department may require the individual to produce information relevant to the determination of his or her disadvantage.
 - vi. When an individual's presumption of social and economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage, so long as his or her personal net worth remains above that amount.
- c. Transfers within two years.
- i. Except as set forth in paragraph c(ii) (below), the Department must attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, to a trust with a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the ACP or within two years of the Department's review of the firm's annual affidavit, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.
 - ii. The Department must not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries and retirements.
 - iii. In determining access to capital and credit, any assets that the individual transferred within such two-year period described in (c)(1) that are not considered in evaluating the individual's assets and net worth will be considered.
- d. Individual Determination of Social and Economic Disadvantage:
- i. Individual determinations of social and economic disadvantage. Eligibility of firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged will be determined on a case-by-case basis. The applicant firm has the burden of demonstrating, by a preponderance of the evidence, that the individuals who own and control the firm are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall

not be considered economically disadvantaged. The following guidance will be considered in making individual determinations of social and economic disadvantage:

- ii. **Social Disadvantage:** Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of social disadvantage must include the following elements:
 1. At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;
 2. Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and
 3. Negative impact on entry into or advancement in the business world because of the disadvantage. Education, employment and business history, where applicable, must be considered to determine if the totality of circumstances shows disadvantage in entering into or advancing in the business world.
 4. The Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities—especially persons with severe disabilities (e.g., significant mobility, vision or hearing impairments)—may be socially and economically disadvantaged.
 5. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, the Certification Committee will look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria.
- iii. **Economic Disadvantage:** Economically disadvantaged individuals are socially disadvantaged individuals whose 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 disadvantaged.
 1. A description of the conditions that are the basis for the claim must be submitted in a narrative format, along with personal financial information. Married applicants must submit separate financial information for his or her spouse, unless the individual and spouse are legally separated.
 - a. The following factors will be examined when diminished capital and credit opportunities are considered: personal financial condition, including personal

income for the last two years; personal net worth, and fair market value of all assets. Financial condition will be compared to the financial profiles (total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth) of small businesses in the same primary industry classification, or in similar lines of business, which are not owned by socially and economically disadvantaged individuals.

Ref. 49 CFR Part 26.67

Section 5 – Ownership Determination

a. Ownership

- i. In determining whether the socially and economically disadvantaged participants in a firm own the firm, the Department will consider all the facts in the record, viewed as a whole, including the origin all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.
- ii. To be an ACP eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.
 1. In the case of corporations, socially and economically disadvantaged individuals must own at least 51 percent of the aggregate of all stock outstanding.
 2. In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.
 3. In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.
- iii. The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.
- iv. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risk and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

- v. All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph, no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if:
 - 1. The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or
 - 2. The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.
- i. The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value of the firm. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.
- ii. The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:
 - 1. The owner's expertise must be:
 - a. In a specialized field;
 - b. Of outstanding quality;
 - c. In areas critical to the firm's operations;
 - d. Indispensable to the firm's potential success;
 - e. Specific to the type of work the firm performs; and
 - f. Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.
 - 2. The individual whose expertise is relied upon must have a significant financial investment in the firm.
- i. The Department will deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual:

1. As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section;
 2. Through inheritance, or otherwise because of the death of the former owner.
- ii. The Department will presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is:
1. Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
 2. Involved in the same or a similar line of business; or
 3. Engaged in an ongoing business relationship with the firm or an affiliate of the firm, for which the individual is seeking certification.
- iii. To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate, by clear and convincing evidence, that:
1. The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
 2. The disadvantaged individual actually controls the management, policy and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.
- iv. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire ownership interest asserted by one spouse, the Department will deem that ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. A greater portion of joint or community property assets will not be counted toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.
- v. A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.
- vi. The following factors will be considered in determining ownership; however, a contribution of capital will not be regarded as failing to be real and substantial, or used to find a firm ineligible, solely because:

1. ownership interest was acquired as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (ii) of this section;
2. a provision for the co-signature of a spouse who is not socially and economically disadvantaged on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
3. ownership of the firm or its assets is transferred for adequate consideration from a spouse who is not socially and economically disadvantaged to a spouse who is such an individual. In this case, the Department will give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

Ref. 49 CFR Part 26.69

Section 6 – Determination of Control

a. Control

- i. In determining whether socially and economically disadvantaged owners control a firm, the Department will consider all the facts in the record, viewed as a whole.
- ii. Only an independent business may be certified as a DBE. An independent business is one whose viability does not depend on its relationship with another firm or firms. In determining whether a potential DBE is an independent business, the Certification Committee will:
 1. scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources;
 2. consider whether present or recent employer/employee relationships between the disadvantaged owner(s) and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm;
 3. examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a contractor compromises the independence of the potential DBE firm; and
 4. consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.
- iii. A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executor agreements, voting trusts, restrictions on or assignments of

voting rights) that prevent the owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm.

