

DBE PROGRAM

POLICY STATEMENT

Section 26.1, 26.23

Objectives/Policy Statement

The City of Creswell has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. The City of Creswell has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, the City of Creswell has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of the City of Creswell to ensure that DBEs as defined in Part 26 have an equal opportunity to receive and participate in DOT-assisted contracts. It is also our policy:

1. To ensure nondiscrimination in the award and administration of DOT-assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To assist the development of firms that can compete successfully in the market place outside the DBE Program.

The City of Creswell's City Administrator, or his/her Designee, will act as the DBE Liaison Officer. In this capacity, they are responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the City of Creswell in its financial assistance agreements with the Department of Transportation.

The City of Creswell has disseminated this policy statement to the City Council and all of the components of our organization. We have distributed this statement to DBE and non-DBE business communities that perform work for us on DOT-assisted contracts by inclusion in all federally assisted Airport Improvement Program (AIP) projects.

City of Creswell, City Administrator

Date

Date

SUBPART A – GENERAL REQUIREMENTS

Section 26.1 Objectives

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

Section 26.3 Applicability

The City of Creswell is the recipient of federal airport funds authorized by 49 U.S.C. 47101, *et seq.*

Section 26.5 Definitions

The City of Creswell will adopt the definitions contained in Section 26.5 for this program.

Section 26.7 Non-discrimination Requirements

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

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

Section 26.11 Record Keeping Requirements

Reporting to DOT: 26.11(b)

We will report DBE participation to DOT as follows:

We will submit annually the Uniform Report of DBE Awards form as provided by the FAA.

Bidders List: 26.11(c)

We will collect this information in the following ways:

The City of Creswell will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The purpose of this requirement is to allow use of the bidders list approach to calculating overall goals. The bidder list will include the name, address, DBE/non-DBE status, age, and annual gross receipts of firms, along with their bid as a part of the bid package. **Attachment 1** is a copy of the Bidders List.

Section 26.13 Federal Financial Assistance Agreement

The City of Creswell has signed the following assurances, applicable to all DOT-assisted contracts and their administration:

Assurance: 26.13(a)

The City of Creswell shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT assisted contracts. The recipient's DBE Program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal

obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the City of Creswell of its failure to carry out its approved program, the Department may impose sanction as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

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

Contract Assurance: 26.13b

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

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

SUBPART B - ADMINISTRATIVE REQUIREMENTS

Section 26.21 DBE Program Updates

Since the City of Creswell has received a grant from FAA, we will continue to carry out this program until all funds from DOT financial assistance have been expended. We will provide to DOT updates representing significant changes in the program.

Section 26.23 Policy Statement

The Policy Statement is elaborated on the first page of this program.

Section 26.25 DBE Liaison Officer (DBELO)

We have designated the following individual as our DBE Liaison Officer:

Airport Manager
City of Creswell
13 S 1st Street
P.O. Box 276
Creswell, OR 97426
Phone: 541-895-2913

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring the City of Creswell complies with all provisions of 49 CFR Part 26. The DBELO has direct, independent, access to the Governing Entity concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in **Attachment 2** to this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. The DBELO has a staff of three to assist in the administration of the program. The duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required by DOT.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to set overall annual goals.
4. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
5. Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals attainment and identifies ways to improve progress.
6. Analyzes the City of Creswell's progress toward attainment and identifies ways to improve progress.
7. Participates in pre-bid meetings.
8. Advises the CEO\governing body on DBE matters and achievement.
9. Chairs the DBE Advisory Committee.
10. Participates in pre-bid meetings.
11. Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
12. Plans and participates in DBE training seminars.
13. Certifies DBEs according to the criteria set by DOT and acts as liaison to the Uniform Certification Process in the states of Oregon and Washington.
14. Provides outreach to DBEs and community organizations to advise them of opportunities.
15. Maintains the City of Creswell's updated directory on certified DBEs.

Section 26.27 DBE Financial Institutions

It is the policy of the City of Creswell to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contract to make use of these institutions. We have made the following efforts to identify and use such institutions:

Accessing the Certified Firms on the website of the Office of Minority, Women, and Emerging Small Business (OMWESB) of the Department of Consumer & Business Services.

Information on the availability of such institutions can be obtained from the DBE Liaison Officer.

Section 26.29 Prompt Payment Mechanisms

The City of Creswell will include the following clause in each DOT-assisted prime contract:

The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 15 days from the receipt of each payment the prime contract receives from the City of Creswell. The prime contractor agrees further to return retainage payments to each subcontractor within 15 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the City of Creswell. This clause applies to both DBE and non-DBE subcontracts.

Section 26.31 Directory

The Office of Minority, Women, and Emerging Small Business (OMWESB) of the Department of Consumer & Business Services maintains an online directory linked to their website at: <http://egov.oregon.gov/DCBS/OMWESB> which identifies all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as a DBE, and is updated daily. For more information regarding this directory, send e-mail to: omwesb.web@state.or.us, or call (503) 947-7976.

Section 26.33 Overconcentration

The City of Creswell has not identified that overconcentration exists in the types of work that DBEs perform.

Section 26.35 Business Development Programs

The City of Creswell has not established a business development program.

Section 26.37 Monitoring and Enforcement Mechanisms

The City of Creswell will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps provided in 26.109. This may include referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General for action under suspension and debarment of Program Fraud and Civil Penalties rules.

The City of Creswell will also consider action under our own legal authorities, including determinations for future contracts. **Attachment 3** lists the regulation, provisions, and contract remedies available to us in the events of non-compliance with the DBE regulation by a participant in our procurement activities.

The City of Creswell's authority incorporates the following enforcement:

The City of Creswell has authority under ORS 279C.440(1)(c) to disqualify a business from award of City contracts for up to three years based upon a violation of a contract provision that is regarded by the City of

Creswell to be so serious as to justify disqualification, provided the violation was not caused by acts beyond the business's control.

The City of Creswell must reject a bidder under ORS 279C.440(2)(d) based upon an unsatisfactory record of performance. A bidder that has failed to comply with 49 CFR Part 26 requirements under a prior contract would have an unsatisfactory record of performance for the purposes of ORS 279C.440(2)(d). This defines "lowest responsible bidder" for the purposes of ORS 279C.375.

ORS 200.065(1) and (2) prohibit fraud in DBE certification and false claims regarding certification for the purpose of obtaining a contract subcontract, or other benefit. ORS 200.065 authorizes the City of Creswell to withhold payment, suspend or terminate the contract, and impose a civil penalty of 10 percent of the contract or subcontract price, but not more than \$5,000. ORS 200.065(4) required the City of Creswell to investigate and confers the power to subpoena witnesses, records, etc. ORS 200.065(5) authorizes the City of Creswell to disqualify a person or entity for up to three years for violation of subsection (1) or (2), and also allows the City of Creswell to disqualify based upon a fraudulent DBE certification.

ORS 200.075(1) authorizes the City of Creswell to suspend a contractor's or subcontractor's right to participate in the City of Creswell's contract if the contractor or subcontractor: (1) enters into a public improvement contract with the City of Creswell representing without the DBE's knowledge and consent that the DBE will be performing work or supplying materials; (2) exercises management control and decision making control over the internal operations of a DBE; or (3) using a DBE to satisfy a contract goal when the DBE does not perform a commercially reasonable function.

SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 26.43 Set-asides or Quotas

The City of Creswell does not use quotas in any way in the administration of this DBE program.

Section 26.45 Overall Goals

A description of the methodology to calculate the overall goal and the goal calculations can be found in **Attachment 4** to this program. This section of the program will be updated annually.

In accordance with Section 26.45(f), the City of Creswell will submit its overall goal to DOT on August 1 of each year. Before establishing the overall goal each year, the City of Creswell will consult with the program officials as outlined in **Attachment 4** to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the City of Creswell's efforts to establish a level playing field for the participation of DBEs.

Following this consultation, we will publish a notice of the proposed overall goals, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at your principal office for 30 days following the date of the notice, and informing the public that you and DOT will accept comments on the goals for 45 days from the date of the notice. This notice will be issued in the Creswell Chronical and the Daily Journal of Commerce (DJC). Normally, we will issue this notice by August 1 of each year. The notice must include addresses to which comments may be sent and addresses (including offices and websites) where the proposal may be reviewed.

Our overall goal submission to DOT will include a summary of information and comments received during this public participation process and our responses.

We will begin using our overall goal on October 1 of each year, unless we have received other instructions from DOT. If we establish a goal on a project basis, we will begin using our goal by the time of the first solicitation for a DOT-assisted contract for the project.

Section 26.51(a-c) Breakout of Estimated Race-Neutral & Race-Conscious Participation

The breakout of estimated race-neutral and race-conscious participation can be found in **Attachment 5** to this program. This section of the program will be updated annually when the goal calculation is updated.

Section 26.51(d-g) Contract Goals

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

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

We will express our contract goals as a percentage of the Federal share of a DOT-assisted contract.

Section 26.53 Good Faith Efforts Procedures

Demonstration of good faith efforts (26.53(a) & (c))

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in Appendix A to Part 26.

The DBELO is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive.

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

Information to be submitted (26.53(b))

The City of Creswell treats bidder/offers' compliance with good faith efforts' requirements as a matter of responsiveness.

Each solicitation for which a contract goal has been established will require the bidders/offerors to submit the following information on the forms shown in **Attachment 6**:

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

Administrative reconsideration (26.53(d))

Within five (5) days of being informed by the City of Creswell that it is not responsive because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the following reconsideration official:

City Administrator
City of Creswell
13 S 1st Street
P.O. Box 276
Creswell, OR 97426
Phone: 541-895-2531
Fax: 541-895-3647

The reconsideration official will not have played any role in the original determination that the bidder/offeror did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do. We will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate

good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

Good Faith Efforts when a DBE is replaced on a contract (26.53(f))

The City of Creswell will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. We will require the prime contractor to notify the DBELO immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

In this situation, we will require the prime contractor to obtain our prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts.