- iv. The disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
 1. A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).
 2. In a corporation, disadvantaged owners must control the board of directors.
 3. In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.
 4. In a limited liability company, if the articles of organization provide that management of the limited liability company is vested in a manager or managers, one or more disadvantaged owners must serve as manager, with control over all member decisions. If the articles of organization do not provide for a manager or provide that management is vested in the members, one or more disadvantaged owners must serve as a member, with control over all member decisions.
- v. Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.
- vi. The socially and economically disadvantaged owners of the firm may delegate various areas of management, policymaking, or daily operations to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged. Such delegation of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the disadvantaged owners in the firm's overall affairs must be such that the Certification Committee can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management and policy.
- vii. The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to the type of business in which the firm is engaged and in the firm's operations. The socially and economically disadvantaged owner is not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise which is limited to office management, administration or bookkeeping functions and

unrelated to the principal business activities of the firm is insufficient to demonstrate control.

- viii. If state or local law requires individuals to have a particular license or other credential in order to own and/or control a certain type firm, the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, the Department will not deny certification solely on the ground that the person lacks the license or credential. However, the Department will take into consideration the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.
- ix. The Certification Committee will consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm. Such consideration will be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income and any other explanations for the differences proffered by the firm.
 - 1. Where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, the Certification Committee may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved and continues to receive greater compensation than the disadvantaged individual.
 - 2. In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities.
- x. A socially and economically disadvantaged individual may control a firm even though one or more immediate family members who are not disadvantaged participate in the firm as a manager, employee, owner, or in another capacity. A judgment will be made about the control the socially and economically disadvantaged owner exercises vis-à-vis other persons involved in the business as the Certification Committee does in other situations, without regard to whether or not the other persons are immediate family members.
- xi. If the Certification Committee cannot determine that the disadvantaged owners, as distinct from the family as a whole, control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

- xii. Where a firm was formerly owned and/or controlled by a non-disadvantaged person, its ownership and/or control have been transferred to a socially and economically disadvantaged individual, and where the non-disadvantaged person remains involved with the firm in any capacity, the disadvantaged owner must demonstrate, by clear and convincing evidence, that the transfer of ownership and/or control was made for reasons other than obtaining DBE certification, and further that the disadvantaged owner actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged person who formerly owned and/or controlled the firm.
- xiii. In determining whether a firm is controlled by the disadvantaged owners, the Certification Committee will consider whether the firm owns equipment necessary to perform its work. Where leasing equipment is a normal industry practice and the lease does not involve a relationship with a contractor or other party which may compromise the independence of the firm, a firm will not be considered ineligible because it leased its equipment.
- xiv. The Certification Committee will grant certification to a firm only for specific types of work in which the disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm must demonstrate that its disadvantaged owners are able to control the firm with respect to that type of work and provide documentation that it has performed the work. The Certification Committee will not require a firm to recertify or submit a new application, but will verify the owner's control of the firm in the additional categories of work.

b. NAICS Codes

- i. The types of work a firm can perform (whether on initial certification or when a new type of work is added) will be described in terms of the most specific available NAICS code for the type of work. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide. Multiple NAICS codes may be assigned where appropriate.
- ii. Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the Department needs to make an appropriate designation.
- iii. If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the Department, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and the Department will not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.
- iv. The Department is not precluded from changing a certification classification or description if there is a factual basis in the record.

c. Franchise

- i. A business operating under a franchise or license agreement may be certified if it meets the certification standard and the franchiser or licensor is not affiliated with the franchisee or licensee.
- ii. In order for a partnership to be controlled by disadvantaged individuals, any non-disadvantaged partner must not have the power, without the specific written concurrence of the disadvantaged partner, to contractually bind or subject the partnership to contract or tort liability.
- vi. The disadvantaged individuals controlling a firm may use an employee leasing company in the normal course of business. The use of such a company does not preclude the disadvantaged owners from controlling the firm if they continue to maintain control of the work of the leased employees. This includes being responsible for accepting, rejecting, assigning and otherwise controlling on-the-job activities of the employees. A DBE may not lease employees from a pre-qualified contractor or other subcontractor performing on the project without prior approval from the Department.

Ref. 49 CFR Part 26.71

Section 7 – Other Rules Affecting Certification

a. Other Certification Considerations

- i. Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in paragraph ii of this section, the Department will not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.
- ii. The Department may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the ACP.
- iii. The Department must evaluate the eligibility of a firm on the basis of present circumstances. The Department must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of 49 CFR Part 26.
- iv. The Department will not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contract at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership and control requirements of 49 CFR Part 26, the firm is eligible for certification.

- v. DBE firms and firms seeking DBE certification shall cooperate fully with the Departments requests (and USDOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.
- vi. Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.
- vii. An eligible DBE firm must be owned by individuals who are disadvantaged. Except as provided as follows, a firm that is not owned by such individuals, but instead is owned by another firm – even a DBE firm – cannot be an eligible DBE.
 - 1. If disadvantaged individuals own and control a firm through a parent or holding company established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the subsidiary may be certified if it otherwise meets all other eligibility requirements. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.
 - 2. Such a subsidiary can be certified only if disadvantaged individuals cumulatively own 51 percent of the subsidiary. Illustrative examples of cumulative ownership provisions are included in 49 CFR 26.73(e)(2).
 - 3. Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by disadvantaged individuals.
- viii. A DBE firm is not required to be prequalified as a condition for certification.
- ix. A firm that is owned by an Indian tribe or Native Hawaiian organization as an entity, rather than by individuals, may be eligible for certification. Such a firm must meet the size standards of 49 CFR 26.65 and be controlled by socially and economically disadvantaged individuals, as provided in 49 CFR 26.71.
- x. The Department will apply the following special rules to the certification of Alaska Native Corporations (ANCs):
 - 1. Notwithstanding any other provisions of this subpart, a direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification as a DBE if it meets all of the following requirements:
 - 2. 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;

- a. 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,
 - b. The subsidiary, joint venture, or partnership entity has been certified by the SBA under the 8(a) or small disadvantaged business program.
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- xi. As a recipient to whom an ANC-related entity applies for certification, the Department will not sue the USDOT uniform application form. The Department will obtain from the firm documentation sufficient to demonstrate that entity meets the requirements of the previous paragraphs. The Department will also obtain sufficient information about the firm to allow it to administer the DBE program (e.g., information that would appear in the DBE Directory).
 - xii. If an ANC-related firm does not meet all the conditions of the previous paragraphs, then it must meet the requirements of paragraph vii of this section in order to be certified, on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

Ref. 49 CFR Part 26.73

**ARKANSAS DEPARTMENT OF TRANSPORTATION
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

Chapter V – Certification Procedures

Section 1 – Unified Certification Programs

- a. In accordance with the requirements of 49 CFR Part 26.81, USDOT recipients in Arkansas adopted a Unified Certification Program (UCP). The ACP was submitted to FHWA and USDOT and was subsequently approved. It has been implemented with all USDOT recipients in the State of Arkansas operating in accordance with its terms. Interested applicants apply for DBE certification only once in order to be determined eligible to participate as a DBE with any USDOT recipient in the state.
- b. The Department, Clinton National Airport, and the Arkansas Airport Operators Association were designated as Primary Partners within the UCP and will oversee implementation of the UCP. Each Primary Partner will designate a representative.
- c. The UCP agreement provides for the establishment of the ACP meeting all the requirements of this section. The agreement specified that:
 - i. The ACP will follow all certification procedures and standards of this part, on the same basis as the Department;
 - ii. The ACP shall cooperate fully with oversight, review and monitoring activities of USDOT and its operating administrations; and
 - iii. The ACP shall implement USDOT directives and guidance concerning certification matters.
- d. The ACP shall make all certifications on behalf of USDOT recipients in Arkansas with respect to participation in the USDOT DBE Program.
 - i. Certification decisions by the ACP shall be binding on all USDOT recipients within Arkansas.
 - ii. The ACP 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 Arkansas.
 - iii. All obligations of recipients with respect to certification and non-discrimination must be carried out by the ACP.
- e. A DBE firm must be fully, finally and currently certified before the due date for bids or offers on an Invitation to Bid or Request for Proposal on which a firm seeks to participate as a DBE.