If the contractor fails or refuses to comply in the time specified, our contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Bid Specification:

The requirements of 49 CFR Part 26, Regulations of the U.S. Department of Transportation, apply to this contract. It is the policy of the City of Creswell to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this contract will be conditioned upon satisfying the requirements of this bid specification. These requirements apply to all bidders/offerors, including those who qualify as a DBE. A DBE contract goal of 1.90 percent has been established for this contract. The bidder/offeror shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 (Attachment 1), to meet the contract goal for DBE participation in the performance of this contract.

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

Section 26.55 Counting DBE Participation

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

SUBPART D – CERTIFICATION STANDARDS

Section 26.61 – 26.73 Certification Process

The City of Creswell will use the certification standards of Subpart D of Part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. We will make our certification decisions based on the facts as a whole.

For information about the certification process or to apply for certification, firms should contact the DBELO.

SUBPART E – CERTIFICATION PROCEDURES

Section 26.81 Unified Certification Programs

The City of Creswell is the member of the Unified Certification Program (UCP) administered by the State of Oregon. The UPC will meet all of the requirements of this section. A copy of the UCP agreement is attached to this DBE plan.

Section 26.83 Procedures for Certification Decisions

Re-certifications 26.83(a) & (c)

We will review the eligibility of DBEs that we certified under former Part 23, to make sure that they will meet the standards of Subpart E of Part 26. We will complete this review no later than three years from the most recent certification date of each firm.

For firms that we have certified or reviewed and found eligible under Part 26, we will again review their eligibility every three years on a case by case basis.

“No Change” Affidavits and Notices of Change (26.83(j))

We require all DBEs to inform us, in a written affidavit, of any change in its circumstances affecting its ability to meet size, disadvantaged status, ownership or control criteria of 49 CFR Part 26 or of any material changes in the information provided with the City of Creswell’s application for certification.

We also require all owners of all DBEs we have certified to submit, on the anniversary date of their certification, a “no change” affidavit meeting the requirements of 26.83(j). The test of this affidavit is the following:

I swear (or affirm) that there have been no changes in the circumstances of [*name of DBE firm*] affecting its ability to meet the size, disadvantaged status, ownership, or control requirements of 49 CFR part 26. There have been no material changes in the information provided with [*name of DBE*]’s application for certification, except for any changes about which you have provided written notice to the City of Creswell under 26.83(j). [*Name of firm*] meets Small Business Administration (SBA) criteria for being a small business concern and its average annual gross receipts (as defined by SBA rules) over the firm’s previous three fiscal years do not exceed \$20.4 million.

We require DBEs to submit with this affidavit documentation of the firm’s size and gross receipts.

We will notify all currently certified DBE firms of these obligations. An affidavit of “no change” will be sent to the firm annually approximately 30 days prior to the one-year and two-year anniversaries of the certification date. This notification will inform DBEs that to submit the “no change” affidavit, their owners must swear or affirm that they meet all regulatory requirements of Part 26, including personal net worth. Likewise, if a firm’s owner knows or should know that he or she, or the firm, fails to meet a Part 26 eligibility requirement (e.g. personal net worth), the obligation to submit a notice of change applies.

Section 26.85 Denials of Initial Requests for Certification

If we deny a firm’s application or decertify it, it may not reapply until 12 months have passed from this action.

Section 26.87 Removal of a DBE’s Eligibility

In the event we propose to remove a DBE’s certification, we will follow procedures consistent with 26.87. Attachment 8 to this program sets forth these procedures in detail. To ensure separation of functions in a de-certification, we have determined that the Mayor will serve as the decisionmaker in decertification proceedings. We

have established an administrative “firewall” to ensure that the City Manager will not have participated in any way in the de-certification proceeding against the firm (including in the decision to initiate such a proceeding).

Section 26.89 Certification Appeals

Any firm or complainant may appeal our decision in a certification matter to DOT. Such appeals may be sent to:

Department of Transportation
Office of Civil Rights Certification Appeals Branch
1200 New Jersey Avenue, SE
West 35-304
Washington, D.C. 20590

We will promptly implement any DOT certification appeal decisions affecting the eligibility of DBEs for our DOT-assisted contracting (e.g., certify a firm if DOT has determined that our denial of its application was erroneous).

SUBPART F – COMPLIANCE AND ENFORCEMENT

Section 26.109 Information, Confidentiality, Cooperation

We will safeguard from disclose to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law.

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

Monitoring Payments to DBEs

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

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

ATTACHMENTS

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|---------------|-------------------------------------------------------------------|
| Attachment 1 | Bidders List |
| Attachment 2 | Organizational Chart |
| Attachment 3 | Monitoring and Enforcement Mechanisms |
| Attachment 4 | Overall Goal Calculations |
| Attachment 5 | Breakout of Estimated Race-Neutral & Race-Conscious Participation |
| Attachment 6 | Form 1 & 2 for Demonstration of Good Faith Efforts |
| Attachment 7 | Certification Application Forms |
| Attachment 8 | Procedures for Removal of DBE’s Eligibility |
| Attachment 9 | Regulations: 49 CFR Part 26 |
| Attachment 10 | Oregon State Unified Certification Program Statement |

Attachment 2

ORGANIZATIONAL CHART

Contract Oversight Body

Mayor
City Manager
City Engineer
Airport Manager

Airport Grant Administration

City Administrator

DBE Liaison Officer

Airport Manager

Attachment 3

MONITORING AND ENFORCEMENT MECHANISMS

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

1. Breach of contract action, pursuant to the terms of the contract;
2. Other laws, statutes, regulations, etc. that are available to enforce the DBE requirements.

In addition, the federal government has available several enforcement mechanisms that it may apply to firms participating in the DBE problem, including, but not limited to, the following:

1. Suspension or debarment proceedings pursuant to 49 CFR Part 26
2. Enforcement action pursuant to 49 CFR Part 31
3. Prosecution pursuant to 18 USC 1001.

Attachment 4

SECTION 26.45: OVERALL GOAL CALCULATION

Amount of Goal

1. The City of Creswell's overall goal for the time period 2006-2007 is 1.9 percent of the Federal financial assistance we will expend in DOT-assisted contracts.

2. \$540,000.00 is the dollar amount of DOT-assisted contracts that the City of Creswell expects to award during FY 2007-2008. The City of Creswell has set a goal of expending \$10,260.00 with DBEs during this fiscal year/project.

The local market area was determined to be Lane County Oregon, as this is the area from which a substantial majority of the City's bidders come from and the area where the City spends a substantial majority of its contracting dollars.

Methodology used to Calculate Overall Goal

Step 1: 26.45(c)

Determine the base figure for the relative availability of DBEs.

The base figure for the relative availability of DBEs was calculated as follows:

$$\text{Base figure} = \frac{\text{Ready, willing, and able DBEs}}{\text{All firms ready, willing and able}}$$

The data source or demonstrable evidence used to derive the numerator was: The state Office of Minority, Women, and Emerging Small Business (OMWESB).

The data source or demonstrable evidence used to derive the denominator was: The U.S. Census Bureau for 2004.

2004 NAISC Code	Description	% of Work Performed	Total Firms	DBE Firms	Base Figure %	Weighted % (rounded .01)
237310	Paving	15%	28	2	7.14%	1.10%
237110	Water Line	71%	11	0	0.00%	0.00%
238990	Erosion Control	1%	36	4	11.11%	.10%
541330	Engineering	13%	722	39	5.40%	.70%
	Totals	100%	797	45	5.65%	1.90%

When we divided the numerator by the denominator, (45 divided by 745) we arrived at the base figure for our overall goal and that number was 5.65%.

Step 2: 26.45(d)

After calculating a base figure of the relative availability of DBEs, evidence was examined to determine if any adjustment was needed to the base figure in order to arrive at the overall goal.

In order to reflect as accurately as possible the DBE participation that we would expect in the absence of discrimination, we have adjusted our base figure to 1.88%, which we rounded up to the nearest tenth, or 1.9%.

The reason we chose to adjust our figure using this data was because:

- a. A more accurate representation of DBE involvement should correspond to the amount of work performed by DBE's as a percentage of the overall project. Therefore, the DBE participation goals are weighted according to the percentage each work category represents as part the entire project.
- b. DBE Consultation: To determine the possible effects of discrimination on DBE firms in the market area we consulted with the only DBE construction firm in defined market area. They reported no impediment to bid on contract work based on DBE status.
- c. Past Participation: The City of Creswell completed an FAA AIP project with similar work elements in November of 2004. Although this project did not have a DBE requirement because the engineering and construction costs were below \$250,000.00.
- d. Disparity Study: A disparity study was conducted in 1996 for the Portland Region. The study did not find evidence of discrimination in contracting with minority and women-owned business. It also indicated that when including minority and women owned businesses in contracting opportunities, the same businesses were included repeatedly. After review of our market area, the results and date of the disparity study, we did not adjust our goal.

The steps shown above were felt to be adequate to promote a competitive environment for DBE participation.

Public Participation

We will publish a notice of the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the City's offices for 30 days following the date of the notice and informing the public that we and DOT will accept comments on the goal for 45 days from the date of the notice.

We will publish our goal information in these publications:

- a. Creswell Chronical
- b. Daily Journal of Commerce
- c. Plan Centers - upon request

Any comments received from individuals or organizations will be summarized and forwarded to the FAA, with our responses.

Attachment 5

SECTION 26.51: BREAKOUT OF ESTIMATED RACE-NEUTRAL & RACE CONSCIOUS PARTICIPATION

Based on the 9th Circuit Court Decision in *Western States Paving Company v. Washington State Department of Transportation*, The City of Creswell has determined that it is appropriate to use a race/gender neutral goal. Therefore, the goal of 1.9% will be met entirely with race-neutral participation. The City of Creswell encourages all bidders to take active race/gender neutral steps to include DBE's in this and other airport contracts. Race/gender neutral steps include: unbundling large contracts, subcontract work the prime contractor may self-perform, provide bonding or financing assistance, provide technical assistance, etc.