- f. The ACP is not required to process an application for certification from a firm having its principal place of business outside Arkansas in the firm is not certified by the UCP in the state in which it maintains its principal place of residence. The “home state” shall share its information and documents concerning the firm with other UCPs that are considering the firm’s application.
- g. Subject to USDOT approval as provided in this section, the recipients in two or more state 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 USDOT recipient.
- h. The Department may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. The Department may also grant reciprocity to other recipient’s certification decisions.

Ref. 49 CFR Part 26.81

Section 2 – Certification Application and Procedures

- a. The purpose of certification is to ensure that only small businesses independently owned and controlled in both substance and form by one or more socially and economically disadvantaged persons participate in the ACP. These businesses must meet all standards and eligibility requirements as set forth in 49 CFR 26.
- b. The ACP Certification Committee is responsible for determining and certifying eligibility of businesses seeking to participate as DBEs on DOT- assisted transportation related projects.
- c. The Department will take all the following steps in determining whether a DBE firm meets the standards of 49 CFR Part 26:
 - i. Perform an on-site visit to the firm’s principal place of business. The Department will interview the principal officers and review their resumes and/or work histories. The Department will interview key personnel of the firm if necessary. The Department will also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in the jurisdiction or local area. The Department will rely upon the site visit report of any other recipient with respect to a firm applying for certification.
 - ii. Analyze documentation related to the legal structure, ownership, and control of the application 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 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 49 CFR Part 26.85.
 - ix. An annual affidavit, sworn to by the firm's owners and executed under penalty of perjury, affirming there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements or any material changes in information provided in the UCA originally submitted, except for changes of which the Department has been notified. In addition, the firm must submit the most recent year federal income taxes to confirm business size and a copy of the firm's home state DOT's certification. Additional information could be requested, that is determined on a case-by-case basis.
 - x. Every three years, along with the information stated above in iii., 3., the socially and economically disadvantaged individual(s) must submit a personal net worth statement along with supporting documentation. Then an on-site review will be conducted at that time.
 - xi. Review by the Certification Committee of information submitted by the applicant, the on-site review, and a report prepared by the DBE staff.
- d. The certification application package is provided to any business seeking recognition as a DBE. The Department will use the application provided in Appendix 4 to this part without change or revision. The Department will make sure the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States. The Department will review all information on the form prior to making a decision about the eligibility of the firm. The Department may request clarification of information contained in the application at any time in the application process. The Department will prohibit the release of personal financial information associated with determining net worth and related certification eligibility issues.

- e. When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information the Department has obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), the Department will promptly make the information available to the other recipient.
- f. The Department will not charge a fee to apply for ACP DBE certification.
- g. The Certification Committee meets regularly, generally monthly, to examine and evaluate pending applications for certification. From information provided by the applicant and an on-site review, the Committee determines if the business meets the following criteria:
 - i. Is a small business as defined in Small Business Administration regulations (13 CFR 121) and does not exceed the cap on average annual gross receipts of \$28.48 million.
 - ii. Is at least 51 percent owned and controlled by one or more socially and economically disadvantaged individuals as defined by 49 CFR 26.5.
 - iii. Is a for-profit small business.
 - iv. If the management and daily business operations controlled by one or more of the socially and economically disadvantaged owners.
- h. Guidelines for use in making the listed determinations are included in 49 CFR 26.
- i. The Certification Committee reviews each applicant's file and determines if the business is to be approved, denied or deferred.
 - i. If approved, the business is added to the ACP DBE Directory of certified businesses.
 - ii. If denied, the Certification Committee will document the reasons. The Certification Committee will notify the applicant in writing of the decision.
 - iii. If deferred, the Certification Committee requests additional information before making a determination, or if the applicant has not responded to a request for information, the file is placed in pending status for six months.
 - iv. Decisions on eligibility will be made within 90 days of receiving the required information. The Department may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension.
- j. Approximately four weeks prior to each letting, the DBE Supportive Services Specialist compiles and issues an updated list of certified DBEs that includes name, address, telephone number, contact person and types of work each business is certified to perform.
- k. Once the Department has certified a DBE, it shall remain certified until and unless the Certification Committee has removed its certification, in whole or in part, through the procedures of 49 CFR Part 26.87, except as provided in 49 CFR Part 26.67(b)(1).