The City of Creswell uses the following means to increase DBE participation:

The following is a summary of the basis of our estimated breakout of race-neutral and race-conscious DBE participation:

- 1) Arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses participation.
- 2) Carrying out information and communications programs on contracting procedures and specific contract opportunities.
- 3) Ensuring distribution of the State DBE directory, through print and electronic means.

The steps shown above were felt to be adequate to promote a competitive environment for DBE participation.

For reporting purposes, race-neutral DBE participation includes, but is not necessarily limited to, the following: DBE participation through a prime contract a DBE obtains through customary competitive procurement procedures; DBE participation through a subcontract on a prime contract that does not carry DBE goal; DBE participation on a prime contract exceeding a contract goal; and DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award.

We will maintain data separately on DBE achievements in those contracts with and without contract goals, respectively.

Attachment 6

FORMS 1 & 2 FOR DEMONSTRATION OF GOOD FAITH EFFORTS

FORM 1: DISADVANTAGED BUSINESS ENTERPRISE (DBE) UTILIZATION

The undersigned bidder/offeror has satisfied the requirements of the bid specification in the following manner (please check the appropriate space):

_____ The bidder/offeror is committed to a minimum of _____ % DBE utilization on this contract.

_____ The bidder/offeror (if unable to meet the DBE goal of _____%) is committed to a minimum of _____% DBE utilization on this contract a submits documentation demonstrating good faith efforts.

Name of bidder/offeror's firm: _____

State Registration No. _____

By _____
(Signature) Title

FORM 2: LETTER OF INTENT

Name of bidder/offeror's firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Name of DBE firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____

Description of work to be performed by DBE firm:

The bidder/offeror is committed to utilizing the above-named DBE firm for the work described above. The estimated dollar value of this work is \$ _____.

Affirmation

The above-named DBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

By _____
(Signature) (Title)

If the bidder/offeror does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.

(Submit this page for each DBE subcontractor.)

Attachment 7

CERTIFICATION APPLICATION FORMS

Following is an application packet for certification with the Office of Minority, Women, and Emerging Small Businesses (OMWESB).

Attachment 8

PROCEDURES FOR REMOVAL OF DBE'S ELIGIBILITY

Part 26.87

(a) Ineligibility complaints

Upon receiving a written complaint, the DBELO will review the records concerning the firm, any material provided by the firm and the complainant, and other available information. It is determined that there is reasonable cause to believe that the firm is ineligible, written notice will be given to the firm that is proposed to be ineligible, setting forth the reasons for the proposed determination. If there is a determination that such reasonable cause does not exist, the firm will be notified of the complainant the firm in writing of this determination and the reasons for it.

(b) Recipient-initiated proceedings

If there is notification by the firm of a change in its circumstances or other information that comes to the DBELO's attention, and there it is determined that there is reasonable cause to believe that a currently certified firm is ineligible, written notice to the firm must be provided that there is a proposal to find the firm ineligible, setting forth the reasons for the proposed determination.

(c) DOT directive to initiate proceeding

If the DBELO determines that information provides reasonable cause to believe that a firm does not meet the eligibility criteria, the DBELO will initiate a proceeding to remove the firm's certification. The firm will be provided a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(d) Hearing

The DBELO will notify the firm of the reasonable cause to remove its eligibility as provided in paragraph (a), (b), or (c) of this section and give the firm an opportunity for an informal hearing to respond to the reasons for the proposal. The burden of proof shall be submitted by the DBELO. A complete record of the hearing shall be retained per Part 26.89.

(e) Separation of functions

The final decision will be made by the DBELO, P.D. Napolitano.

(f) Grounds for decision

- (1) Changes in the firm's circumstances since the certification of the firm.
- (2) Information or evidence not available at the time the firm was certified.
- (3) Information was concealed or misrepresented by the firm.
- (4) A Change in the certification standards or requirements of the Department.
- (5) A documented finding that the DBEOL's determination was factually erroneous.

(g) Notice of decision

The firm will receive the final written decision and the reasons for it, including specific references to the evidence that supports each reason. A copy of the decision will be sent to the complainant.

(h) Status of firm during proceeding

- (1) The firm will remain an eligible DBE during the proceeding.
- (2) The firm does not become ineligible until the issuance of the notice of decision.

(i) Effects of removal of eligibility

The following steps will be taken:

- (1) When a prime contractor has made a commitment to use the ineligible firm, or a commitment has been made to use a DBE prime contractor, but a subcontract or contract has not been executed before the issuance of the de-certification notice, the ineligible firm does not count toward the contract goal or overall goal. The prime contractor will be directed to meet the contract goal with an eligible DBE firm or demonstrate that good faith effort has been made.
- (2) If a prime contractor has executed a subcontract with the firm before it is notified of the firm's ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where the prime contract is later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the issuance of the notice of its ineligibility shall not count toward the overall goal, but may count toward the contract goal.
- (3) Exception - If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, it may continue to count its participation on that contract toward overall and contract goals.

(j) Availability of appeal

When an administratively final removal of a firm's eligibility is made under this section, the firm may appeal the removal to the Department under §26.89.

Attachment 9

REGULATIONS

Title 49 Part 26

U.S. Department of Transportation Office of Small and Disadvantaged Business Utilization

PART 26 - PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

Subpart A - General

Sec.

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- 26.101 What compliance procedures apply to recipients?
- 26.103 What enforcement actions apply in FHWA and FTA programs?
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- 26.107 What enforcement actions apply to firms participating in the DBE program?
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Appendix A to part 26 - Guidance Concerning Good Faith Efforts

Appendix B to part 26 - Forms [Reserved]

Appendix C to part 26 - DBE Business Development Program Guidelines

Appendix D to part 26 - Mentor-Protégé Program Guidelines

Appendix E to part 26 - Individual Determinations of Social and Economic Disadvantage

Authority: 23 U.S.C. 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C 1615, 47107, 47113, 47123;; Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107,113.

SUBPART A - GENERAL

§26.1 What are the objectives of this part?

This part seeks to achieve several objectives:

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

§26.3 To whom does this part apply?

- (a) If you are a recipient of any of the following types of funds, this part applies to you:
- (1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), 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.
 - (2) 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.
 - (3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*
- (b) [Reserved]
- (c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this part does not apply to the contract.
- (d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

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

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

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

- (i) One concern controls or has the power to control the other; or
 - (ii) A third party or parties controls or has the power to control both; or
 - (iii) An identity of interest between or among parties exists such that affiliation may be found.
- (2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

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

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*). "Compliance" means that a recipient has correctly implemented the requirements of this part.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

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

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

Disadvantaged business enterprise or DBE means a for-profit small business concern --

- (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is

owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Good faith efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section.

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Operating Administration or OA means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual . As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. The SIC Manual and the NAICS Manual are available through the National Technical Information Service (NTIS) of the U. S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site (www.ntis.gov/naics).

Primary recipient means a recipient which DOT financial assistance and passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or SBA means the United States Small Business Administration.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is --

- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.
- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
 - (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - (vi) Women;
 - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

§26.7 What discriminatory actions are forbidden?

- (a) You must never exclude any person from participation in, deny any person the benefits of, or

otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

§26.9 How does the Department issue guidance and interpretations under this part?

(a) This part applies instead of subparts A and C through E of 49 CFR part 23 in effect prior to [insert date 30 days from date of publication in the Federal Register] (See 49 CFR Parts 1 to 99, revised as of October 1, 1998.) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after [insert date 30 days from date of publication in the Federal Register] have definitive, binding effect in implementing the provisions of this part and constitute the official position of the Department of Transportation.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid and binding, and constitute the official position of the Department of Transportation, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.

§26.11 What records do recipients keep and report?

(a) [Reserved]

(b) You must continue to provide data about your DBE program to the Department as directed by DOT operating administrations.

(c) You must create and maintain a bidders list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects. For every firm, the following information must be included:

- (1) Firm name;
 - 1. Firm address;
 - 2. Firm's status as a DBE or non-DBE;
 - 3. The age of the firm; and
 - 4. The annual gross receipts of the firm.

§26.13 What assurances must recipients and contractors make?

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance:

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

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with

a subcontractor) must include the following assurance:

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

§26.15 How can recipients apply for exemptions or waivers?

(a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that --

(i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in Subpart B or C of this part;

(ii) Conditions in your jurisdiction are appropriate for implementing the proposal;

(iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and

(iv) Your proposal is consistent with applicable law and program requirements of the concerned operating administration's financial assistance program.

(3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

(i) DBE eligibility is determined as provided in Subparts D and E of this part, and DBE participation is counted as provided in §26.49;

(ii) Your level of DBE participation continues to be consistent with the objectives of this part;

(iii) There is a reasonable limitation on the duration of the your modified program; and

(iv) Any other conditions the Secretary makes on the grant of the waiver.

(4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

SUBPART B - ADMINISTRATIVE REQUIREMENTS FOR DBE PROGRAMS FOR FEDERALLY-ASSISTED CONTRACTING

§26.21 Who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

- (1) All FHWA recipients receiving funds authorized by a statute to which this part applies;
- (2) FTA recipients that receive \$250,000 or more in FTA planning, capital, and/or operating assistance in a Federal fiscal year;
- (3) FAA recipients that receive a grant of \$250,000 or more for airport planning or development.

(b) (1) You must submit a DBE program conforming to this part by [insert date 210 days from date of publication in the Federal Register] to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed and approved by the particular operating administration that provides funding for your DOT-assisted contracts).

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

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

§26.23 What is the requirement for a policy statement?

You must issue a signed and dated policy statement that expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation. You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

§26.25 What is the requirement for a liaison officer?

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part.

§26.27 What efforts must recipients make concerning DBE financial institutions?

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

§26.29 What prompt payment mechanisms must recipients have?

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than a specific number of days from receipt of each payment you make to the prime contractor. This clause must also require the prompt return of retainage payments from the prime contractor to the subcontractor within a specific number of days after the subcontractor's work is satisfactorily completed.

(1) This clause may provide for appropriate penalties for failure to comply, the terms and conditions of which you set.

(2) This clause may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(b) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:

- (1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.
- (2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.
- (3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

§26.31 What requirements pertain to the DBE directory?

You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE. You must revise your directory at least annually and make updated information available to contractors and the public on request.

§26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?

- (a) If you determine that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, you must devise appropriate measures to address this overconcentration.
- (b) These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. You may also consider varying your use of contract goals, to the extent consistent with §26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.
- (c) You must obtain the approval of the concerned DOT operating administration for your determination of overconcentration and the measures you devise to address it. Once approved, the measures become part of your DBE program.

§26.35 What role do business development and mentor-protégé programs have in the DBE program?

- (a) You may or, if an operating administration directs you to, you must establish a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program. You may require a DBE firm, as a condition of receiving assistance through the BDP, to agree to terminate its participation in the DBE program after a certain time has passed or certain objectives have been reached. See Appendix C of this part for guidance on administering BDP programs.
- (b) As part of a BDP or separately, you may establish a "mentor-protégé" program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm.
 - (1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protégé program are eligible to participate in the mentor-protégé program.
 - (2) During the course of the mentor-protégé relationship, you must:
 - (i) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than one half of its goal on any contract let by the recipient, and
 - (ii) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.

(3) For purposes of making determinations of business size under this part, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program. See Appendix D of this part for guidance concerning the operation of mentor-protégé programs.

(c) Your BDPs and mentor-protégé programs must be approved by the concerned operating administration before you implement them. Once approved, they become part of your DBE program.

§26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?

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

(b) Your DBE program must also include a monitoring and enforcement mechanism to verify that the work committed to DBEs at contract award is actually performed by the DBEs. This mechanism must provide for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms) and include a provision ensuring that DBE participation is credited toward overall or contract goals only when payments are actually made to DBE firms.

SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING

§26.41 What is the role of the statutory 10 percent goal in this program?

(a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.

(c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

§26.43 Can recipients use set-asides or quotas as part of this program?

(a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.

(b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

§26.45 How do recipients set overall goals?

(a) You must set an overall goal for DBE participation in your DOT-assisted contracts.

(b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.

(c) *Step 1.* You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis

from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.

(1) *Use DBE Directories and Census Bureau Data.* Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) database, determine the number of all ready, willing and able businesses available in your market that perform work in the same SIC codes. (Information about the CBP database may be obtained from the Census Bureau at their web site, www.census.gov/epcd/cbp/view/cbpview.html.) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number for all businesses to derive a base figure for the relative availability of DBEs in your market.

(3) *Use data from a disparity study.* Use a percentage figure derived from data in a valid, applicable disparity study.

(4) *Use the goal of another DOT recipient.* If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) *Alternative methods.* Subject to the approval of the DOT operating administration, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include:

- (i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;
- (ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and
- (iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.

(2) You may also consider available evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:

- (i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;
 - (ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.
- (3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:

- (1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming fiscal year;
- (2) If you are an FTA or FAA recipient, as a percentage of all FTA or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-

assisted contracts in the forthcoming fiscal year. In appropriate cases, the FTA or FAA Administrator may permit you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects.

(f) (1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration for review on August 1 of each year, unless the Administrator of the concerned operating administration establishes a different submission date.

(2) If you are an FTA or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FTA or FAA Administrator.

(3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see §26.51(c)).

(4) You are not required to obtain prior operating administration concurrence with the your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

(5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:

(i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and

(ii) Avoid imposing undue burdens on non-DBEs.

(g) In establishing an overall goal, you must provide for public participation. This public participation must include:

(1) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs.

(2) A published notice announcing your proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the your principal office for 30 days following the date of the notice, and informing the public that you and the Department will accept comments on the goals for 45 days from the date of the notice. The notice must include addresses to which comments may be sent, and you must publish it in general circulation media and available minority-focused media and trade association publications.

(h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

§26.47 Can recipients be penalized for failing to meet overall goals?

(a) You cannot be penalized, or treated by the Department as being in noncompliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith.

(b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

§26.49 How are overall goals established for transit vehicle manufacturers?

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal. In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying §26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will perform during the fiscal year in question. You must exclude from this base funds attributable to work performed outside the United States and its territories, possessions, and commonwealths. The requirements and procedures of this part with respect to submission and approval of overall goals apply to you as they do to recipients.

(c) As a transit vehicle manufacturer, you may make the certification required by this section if you have submitted the goal this section requires and FTA has approved it or not disapproved it.

(d) As a recipient, you may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

§26.51 What means do recipients use to meet overall goals?

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

(b) Race-neutral means include, but are not limited to, the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);

(2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

(4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

EXAMPLE to paragraph (f)(1): Your overall goal for Year I is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year I.

(2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

EXAMPLE to paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of

race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

EXAMPLE to paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

EXAMPLE to paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (i.e., from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two consecutive years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in §26.11.

§26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

(a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:

- (1) Documents that it has obtained enough DBE participation to meet the goal; or
- (2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

- (1) Award of the contract will be conditioned on meeting the requirements of this section;
- (2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:
 - (i) The names and addresses of DBE firms that will participate in the contract;
 - (ii) A description of the work that each DBE will perform;

- (iii) The dollar amount of the participation of each DBE firm participating;
 - (iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
 - (v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
 - (vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part); and
- (3) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section --
- (i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or
 - (ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.
- (c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.
- (d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.
- (1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.
 - (2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.
 - (3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.
 - (4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.
 - (5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.
- (e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.
- (f) (1) You must require that a prime contractor not terminate for convenience a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without your prior written consent.
- (2) When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor 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 under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.
- (3) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.
- (g) You must apply the requirements of this section to DBE bidders/offerors for prime contracts.

In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

§26.55 How is DBE participation counted toward goals?

(a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.

(1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

(2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

(b) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

(c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

(1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by 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 the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

(2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.

(3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.

(4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.

(d) Use the following factors in determining whether a DBE trucking company is performing a

commercially useful function:

- (1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
 - (2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
 - (3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
 - (4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
 - (5) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.
 - (6) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.
- (e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
- (1) (i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.
 - (ii) For purposes of this paragraph (e)(1), a manufacturer is a firm 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.
 - (2) (i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.
 - (ii) For purposes of this section, 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 are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
- (A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
- (B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) 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.
- (C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).
- (3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count 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, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.
- (f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of

this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in §26.87(i)).

(g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.

(h) Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or your overall goal until the amount being counted toward the goal has been paid to the DBE.

SUBPART D - CERTIFICATION STANDARDS

§26.61 How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups identified in §26.67(a) are socially and economically disadvantaged. This means that they do not have the burden of proving to you that they are socially and economically disadvantaged. However, applicants have the obligation to provide you information concerning their economic disadvantage (see §26.67).

(d) 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 to you, by a preponderance of the evidence, that they are socially and economically disadvantaged. (See Appendix E of this part.)

(e) You must make 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) by considering all the facts in the record, viewed as a whole.

§26.63 What rules govern group membership determinations?

(a) If you have reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, you must require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group.

(b) In making such a determination, you must consider 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. You may require the applicant to produce appropriate documentation of group membership.

(1) If you determine that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis.

(2) Your decisions concerning membership in a designated group are subject to the certification appeals procedure of §26.89.

§26.65 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. You must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three

fiscal years, in excess of \$16.6 million. The Secretary adjusts this amount for inflation from time to time.

§26.67 What rules determine social and economic disadvantage?

(a) Presumption of disadvantage.

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

(2) (i) You must require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.

(ii) In determining net worth, you must exclude an individual's ownership interest in the applicant firm and 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). A contingent liability does not reduce an individual's net worth. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

(b) Rebuttal of presumption of disadvantage.

(1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

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

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

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(c) **8(a) and SDB Firms.** If a firm applying for certification has a current, valid certification from or recognized by the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB certification based on the firm's self-certification as an SDB), you may accept the firm's 8(a) or SDB certification in lieu of conducting your own certification proceeding, just as you may accept the certification of another DOT recipient for this purpose. You are not required to do so, however.

(d) Individual determinations of social and economic disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$750,000 shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

§26.69 What rules govern determinations of ownership?

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

(b) To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 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.

(c) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), 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.

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

(f) 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 --

(i) In a specialized field;

- (ii) Of outstanding quality;
 - (iii) In areas critical to the firm's operations;
 - (iv) Indispensable to the firm's potential success;
 - (v) Specific to the type of work the firm performs; and
 - (vi) 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.
- (g) You must always 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; or
 - (2) Through inheritance, or otherwise because of the death of the former owner.
- (h) (1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is --
- (i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
 - (ii) Involved in the same or a similar line of business; or
 - (iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.
- (2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that --
- (i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
 - (ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.
- (i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:
- (1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.
 - (2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.
- (j) You may consider the following factors in determining the ownership of a firm. However, you must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because --
- (1) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (h) of this section;
 - (2) There is a provision for the co-signature of a spouse who is not a socially and economically

disadvantaged individual 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 in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, you must 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.

§26.71 What rules govern determinations concerning control?

- (a) In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.
- (b) Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.
 - (1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - (2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.
 - (3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.
 - (4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.
- (c) A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in §26.69(j)(2).
- (d) The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
 - 1. A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).
 - 2. In a corporation, disadvantaged owners must control the board of directors.
 - 3. In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.
- (e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.
- (f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals.

Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

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

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

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

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

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

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

other persons are immediate family members.

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

(1) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate to you, by clear and convincing evidence, that:

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

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

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

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

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

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

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

§26.73 What are other rules affecting certification?

(a) (1) 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 (a)(2) of this section, you must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

(2) You 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 DBE program.

(b) You must evaluate the eligibility of a firm on the basis of present circumstances. You 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 this part. Nor must you refuse to certify a firm solely on the basis that it is a newly formed firm.

(c) DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT 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.

(d) 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.

(e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, 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 socially and economically 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, you may certify the subsidiary if it otherwise meets all requirements of this subpart. 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) You may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:

EXAMPLE 1: Socially and economically disadvantaged individuals own 100 percent of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

EXAMPLE 2: Disadvantaged individuals own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

EXAMPLE 3: Disadvantaged individuals own 80 percent of the holding company, which in turn owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is 56 percent (80 percent of the 70 percent). This is more than 51 percent, so you may certify the subsidiary, if all other requirements are met.