- l. The DBE must certify annually by submitting an affidavit stating no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of 49 CFR 26 or any material changes in the information provided in its application, except for changes about which the firm has notified the Department previously, have occurred. If the DBE is based outside Arkansas, a copy of the home state DOT's certification must be submitted. If no changes in ownership have occurred, the average gross receipts for the most recent three years and owner's personal net worth are within the required limits and no eligibility issues are raised, the DBE's certification remains in effect.
- m. DBE firms must inform the Department, in writing, within 30 days of any change in circumstances affecting the firm's ability to meet size, disadvantaged status, ownership, or control requirements or of any material change in the information provided in the firm's application. The notification must be in the form of a sworn affidavit and include supporting documentation describing in detail the nature of such changes. The Certification Committee will review the information and the applicant's file and make a determination of eligibility.
- n. Every three years, on or near the firm's anniversary date, an on-site review will be scheduled to determine if the firm should continue to be certified as a DBE. The Certification Committee reviews the firm's annual affidavit information, on-site review and makes a determination regarding the firm's continued eligibility.
- o. Should a business fail to submit its annual affidavit information by the anniversary date, procedures will be initiated to remove the firm's eligibility as a DBE. To ensure uninterrupted certification, a DBE's annual affidavit information should be received no later than its anniversary date.
- p. As a recipient, the Department must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.
- q. Except as otherwise provided in this paragraph, if an applicant for DBE certification withdraws its application before the Department has issued a decision on the application, the applicant can resubmit the application at any time. The Department will not apply the waiting period provided under 49 CFR Part 26.86(c) before allowing the applicant to resubmit its application. However, the Department 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 Department may also apply the waiting period provided under 49 CFR Part 26.86(c) of this part to a firm that has established a pattern of frequently withdrawing applications before the Certification Committee makes a decision.

Ref. 49 CFR Part 26.83

Section 3 – Interstate Certification

Effective January 1, 2012, this section shall apply to any out-of-state firm requesting DBE certification with the ACP.

- a. An out-of-state firm seeking ACP certification must be currently certified as a DBE under 49 CFR Part 26.61, Subpart D, by their home state.
- b. The applicant firm must provide the following information to the Department:
 - i. A complete copy of the application form, all supporting documents, and any other information the applicant has submitted to the home state or any other state related to the firm's certification. This includes affidavits of no changes, any notices of changes, as well as any other recipient concerning the application or the firm's status as a DBE;
 - ii. Any notices or correspondence from states other than the home state relating to the firm's status as an applicant or DBE (e.g., notices of denial of certification);
 - iii. Any appeals filed with USDOT, to include the applicant firm's letter of appeal and USDOT's response;
 - iv. An affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that the applicant has submitted all of the information required by 49 CFR 26.85(c), that the information is complete, and that it is an identical copy of the information submitted to the home state.
- c. Once all the information required from the applicant firm is received, the Department will take the following actions:
 - i. Within seven days, contact the home state and request a copy of the on-site review report, any updates to the review, and any evaluation of the firm based upon the site visit. The home state must transmit this information within seven days of receiving the request;
 - ii. Determine whether there is good cause to believe that the home state's certification of the firm is erroneous or should not apply to the ACP. Reasons for making such a determination may include:
 1. Evidence that the home state's certification was obtained by fraud;
 2. New information, not available to the home state at the time of its certification, showing that the firm does not meet all eligibility criteria;
 3. The home state's certification was factually erroneous or was inconsistent with the requirements of 49 CFR Part 26;
 4. That Arkansas's State law requires a result different than that of the State law of the home state;
 5. That the information provided by the applicant firm did not meet the requirements as provided above.
- d. Unless the Department determines there is good cause to believe the home state's certification is erroneous or should not apply to the ACP, the Department shall, no later than 60 days from the date on which the ACP received from the applicant firm all information required, send to the firm a notice that it is certified and place the firm on the directory of certified firms.

- e. If the Department determines the home state's certification is erroneous, the Department will, no later than 60 days from the date on which the Department received from the firm all information required, send a notice stating the reasons for this determination.
- f. This notice will state the specific reasons for denial and offer the firm an opportunity to respond. The firm may respond in writing or request a meeting with the Certification Committee. If the firm requests a meeting, the Department will schedule a meeting to take place within 30 days of receiving the request.
- g. The firm bears the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements of 49 CFR Part 26 with respect to the specific issues identified by the ACP.
- h. The Department will issue a written decision within 30 days of receipt of the written appeal or meeting. A decision made by the Department may be appealed to the U.S. DOT under 49 CFR 26.89.