EXAMPLE 4: Same as Example 2 or 3, but someone other than the socially and economically disadvantaged owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, you cannot certify it because it fails to meet control requirements.

EXAMPLE 5: Disadvantaged individuals own 60 percent of the holding company, which in turn owns 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is about 31 percent. This is less than 51 percent, so you cannot certify the subsidiary.

EXAMPLE 6: The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of §26.65(b). Under the rules concerning

affiliation, the subsidiary fails to meet the size standard and cannot be certified.

(f) 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 socially and economically disadvantaged individuals.

(g) You must not require a DBE firm to be prequalified as a condition for certification unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.

(h) A firm that is owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of §26.65. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in §26.71.

SUBPART E - CERTIFICATION PROCEDURES

§26.81 What are the requirements for Unified Certification Programs?

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

(1) Within three years of [insert date 30 days after date of publication in Federal Register], you and the other recipients in your state must sign an agreement establishing the UCP for that state and submit the agreement to the Secretary for approval. The Secretary may, on the basis of extenuating circumstances shown by the recipients in the state, extend this deadline for no more than one additional year.

(2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.

(3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.

(4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.

(5) If you and the other recipients in your state fail to meet the deadlines set forth in this paragraph (a), you shall have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond your control. If you fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary shall direct you to complete the required action by a date certain. If you and the other recipients fail to carry out this direction in a timely manner, you are collectively in noncompliance with this part.

(b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.

(1) Certification decisions by the UCP shall be binding on all DOT recipients within the state.

(2) The UCP shall provide "one-stop shopping" to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

(3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.

(c) All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

(d) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The "home state" UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm's application.

(e) Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.

(f) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.

(g) Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under the provisions of this section), the information required by §26.31. The UCP shall make the directory available to the public electronically, on the internet, as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

(h) Except as otherwise specified in this section, all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

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

(a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.

(b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.

(c) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their resumes and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification;

(2) If the firm is a corporation, analyze the ownership of stock in the firm;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) 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;

(6) 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;

(7) Require potential DBEs to complete and submit an appropriate application form.

(i) Uniform form [reserved]

(ii) You must make sure that 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.

- (iii) You must review all information on the form prior to making a decision about the eligibility of the firm.
- (d) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other recipient.
- (e) When another DOT recipient has certified a firm, you have discretion to take any of the following actions:
- (1) Certify the firm in reliance on the certification decision of the other recipient;
 - (2) Make an independent certification decision based on documentation provided by the other recipient, augmented by any additional information you require the applicant to provide; or
 - (3) Require the applicant to go through your application process without regard to the action of the other recipient.
- (f) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.
- (g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.
- (h) Once you have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of §26.87. You may not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made changes.
- (i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.
- (1) Changes in management responsibility among members of a limited liability company are covered by this requirement.
 - (2) You must attach supporting documentation describing in detail the nature of such changes.
 - (3) The notice must take the form of an affidavit sworn to by the owners of the firm before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under §26.109(c).
- (j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under §26.109(c).
- (k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You 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. You may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to

the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under §26.89.

§26.85 What rules govern recipients' denials of initial requests for certification?

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

(b) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your DBE program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm.

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

§26.87 What procedures does a recipient use to remove a DBE's eligibility?

(a) Ineligibility complaints.

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

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

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

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

(c) DOT directive to initiate proceeding.

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

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

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

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

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

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

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

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

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

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

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

(f) Grounds for Decision. You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following:

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

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

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

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

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) Notice of decision. Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

(h) Status of firm during proceeding.

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

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

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

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been

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

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

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

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

§26.89 What is the process for certification appeals to the Department of Transportation?

(a) (1) If you are a firm which is denied certification or whose eligibility is removed by a recipient, you may make an administrative appeal to the Department.

(2) If you are a complainant in an ineligibility complaint to a recipient (including the concerned operating administration in the circumstances provided in §26.87(c)), you may appeal to the Department if the recipient does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) Send appeals to the following address:

U.S. Department of Transportation
Office of Civil Rights
400 7th Street, S.W., Room 2401
Washington, D.C. 20590

(b) Pending the Department's decision in the matter, the recipient's decision remains in effect. The Department does not stay the effect of the recipient's decision while it is considering an appeal.

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, containing information and arguments concerning why the recipient's decision should be reversed. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal.

(1) If you are an appellant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under §26.109(c).

(2) If you are an appellant other than one described in paragraph (c)(1) of this section, the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in paragraph (c)(1) of this section. Failure to provide this information may be deemed a failure to cooperate under §26.109(c).

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a recipient's showing of good cause. To facilitate the

Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

(f) As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.

(2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (see paragraph (d) of this section). The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

(8) The Department's policy is to make its decision within 180 days of receiving the complete administrative record. If the Department does not make its decision within this period, the Department provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.

(g) All decisions under this section are administratively final, and are not subject to petitions for reconsideration.

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

- (a) If you are the recipient from whose action an appeal under §26.89 is taken, the decision is binding. It is not binding on other recipients.
- (b) If you are a recipient to which a DOT determination under §26.89 is applicable, you must take the following action:
 - (1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in §26.87(i) take effect.
 - (2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in §26.87.
 - (3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.
 - (4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.
 - (5) If the Department affirms your determination, no further action is necessary.
- (c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under §26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other 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.

SUBPART F - COMPLIANCE AND ENFORCEMENT

§26.101 What compliance procedures apply to recipients?

- (a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under §26.103 or §26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.
- (b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

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

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

- (a) Noncompliance complaints. Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the

confidentiality of your identity as provided in §26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.

(b) Compliance reviews. The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.

(c) Reasonable cause notice. If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, return receipt requested, a written notice advising you that there is reasonable cause to find you in noncompliance. The notice states the reasons for this finding and directs you to reply within 30 days concerning whether you wish to begin conciliation.

(d) Conciliation.

(1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

(2) If you and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as being in compliance. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.

(3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.

(4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.

(e) Enforcement actions.

(1) Enforcement actions are taken as provided in this subpart.

(2) Applicable findings in enforcement proceedings are binding on all DOT offices.

§26.105 What enforcement actions apply in FAA Programs?

(a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

(b) The provisions of §26.103 (b) and this section apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

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

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty,

the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified

by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.

(e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

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

(a) Availability of records.

(1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information (5 U.S.C. 552) and Privacy Acts (5 U.S.C. 552a). The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

(2) If you are a recipient, you shall safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.

(b) Confidentiality of information on complainants. Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

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

(d) Intimidation and retaliation. If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

Attachment 10

OREGON STATE UNIFIED CERTIFICATION PROGRAM AGREEMENT

**Interagency Agreement between
The Unified Certification Program Partners
and
The Department of Consumer and Business Services
for
Administering the Disadvantaged Business Enterprise
Unified Certification Function**

The Disadvantaged Business Enterprise requirements contained in 49 CFR Part 26 include a provision for a “one-stop” certification process. The process must be defined and submitted to the Secretary of Transportation for approval within 3 years of publication of the regulations, March 1, 2002, (Attachment A). Failure to develop and execute a Unified Certification Program agreement will result in a loss of U.S. Department of Transportation (USDOT) funding.

As provided under 49 CFR 26, only firms owned and controlled by socially and economically disadvantaged person(s) are to benefit from the DBE Program. The Oregon Department of Transportation (ODOT) Office of Civil Rights is responsible for ensuring compliance with the federal regulations in the determination of a DBE certification, and will act in the capacity of Lead Agency for the Unified Certification Program Partners. Authority for the Oregon Unified Certification Program, Disadvantaged Business Enterprise Certification Component is delegated to the Office of Minority, Women, and Emerging Small Business through this agreement with the Department of Consumer and Business Services. The Oregon Department of Transportation retains responsibility to U.S. DOT for assuring certification of DBEs is performed consistent with 49 CFR Part 26.

As provided under Oregon Revised Statute 200.055(5), the Department of Consumer and Business Services is the “sole agency authorized to certify enterprises as Disadvantage Business Enterprises eligible to perform on public contracts in this state.”, (Attachment B). Additionally, pursuant to Oregon Revised Statute 183.341, the Department of Consumer and Business Services, Office of Minority, Women and Emerging Small Business has adopted model rules for the certification of Disadvantaged Business Enterprise firms, (see OAR 445-050-0020(2)), (Attachment C).

This Agreement is made and entered into by and between the Unified Certification Program Partners and the Oregon Department of Consumer and Business Services to provide Disadvantaged Business Enterprise certification services as required under the Code of Federal Regulations 49 Part 26.

Hereafter the following agencies shall be referred to as the Unified Certification Program Partnership:

Oregon Department of Transportation – ODOT
Oregon Department of Aviation
METRO
Port Of Portland
Tri-Met
Lane Transit District
Salem Area Mass Transit District

Hereafter Unified Certification Program Partnership shall be referred to as UCP Partners.

Hereafter the Department of Consumer and Business Services shall be referred to as DCBS.

Hereafter the Office of Minority, Women and Emerging Small Business shall be referred to as OMWESB.

Hereafter Disadvantaged Business Enterprise shall be referred to as DBE.

This Agreement shall be effective from the date of execution by the UCP Partners and Department of Consumer and Business Services and shall continue thereafter.

Now therefore, the parties hereto mutually agree to the following duties and responsibilities:

UCP Partnership Duties and Responsibilities:

- Agree to ensure that OMWESB has sufficient resources to carry out the requirements of 49 CFR §26.81.
- Agree that the ODOT will be the Lead Agency for the Partnership.
- Agree that all certifications shall be pre-certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

Lead Agency Duties and Responsibilities:

- Shall notify OMWESB of any DBE certification issues affecting DBE eligibility for participation on federally assisted projects.
- Shall notify and advise OMWESB and UCP Partners of any change in federal law, USDOT regulation, and or changes to ODOT's DBE Program Plan document.
- Shall notify OMWESB and UCP Partners of training programs relevant to DBE Certification function/procedures.
- Shall review an OMWESB determination in a third party complaint that challenges a DBE firm's certification status and or eligibility.

- Shall provide ongoing DBE Certification expertise, oversight, conduct process reviews when required, and an annual audit of DBE Certification files.
- Shall assist OMWESB in the conduct of “Contested Case Hearings” for DBE firms who have appealed an OMWESB determination.
- Shall submit to the UCP Partners the following documentation on each DBE certification upon request:
 - Copy of letter of determination
 - Copy of site visit
- Shall notify UCP Partners in writing within 7 days upon request of any of the following:
 - **De-Certification or Denial of DBE Certification**
 - Third party challenge
 - DBE Certification closed due to lack of response
 - DBE Certification application withdraws

DCBS (OMWESB) Duties and Responsibilities:

- Shall consult with the UCP Partners regarding changes in State rules, regulations, statutory proposals or amendments conflicting with federal guidelines in DBE certification.
- Will not be required to process an application for certification from a firm having its principle place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business.
- Shall share its information and documents concerning the firm with other UCPs that are considering the firm’s application.
- Shall maintain a DBE Certification database and directory.
- Shall provide the UCP Partners all necessary DBE Certification information required to complete federal reports and data collection.
- In accordance with 49 CFR §26.83(k) OMWESB shall make decisions on applications for certification within 90 days of receiving from the applicant firm all information required. This time period may be extended once, for no more than 60 days, upon written notification to the firm, explaining fully and specifically the reasons for the extension.
- Shall, consistent with Oregon Public Records law, safeguard from disclosure to any unauthorized person information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information.

- Shall submit to the Lead Agency the following documentation on each DBE certification within 7 days of certification:
 - Copy of letter of determination
 - Copy of site visit
- Shall notify Lead Agency in writing within 7 days of any of the following:
 - **De-Certification or Denial of DBE Certification**
 - Third party challenge
 - DBE Certification closed due to lack of response
 - DBE Certification application withdraws
- Shall participate in Lead Agency annual DBE staff training.
- Shall coordinate participation in DBE Certification workshops with UCP Partners.
- Shall provide technical assistance to firms seeking DBE Certification.

General Provisions:

- The UCP Partners and DCBS will not exclude persons from participation in, deny benefits to, or otherwise discriminate against any persons in connection with the award and performance of any contract governed by 49 CFR Part 26 on the basis of race, color, sex and national origin.
- The UCP Partners and DCBS will not directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing the accomplishments of the objective of this program with respect to individuals of a particular race, color, sex and national origin.
- The UCP Partners and DCBS mutually agree that all DBE certification decisions by OMWESB shall be binding on all DOT recipients within Oregon.
- The UCP Partners and DCBS mutually agree to have open and regular communications on matters concerning DBE certification. Matters of concern to all agencies include process time, staffing, budget, certification issues, and changes in the overall DBE certification process.
- UCP Partners and DCBS shall cooperate in the administration of the USDOT required DBE Certification process, striving for the most efficient use of their individual agency resources in carrying out the process of certifying Socially and Economically Disadvantaged individuals.

- The UCP Partners and DCBS mutually agree to notify and/or copy all members of the UCP Partnership of any communications regarding DBE Certification to the USDOT, or respective agencies.
- The UCP Partners and DCBS agree to work in partnership during Federal audits and performance reviews
- This Agreement may be amended or terminated by mutual written consent of the parties at any time.

IN WITNESS WHEREOF, the parties hereto have caused this Unified Certification Agreement to be executed by their respective proper officials:

_____	_____
Oregon Department of Transportation	Date
_____	_____
Oregon Department of Aviation	Date
_____	_____
Department of Consumer and Business Services	Date
_____	_____
METRO	Date
_____	_____
Port of Portland	Date
_____	_____
Tri-Met	Date
_____	_____
Lane Transit District	Date
_____	_____
Salem Area Mass Transit District	Date

Attachment A

49 CFR 26

§26.81 What are the requirements for Unified Certification Programs?

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

- (1) Within three years of March 1, 2002, you and the other recipients in your state must sign an agreement establishing the UCP for that state and submit the agreement to the Secretary for approval. The Secretary may, on the basis of extenuating circumstances shown by the recipients in the state, extend this deadline for no more than one additional year.
- (2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.
- (3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.
- (4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.
- (5) If you and the other recipients in your state fail to meet the deadlines set forth in this paragraph (a), you shall have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond your control. If you fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary shall direct you to complete the required action by a date certain. If you and the other recipients fail to carry out this direction in a timely manner, you are collectively in noncompliance with this part.

(b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.

- (1) Certification decisions by the UCP shall be binding on all DOT recipients within the state.

- (2) The UCP shall provide "one-stop shopping" to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.
- (3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.

(c) All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

(d) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The "home state" UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm's application.

(e) Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.

(f) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.

(g) Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under the provisions of this section), the information required by §26.31. The UCP shall make the directory available to the public electronically, on the internet, as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

(h) Except as otherwise specified in this section, all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

Attachment B

OREGON REVISED STATUTES

Chapter 200 — Disadvantaged, Minority, Women and Emerging Small Business Enterprises

2003 EDITION

CERTAIN DISADVANTAGED BUSINESS ENTERPRISES MISCELLANEOUS MATTERS GENERAL PROVISIONS

200.005 Definitions for ORS 200.005 to 200.075, 200.200 and 279.059. As used in ORS 200.005 to 200.075, 200.200 and 279.059:

- (1) “Disadvantaged business enterprise” means a small business concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any corporation, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
- (2) “Economically disadvantaged individual” means an individual who is socially disadvantaged and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to another in the same business area who is not socially disadvantaged.
- (3) “Emerging small business” means:
 - (a) A business with its principal place of business located in this state;
 - (b) A business with average annual gross receipts over the last three years not exceeding \$1 million for construction firms and \$300,000 for nonconstruction firms;
 - (c) A business which has fewer than 20 employees;
 - (d) An independent business; and
 - (e) A business properly licensed and legally registered in this state.
- (4) “Emerging small business” does not mean a subsidiary or parent company belonging to a group of firms which are owned and controlled by the same individuals which have aggregate annual gross receipts in excess of \$1 million for construction or \$300,000 for nonconstruction firms over the last three years.
- (5) A business may be certified as an emerging small business for no more than seven years.
- (6) “Minority or women business enterprise” means a small business concern which is at least 51 percent owned by one or more minorities or women, or in the case of a corporation, at least 51 percent of the stock of which is owned by one or more minorities or women, and whose management and daily business operations are controlled by one or more of such individuals.
- (7) “Minority individual” means a person who is a citizen or lawful permanent resident of the United States, who is:
 - (a) Black who is a person having origins in any of the black racial groups of Africa;
 - (b) Hispanic who is a person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race;

- (c) Asian American who is a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands;
- (d) Portuguese who is a person of Portuguese, Brazilian or other Portuguese culture or origin, regardless of race;
- (e) American Indian or Alaskan Native who is a person having origins in any of the original peoples of North America; or
- (f) A member of another group, or another individual who is socially and economically disadvantaged as determined by the Advocate for Minority, Women and Emerging Small Business.
- (8) “Small business concern” means a small business as defined by the United States Small Business Administration per C.F.R. 121, as amended.
- (9) “Socially disadvantaged individual” means an individual who has been subjected to racial or ethnic prejudice or cultural bias, without regard to individual qualities, because of the individual’s identity as a member of a group.
- (10) “Woman” means a person of the female sex who is a citizen or lawful permanent resident of the United States.
- (11) “Responsible bidder” means one who, in the determination of the office of the Advocate for Minority, Women and Emerging Small Business, has undertaken both a policy and practice of actively pursuing participation by minority and women businesses in all bids, both public and private, submitted by such bidder. [1987 c.893 §2; 1989 c.1043 §1; 1991 c.517 §9; 2001 c.104 §71]

Note: The amendments to 200.005 by section 213, chapter 794, Oregon Laws 2003, become operative March 1, 2005, and apply only to public contracts first advertised, but if not advertised then entered into, on or after March 1, 2005. See sections 336 and 337, chapter 794, Oregon Laws 2003. The text that is operative on and after March 1, 2005, is set forth for the user’s convenience.

200.005. As used in ORS 200.005 to 200.075, 200.200 and 279A.105:

- (1) “Disadvantaged business enterprise” means a small business concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any corporation, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
- (2) “Economically disadvantaged individual” means an individual who is socially disadvantaged and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to another in the same business area who is not socially disadvantaged.
- (3) “Emerging small business” means:
 - (a) A business with its principal place of business located in this state;
 - (b) A business with average annual gross receipts over the last three years not exceeding \$1 million for construction firms and \$300,000 for nonconstruction firms;
 - (c) A business which has fewer than 20 employees;
 - (d) An independent business; and

- (e) A business properly licensed and legally registered in this state.
- (4) “Emerging small business” does not mean a subsidiary or parent company belonging to a group of firms which are owned and controlled by the same individuals which have aggregate annual gross receipts in excess of \$1 million for construction or \$300,000 for nonconstruction firms over the last three years.
- (5) A business may be certified as an emerging small business for no more than seven years.
- (6) “Minority or women business enterprise” means a small business concern which is at least 51 percent owned by one or more minorities or women, or in the case of a corporation, at least 51 percent of the stock of which is owned by one or more minorities or women, and whose management and daily business operations are controlled by one or more of such individuals.
- (7) “Minority individual” means a person who is a citizen or lawful permanent resident of the United States, who is:
 - (a) Black who is a person having origins in any of the black racial groups of Africa;
 - (b) Hispanic who is a person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race;
 - (c) Asian American who is a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands;
 - (d) Portuguese who is a person of Portuguese, Brazilian or other Portuguese culture or origin, regardless of race;
 - (e) American Indian or Alaskan Native who is a person having origins in any of the original peoples of North America; or
 - (f) A member of another group, or another individual who is socially and economically disadvantaged as determined by the Advocate for Minority, Women and Emerging Small Business.
- (8) “Small business concern” means a small business as defined by the United States Small Business Administration per C.F.R. 121, as amended.
- (9) “Socially disadvantaged individual” means an individual who has been subjected to racial or ethnic prejudice or cultural bias, without regard to individual qualities, because of the individual’s identity as a member of a group.
- (10) “Woman” means a person of the female sex who is a citizen or lawful permanent resident of the United States.
- (11) “Responsible bidder” means one who, in the determination of the office of the Advocate for Minority, Women and Emerging Small Business, has undertaken both a policy and practice of actively pursuing participation by minority and women businesses in all bids, both public and private, submitted by such bidder.