Ref. 49 CFR Part 26.85

Section 4 – Denials of Initial Requests for Certification

- a. If it is determined that a firm requesting initial certification is not eligible, the firm will be given written notice that the Certification Committee has found the firm ineligible, setting forth the reasons for the determination, including specific references to the evidence in the record upon which each reason is based and citing the appropriate references in 49 CFR 26.
- b. In any notice of a finding of ineligibility, the firm will be given an opportunity for an informal hearing before the Certification Committee. At this hearing, the firm may respond in person to the reasons for the finding and provide information and arguments concerning why it should be considered eligible. This hearing will be tape-recorded, and a transcript or copy of the recording will be made available upon request to the firm, the ACP DBELO, and/or the USDOT in the event of an appeal. The firm may also elect to present information and arguments to the Certification Committee in writing, without having a hearing.
- c. The Certification Committee will allow a firm to postpone a hearing no longer than six months.
- d. After all the facts have been thoroughly reviewed and considered, the Certification Committee will make a recommendation to the ACP DBELO regarding the firm's eligibility.
- e. Upon receipt of the Certification Committee's recommendation, the ACP DBELO will review all available information and will, if necessary, make or direct further investigations. After thorough review and consideration, the ACP DBELO will make a determination regarding the firm's eligibility.
- b. The firm will be given written notice of the ACP DBELO's decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision.

- c. In any notice of denial of certification, a time period will be established of no less than 12 months that must elapse before the firm may reapply for certification. The time period for reapplication will begin on the date the notice of denial is received by the firm.
- d. Any notice of denial will inform the firm of the availability of an appeal to the U.S. DOT under Section 26.89.
- e. If the firm withdraws their application for any reason prior to the on-site review, the firm will not have a waiting period to reapply for certification.

Ref. 49 CFR Part 26.86

Section 5 – Removal of DBE Eligibility

a. Denials of Certification

- i. If it is determined that a firm requesting initial certification is not eligible, the firm will be given written notice that the Certification Committee has found the firm ineligible, setting forth the reasons for the determination, including specific references to the evidence in the record upon which each reason is based and citing the appropriate references in 49 CFR 26.
- ii. In any notice of a finding of ineligibility, the firm will be given an opportunity for an informal hearing before the Certification Committee. At this hearing, the firm may respond in person to the reasons for the finding and provide information and arguments concerning why it should be considered eligible. This hearing will be tape-recorded, and a transcript or copy of the recording will be made available upon request to the firm, the DBELO, and/or the USDOT in the event of an appeal. The firm may also elect to present information and arguments to the Certification Committee in writing, without having a hearing.
- iii. The Certification Committee will allow a firm to postpone a hearing no longer than six months.
- iv. After all the facts have been thoroughly reviewed and considered, the Certification Committee will make a recommendation to the ACP DBELO regarding the firm's eligibility.
- v. Upon receipt of the Certification Committee's recommendation, the DBELO will review all available information and will, if necessary, make or direct further investigations. After thorough review and consideration, the ACP DBELO will make a determination regarding the firm's eligibility.
 - 1. The firm will be given written notice of the ACP DBELO's decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision.

2. In the event of a denial of certification of a firm certified by the U.S. Small Business Administration (SBA), the SBA will be notified in writing of the ACP denial, including the reasons for the denial.
3. In any notice of denial of certification, a time period will be established of no less than 12 months that must elapse before the firm may reapply for certification. The time period for reapplication will begin on the date the notice of denial is received by the firm.
4. Any notice of denial will inform the firm of the availability of an appeal to the U.S. DOT under Section 26.89.
5. If the firm withdraws their application for any reason prior to the on-site review, the firm will not have a waiting period to reapply for certification.

b. Removal of Eligibility

- i. It is the responsibility of the ACP Hearing Committee to remove a firm's eligibility, that is, to withdraw recognition and certification of DBE designation upon discovery that the business does not meet eligibility criteria.
- ii. The procedure to remove eligibility may be initiated by any of the following: firm fail to provide its annual affidavit, complaint is received alleging that a currently-certified firm is ineligible; notification is received from the firm of a change in its circumstances; or other information pertaining to certification eligibility comes to the attention of the Department.
- iii. The records are reviewed and, if necessary, a verification review is conducted by the External EEO Coordinator. The External EEO Coordinator's report and findings are forwarded to the Certification Committee for review.
- iv. The Certification Committee will review all available information and will, if necessary, make or direct further investigations. After thorough review and consideration, the Certification Committee will determine whether or not there is reasonable cause to believe the firm is ineligible.
- v. If it is determined that such reasonable cause exists, the firm will be given written notice of its intent to remove eligibility setting forth the reasons for the proposed determination, including specific references to the evidence in the record upon which each reason is based and citing the appropriate references in 49 CFR 26. If it is determined that such reasonable cause does not exist, the firm and the complainant (if any) will be notified in writing of this determination and the reasons for it.
- vi. In any notice of reasonable cause to remove eligibility, the firm will be given an opportunity for an informal hearing before the Hearing Committee. This committee is composed of a representative from Legal, Program Management, and Construction who have thorough knowledge and understanding of the DBE Program and certification requirements, but have had no involvement in the subject DBE firm's initial certification or actions leading to or seeking to implement the proposal to

remove the firm's eligibility. These individuals will also not be subject to direction from the office or personnel who did take part in the actions leading to or seeking to implement the proposal to remove the firm's eligibility.

- vii. At the hearing, the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified. This hearing will be recorded, and a transcript or copy of the recording will be made available upon request to the firm, the ACP DBELO, and/or the U.S. DOT in the event of an appeal. The firm may also elect to present information and arguments to the Hearing Committee in writing, without having a hearing.
- viii. After all the facts have been thoroughly reviewed and considered, the Hearing Committee will make a recommendation to the ACP DBELO regarding the firm's eligibility.
- ix. Upon receipt of the Hearing Committee's recommendation, the ACP DBE Liaison Officer will review all available information and will, if necessary, make or direct further investigations. After thorough review and consideration, the ACP DBELO will make a determination regarding the firm's eligibility.
 - 1. The firm will be given written notice of the ACP DBELO's decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. Any notice of removal of certification will inform the firm of the consequences of the decision and of the availability of an appeal to the U.S. DOT under 49 CFR Part 26.89. A copy of this notice will also be sent to the complainant (if any). The firm will become ineligible upon issuance of this notice, not before.
 - 2. When a firm has been declared ineligible to participate in the ACP DBE Program, the following actions will be taken:
 - x. The firm's name will be removed from the ACP DBE Directory.
 - xi. The Department's Construction and Programs & Contracts Divisions and the primary partners of the ACP will be notified, so that the following provisions of the regulations will be enforced:
 - 1. When a prime contractor has made a commitment to use the ineligible firm, or when the ineligible firm has been awarded a contract as a prime contractor, but a subcontract or contract has not been executed, the ineligible firm will not count toward the contract goal or overall annual goal. The prime contractor will be directed to meet the contract goal with an eligible DBE firm or demonstrate that it has made a good faith effort to do so.
 - 2. If a prime contractor has executed a subcontract with the firm before notification of ineligibility, the prime contractor may continue to use the firm and may continue to receive credit towards its DBE goal for the firm's work. In this case, or in a case where a prime contract has been let to a DBE that was later ruled ineligible, the portion of the ineligible firm's performance on the contract remaining after the

notice of ineligibility was issued shall not count toward the overall annual goal, but will count toward the contract goal.

3. Exception: If the firm's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, its participation on that contract will be counted toward the overall and contract goals.

c. Notice Given Federal Authorities of Denial or Removal of Certification

- i. The name and address of each business and its principal officials which has been subject to denial or removal of certification by the Department, along with the basis for such action, will be provided to the appropriate federal agencies. This is accomplished by transmitting a copy of the letter advising the applicant of the Department's decision.

d. Ineligibility Complaints

- i. Any person may file a written complaint with the Department or the ACP alleging that a currently certified firm is ineligible and specifying the alleged reasons the firm is ineligible. The Department and/or the ACP are not required to accept an anonymous complaint or a general allegation that a firm is ineligible.
- ii. The complaint should include any information supporting the assertion that the firm is ineligible and should not continue to be certified. Complainants' identities must be kept confidential at their request. 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 closure of the investigation or dismissal of the proceeding or hearing. The complainant's waiver of confidentiality must be in writing.
- iii. The Certification Committee will review the complaint and if additional information is needed, the Committee will request the Department's External EEO Coordinator to conduct a review of the firm, including:
 1. a document review of the certification file;
 2. an on-site interview of the business principals and others with knowledge of the company, including employees;
 3. an inspection of business documents and records to verify or clarify information furnished regarding the applicant's disadvantaged status, business size, ownership, control and independence; and
 4. an inspection of the business' physical plant and job site activities. Project engineers may be contacted to obtain general information about the DBE's method of operating at the project site and to ascertain if the project engineer has concerns or suspects there may be irregularities.