200.015 Legislative findings. (1) The Legislative Assembly supports the aspirations of minorities, women and emerging small businesses to enter the mainstream of Oregon social, political and economic life.

(2) The Legislative Assembly finds:

- (a) The opportunity for full participation in our free enterprise system by minorities, women and emerging small businesses is essential;
- (b) Greater economic opportunity for minorities, women and emerging small businesses is essential;
- (c) Review of public programs to remedy historical patterns of exclusion of and discrimination against racial or ethnic groups and women is needed;

(d) Public policies and programs to eliminate the effects of long-term, open and pervasive exclusion of and discrimination against minorities and women from the business sector, including increased opportunities to integrate minorities and women into the full economic life of the community should be reviewed; and

(e) In cooperation with the private sector, the affected populations, interested groups and appropriate governmental entities, a program of review should be established to recommend remedies for the unfortunate effects of social, political and economic inequity that still exist.

(3) Women and minorities are rebuttably presumed to be:

(a) Economically disadvantaged.

(b) Socially disadvantaged. [1987 c.893 §3; 1989 c.1043 §2]

200.025 Advocate for Minority, Women and Emerging Small Business; office; duties. (1)

There is created in the Office of the Governor, the Advocate for Minority, Women and Emerging Small Business who shall be appointed by the Governor.

(2) There is created in the Department of Consumer and Business Services the Office for Minority, Women and Emerging Small Business, the employees of which shall be appointed by the Director of the Department of Consumer and Business Services.

(3) The Advocate for Minority, Women and Emerging Small Business shall:

(a) Advise the Governor and the director on activities and initiatives that may promote the economic integration of minorities, women and emerging small businesses into the business sector;

(b) Prepare an annual report to the Governor, director and Legislative Assembly on the status of minorities and women in the marketplace, accomplishments and resolutions of issues of concern to minority and women's enterprises and recommendations for executive and legislative actions; and

(c) Carry out other duties that may be assigned by the Governor.

(4) The Office for Minority, Women and Emerging Small Business shall:

(a) Provide assistance and information to minority, women and emerging small businesses;

(b) Assist in the development and implementation of an aggressive strategy for this state, based on research and monitoring, that encourages participation of minorities, women and emerging small businesses in the state's economy;

(c) Make recommendations to the director on the research, development and implementation of the plan for the involvement of disadvantaged and minority groups and emerging small businesses in all state programs;

(d) Maintain an Oregon Opportunity Register and Clearinghouse for information on public agency and other contract solicitations for professional services, supplies and services and other bid opportunities, in consultation with the State Board of Higher Education, the Department of Transportation and other entities;

(e) Monitor the certification and compliance program for disadvantaged, minority, women and emerging small businesses under ORS 279.059;

(f) Investigate complaints and possible abuses of the certification program; and

(g) Assist in the promotion and coordination of plans, programs and operations of state government that strengthen minority and women participation in the economic life of this state.

[1987 c.893 §4; 1989 c.1043 §3; 1993 c.500 §7; 1993 c.744 §§189,189a]

Note: The amendments to 200.025 by section 214, chapter 794, Oregon Laws 2003, become operative March 1, 2005, and apply only to public contracts first advertised, but if not advertised then entered into, on or after March 1, 2005. See sections 336 and 337, chapter 794, Oregon Laws 2003. The text that is operative on and after March 1, 2005, is set forth for the user's convenience.

200.025. (1) There is created in the Office of the Governor, the Advocate for Minority, Women and Emerging Small Business who shall be appointed by the Governor.

(2) There is created in the Department of Consumer and Business Services the Office for Minority, Women and Emerging Small Business, the employees of which shall be appointed by the Director of the Department of Consumer and Business Services.

(3) The Advocate for Minority, Women and Emerging Small Business shall:

(a) Advise the Governor and the director on activities and initiatives that may promote the economic integration of minorities, women and emerging small businesses into the business sector;

(b) Prepare an annual report to the Governor, director and Legislative Assembly on the status of minorities and women in the marketplace, accomplishments and resolutions of issues of concern to minority and women's enterprises and recommendations for executive and legislative actions; and

(c) Carry out other duties that may be assigned by the Governor.

(4) The Office for Minority, Women and Emerging Small Business shall:

(a) Provide assistance and information to minority, women and emerging small businesses;

(b) Assist in the development and implementation of an aggressive strategy for this state, based on research and monitoring, that encourages participation of minorities, women and emerging small businesses in the state's economy;

(c) Make recommendations to the director on the research, development and implementation of the plan for the involvement of disadvantaged and minority groups and emerging small businesses in all state programs;

(d) Maintain an Oregon Opportunity Register and Clearinghouse for information on public agency and other contract solicitations for professional services, supplies and services and other bid opportunities, in consultation with the State Board of Higher Education, the Department of Transportation and other entities;

(e) Monitor the certification and compliance program for disadvantaged, minority, women and emerging small businesses under ORS 200.055;

(f) Investigate complaints and possible abuses of the certification program; and

(g) Assist in the promotion and coordination of plans, programs and operations of state government that strengthen minority and women participation in the economic life of this state.

200.035 When state agency to notify advocate of solicitations. All state agencies shall provide timely notice of all contract and bid request solicitations in excess of \$5,000 to the Advocate for Minority, Women and Emerging Small Business. [1987 c.893 §5; 1997 c.145 §1; 1997 c.802 §10]

200.045 Standards for good faith efforts to meet contract requirements; standards for establishing bidder's responsibility. (1) To determine whether a bidder that has failed to meet emerging small business enterprise contract requirements, as described in ORS 279.059, may be

awarded the contract, the public contracting agency must decide whether the bidder's efforts to obtain participation by emerging small business enterprises were good faith efforts to meet the requirements.

(2) Performing all of the following actions by a bidder constitutes a rebuttable presumption that the bidder has made a good faith effort to satisfy the subcontracting requirement for emerging small businesses. It shall be a rebuttable presumption that the bidder has not made a good faith effort if the bidder has not acted consistently with such actions. Efforts that are merely superficial are not good faith efforts:

(a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform emerging small business enterprises of contracting and subcontracting or material supply opportunities available on the project;

(b) The bidder identified and selected specific economically feasible units of the project to be performed by emerging small business enterprises in order to increase the likelihood of participation by such enterprises;

(c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;

(d) The bidder provided written notice to a reasonable number of specific emerging small business enterprises, identified from a list of certified emerging small business enterprises provided or maintained by the Department of Consumer and Business Services for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;

(e) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested;

(f) The bidder provided interested emerging small business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;

(g) The bidder negotiated in good faith with the enterprises, and did not without justifiable reason reject as unsatisfactory bids prepared by any emerging small business enterprises;

(h) Where applicable, the bidder advised and made efforts to assist interested emerging small business enterprises in obtaining bonding, lines of credit or insurance required by the contracting agency or contractor;

(i) The bidder's efforts to obtain emerging small business enterprise participation were reasonably expected to produce a level of participation sufficient to meet the goals or requirement of the public contracting agency; and

(j) The bidder used the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of emerging small business enterprises.

(3) To determine whether a bidder is a responsible bidder, the performance of all the following actions constitutes a rebuttable presumption that the bidder is responsible. It shall be a rebuttable presumption that the bidder is not responsible if the bidder has not acted consistently with the actions described in this subsection. Efforts that are merely superficial are not good faith efforts.

- (a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform minority or women business enterprises of contracting and subcontracting or material supply opportunities available on the project;
- (b) The bidder identified and selected specific economically feasible units of the project to be performed by minority or women business enterprises in order to increase the likelihood of participation by such enterprises;
- (c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;
- (d) The bidder provided written notice to a reasonable number of specific minority or women business enterprises, identified from a list of certified minority or women business enterprises provided or maintained by the Department of Consumer and Business Services for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;
- (e) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested;
- (f) The bidder provided interested minority or women business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;
- (g) The bidder negotiated in good faith with interested, capable and competitive minority or women business enterprises submitting bids;
- (h) Where applicable, the bidder advised and made efforts to assist interested minority or women business enterprises in obtaining bonding, lines of credit or insurance required by the contracting agency or contractor;
- (i) The bidder's efforts to obtain minority or women business enterprise participation were reasonably expected to produce a level of participation sufficient to meet the goals of the public contracting agency; and
- (j) The bidder used the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of disadvantaged, minority or women business enterprises. [1987 c.893 §7; 1989 c.1043 §8; 1997 c.145 §2]

Note: The amendments to 200.045 by section 215, chapter 794, Oregon Laws 2003, become operative March 1, 2005, and apply only to public contracts first advertised, but if not advertised then entered into, on or after March 1, 2005. See sections 336 and 337, chapter 794, Oregon Laws 2003. The text that is operative on and after March 1, 2005, is set forth for the user's convenience.

200.045. (1) To determine whether a bidder that has failed to meet emerging small business enterprise contract requirements may be awarded the contract, the public contracting agency must decide whether the bidder's efforts to obtain participation by emerging small business enterprises were good faith efforts to meet the requirements.