5. Additional information may be requested from the firm, as deemed necessary.
- iv. A report consisting of the results of the review will be prepared within two weeks of the completion date of the investigation.
- v. If, based on the review, the Department determines there is reasonable cause to believe the firm is ineligible, procedures for removal of eligibility included in this Chapter, Part 6 will be followed.

Ref 49 CFR Part 26.87

Section 6 – Suspension of Certification

- a. The ACP shall immediately suspend a DBE's certification without adhering to the requirements in 49 CFR Part 26.87(d) of this part when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.
- b. The ACP may immediately suspend a DBE's certification without adhering to the requirements in 49 CFR Part 26.87(d) when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by 49 CFR Part 26.83(i) of this part or fails to timely file an affidavit of no change under 49 CFR Part 26.83(j). In determining the adequacy of the evidence to issue a suspension, the ACP shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what interferences can reasonable be drawn as a result.
- c. The concerned operating administration may direct the ACP to take action pursuant to paragraph (a) and (b) of this section if it determines that information available to it is sufficient to warrant immediate suspension.
- d. When a firm is suspended pursuant to paragraph (a) and (b) of this section, the ACP shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.
- e. Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under 49 CFR Part 26.87 to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.
- f. While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted towards the Department's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.

- g. Following the receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes its eligibility should be reinstated, it must provide the ACP information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the ACP must either lift the suspension and reinstate the firm's certification or commence a decertification action under 49 CFR Part 26.87. If the ACP commences a decertification proceeding, the suspension remains in effect during the proceeding.
- h. The decision to immediately suspend a DBE under paragraph (a) or (b) of this section is not appealable to USDOT. The failure of the ACP to either lift the suspension and reinstate the firm or commence a decertification proceeding, as required by paragraph (g) of this section, is appealable to USDOT under 49 CFR Part 26.89, as constructive decertification.

Ref. 49 CFR Part 26.88

Section 7 – Appealing Certification Decisions to USDOT

If a firm is denied certification or has its eligibility removed by the ACP, the firm may make an administrative appeal to the DOT. The DBE firm must send an email to the DOT within 90 days of the date of the ACP final decision, including information and arguments concerning why the decision should be reversed. Pending DOT's decision on the appeal, the ACP decision on the firm's eligibility remains in effect.

Appeals should be sent to the following email address:

U.S. Department of Transportation
DBEAppeals@dot.gov

Ref. 49 CFR Part 26.89

Section 8 – Effect of USDOT Certification Appeal Decisions

- a. If the Department is a recipient from whose action an appeal under 49 CFR Part 26.89 is taken, the decision is binding. It is not binding on other recipients.
- b. If the ACP is a recipient to which a USDOT determination under 49 CFR Part 26.89 is applicable, the ACP will take the following action:
 - i. If USDOT determines that the ACP erroneously certified a firm, the firm's eligibility will be removed upon receipt of the determination, without further proceedings on the ACP part. Effective on the date of receipt of the USDOT's determination, the consequences of a removal of eligibility set forth in 49 CFR Part 26.87(i) take effect.
 - ii. If USDOT determines that the ACP erroneously failed to find reasonable cause to remove the firm's eligibility, the ACP must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed.

- iii. If USDOT determines that the ACP erroneously declined to certify or remove the eligibility of the firm, the Department must certify the firm as of the effective date of receipt of the written notice of USDOT's determination.
- iv. If USDOT determines that the ACP erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, the ACP must take appropriate corrective action as determined by USDOT.
- v. If USDOT affirms the ACP determination, no further action is necessary.
 - 1. Where USDOT has upheld the ACP denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence proceeding to remove the firm's eligibility under 49 CFR Part 26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed the Department's denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

Ref. 49 CFR Part 26.91

**ARKANSAS DEPARTMENT OF TRANSPORTATION
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

Chapter VI – Compliance and Enforcement

Section 1 – Confidentiality, Cooperation, and Intimidation or Retaliation

- a. *Availability of records.*
 - i. In responding to requests for information concerning any aspect of the ACP, 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.
 - ii. 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 ACP (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.

Ref. 49 CFR Part 26.109