(2) Performing all of the following actions by a bidder constitutes a rebuttable presumption that the bidder has made a good faith effort to satisfy the subcontracting requirement for emerging

small businesses. It shall be a rebuttable presumption that the bidder has not made a good faith effort if the bidder has not acted consistently with such actions. Efforts that are merely superficial are not good faith efforts:

- (a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform emerging small business enterprises of contracting and subcontracting or material supply opportunities available on the project;
- (b) The bidder identified and selected specific economically feasible units of the project to be performed by emerging small business enterprises in order to increase the likelihood of participation by such enterprises;
- (c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;
- (d) The bidder provided written notice to a reasonable number of specific emerging small business enterprises, identified from a list of certified emerging small business enterprises provided or maintained by the Department of Consumer and Business Services for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;
- (e) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested;
- (f) The bidder provided interested emerging small business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;
- (g) The bidder negotiated in good faith with the enterprises, and did not without justifiable reason reject as unsatisfactory bids prepared by any emerging small business enterprises;
- (h) Where applicable, the bidder advised and made efforts to assist interested emerging small business enterprises in obtaining bonding, lines of credit or insurance required by the contracting agency or contractor;
- (i) The bidder's efforts to obtain emerging small business enterprise participation were reasonably expected to produce a level of participation sufficient to meet the goals or requirement of the public contracting agency; and
- (j) The bidder used the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of emerging small business enterprises.

(3) To determine whether a bidder is a responsible bidder, the performance of all the following actions constitutes a rebuttable presumption that the bidder is responsible. It shall be a rebuttable presumption that the bidder is not responsible if the bidder has not acted consistently with the actions described in this subsection. Efforts that are merely superficial are not good faith efforts.

- (a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform minority or women business enterprises of contracting and subcontracting or material supply opportunities available on the project;
- (b) The bidder identified and selected specific economically feasible units of the project to be performed by minority or women business enterprises in order to increase the likelihood of participation by such enterprises;

- (c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;
- (d) The bidder provided written notice to a reasonable number of specific minority or women business enterprises, identified from a list of certified minority or women business enterprises provided or maintained by the Department of Consumer and Business Services for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;
- (e) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested;
- (f) The bidder provided interested minority or women business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;
- (g) The bidder negotiated in good faith with interested, capable and competitive minority or women business enterprises submitting bids;
- (h) Where applicable, the bidder advised and made efforts to assist interested minority or women business enterprises in obtaining bonding, lines of credit or insurance required by the contracting agency or contractor;
- (i) The bidder's efforts to obtain minority or women business enterprise participation were reasonably expected to produce a level of participation sufficient to meet the goals of the public contracting agency; and
- (j) The bidder used the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of disadvantaged, minority or women business enterprises.

CERTIFICATION

200.055 Certification of disadvantaged, minority, women or emerging small business enterprises; fee; rules; appeal. (1) Any disadvantaged, minority, women or emerging small business enterprise is entitled to be certified as such upon application to the Department of Consumer and Business Services. If the application is approved by the department, the department shall certify the applicant as a disadvantaged, minority, women or emerging small business enterprise. The enterprise shall be considered so certified by any public contracting agency.

(2) In consultation with the State Board of Higher Education and the Department of Transportation, and with the approval of the Advocate for Minority, Women and Emerging Small Business, the Department of Consumer and Business Services by rule shall adopt a uniform standard form and procedure designed to provide complete documentation that a business enterprise is certified as a disadvantaged, minority, women or emerging small business enterprise. The Department of Consumer and Business Services shall compile and make available upon request a list of certified disadvantaged, minority, women or emerging small business enterprises.

(3) Any business enterprise that is refused certification as a disadvantaged business enterprise or denied recertification as such or whose certification is revoked may appeal directly to the United States Department of Transportation.

(4) Any business enterprise that is refused certification as a minority, women or emerging small business enterprise or has its certification revoked may request a contested case hearing as provided in ORS chapter 183.

(5) The Department of Consumer and Business Services shall be the sole agency authorized to certify enterprises as disadvantaged, minority, women or emerging small business enterprises eligible to perform on public contracts in this state.

(6) The Department of Consumer and Business Services by rule may establish a fee not to exceed \$100 for a copy of the list of certified disadvantaged, minority, women and emerging small business enterprises and may assess state agencies for services under ORS 200.005 to 200.075 and 279.059.

(7) The Department of Transportation may collect a fee, not to exceed \$200, from a bidder upon bidder prequalifications to cover the costs of the Department of Consumer and Business Services in administering ORS 200.005 to 200.075 and 279.059. The Department of Transportation shall transfer such fees to the credit of the account established under subsection (8) of this section.

(8) The Department of Consumer and Business Services shall establish a special account in which to deposit fees and assessments. The special account is continuously appropriated to the Department of Consumer and Business Services to meet its expenses in administering ORS 200.005 to 200.075 and 279.059. [1987 c.893 §8; 1989 c.1043 §4; 1993 c.500 §8; 1997 c.145 §3]

Note: The amendments to 200.055 by section 216, chapter 794, Oregon Laws 2003, become operative March 1, 2005, and apply only to public contracts first advertised, but if not advertised then entered into, on or after March 1, 2005. See sections 336 and 337, chapter 794, Oregon Laws 2003. The text that is operative on and after March 1, 2005, is set forth for the user's convenience.

200.055. (1) Any disadvantaged, minority, women or emerging small business enterprise is entitled to be certified as such upon application to the Department of Consumer and Business Services. If the application is approved by the department, the department shall certify the applicant as a disadvantaged, minority, women or emerging small business enterprise. The enterprise shall be considered so certified by any public contracting agency.

(2) In consultation with the State Board of Higher Education and the Department of Transportation, and with the approval of the Advocate for Minority, Women and Emerging Small Business, the Department of Consumer and Business Services by rule shall adopt a uniform standard form and procedure designed to provide complete documentation that a business enterprise is certified as a disadvantaged, minority, women or emerging small business enterprise. The Department of Consumer and Business Services shall compile and make

available upon request a list of certified disadvantaged, minority, women or emerging small business enterprises.

(3) Any business enterprise that is refused certification as a disadvantaged business enterprise or denied recertification as such or whose certification is revoked may appeal directly to the United States Department of Transportation.

(4) Any business enterprise that is refused certification as a minority, women or emerging small business enterprise or has its certification revoked may request a contested case hearing as provided in ORS chapter 183.

(5) The Department of Consumer and Business Services shall be the sole agency authorized to certify enterprises as disadvantaged, minority, women or emerging small business enterprises eligible to perform on public contracts in this state.

(6) The Department of Consumer and Business Services by rule may establish a fee not to exceed \$100 for a copy of the list of certified disadvantaged, minority, women and emerging small business enterprises and may assess state agencies for services under ORS 200.005 to 200.075.

(7) The Department of Transportation may collect a fee, not to exceed \$200, from a bidder upon bidder prequalifications to cover the costs of the Department of Consumer and Business Services in administering ORS 200.005 to 200.075. The Department of Transportation shall transfer such fees to the credit of the account established under subsection (8) of this section.

(8) The Department of Consumer and Business Services shall establish a special account in which to deposit fees and assessments. The special account is continuously appropriated to the Department of Consumer and Business Services to meet its expenses in administering ORS 200.005 to 200.075.

200.065 Fraudulent conduct prohibited; sanctions. (1) It shall be unlawful for any person fraudulently to obtain or retain or attempt to obtain or retain or to aid another person fraudulently to obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise.

(2) It shall be unlawful knowingly to make a false claim that any person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a contract or subcontract or other benefit.

(3) The public contracting agency may withhold payment, suspend or terminate the contract and may impose on any person a civil penalty not to exceed 10 percent of the contract or subcontract price or \$5,000, whichever is less, for each violation of subsection (1) or (2) of this section. The penalty shall be paid to the Office for Minority, Women and Emerging Small Business.

(4) The Department of Consumer and Business Services or an affected public contracting agency shall investigate any complaint that a person has violated subsection (1) or (2) of this section. In

investigating such a complaint, the department or an affected public contracting agency may require any additional information, administer oaths, take depositions and issue subpoenas to compel the attendance of witnesses and the production of books, papers, records, memoranda or other information necessary to carry out its duties. If any person fails to comply with any subpoena issued under this subsection or refuses to testify on any matter on which a person may lawfully be interrogated, the procedure provided in ORS 183.440 shall be followed to compel compliance.

(5) An affected public contracting agency or the Department of Consumer and Business Services may disqualify any person found to have violated subsection (1) or (2) of this section or who admits to such violation under oath during the course of an investigation from bidding or participating in any public contract for a period of time specified by the agency or department, not to exceed three years. Any contracting agency that has notice of the finding of the fraudulent certification may also disqualify the person from bidding on or participating in any public contract. [1987 c.893 §9; 1989 c.1043 §5; 1997 c.145 §4]

200.075 Prohibited conduct; suspension of certification or right to participate in public contracts. (1) Any bidder or contractor or subcontractor on a public contract that knowingly commits any of the acts listed in paragraphs (a) to (c) of this subsection shall have its right to bid on or participate in any public contract suspended. The suspension shall occur only after notice and opportunity for hearing in such manner as the affected public contracting agency, by rule, shall provide. The suspension shall be for up to 90 days for a first violation, up to one year for a second violation and up to five years for a third violation. Each violation shall remain on record for five years. After five years the violation shall no longer be considered in reviewing future violations. The following acts are prohibited:

(a) Entering into any agreement representing that a disadvantaged, minority, women or emerging small business enterprise certified pursuant to ORS 200.055 will be performing work or supplying materials under the public improvement contract without the knowledge and consent of the disadvantaged, minority, women or emerging small business enterprise.

(b) Exercising management and decision making control over the internal operations of any certified disadvantaged, minority, women or emerging small business enterprise. As used in this paragraph, “internal operations” does not include normal scheduling, coordination, execution or performance as a subcontractor on a public contract.

(c) Using a disadvantaged, minority, women or emerging small business enterprise to perform a subcontract or supply material under a public improvement contract to meet an established goal or requirement when the disadvantaged, minority, women or emerging small business enterprise does not perform a commercially useful function in carrying out its responsibilities and obligations under the contract.

(2) Any disadvantaged, minority, women or emerging small business enterprise certified under ORS 200.055 that allows or commits any of the acts listed in paragraphs (a) to (c) of this subsection shall have its certification suspended for up to 90 days for the first violation, up to one year for a second violation and up to five years for a third violation. Each violation shall remain on record for five years. After five years the violation shall no longer be considered in reviewing future violations. The following acts are prohibited:

(a) Use of the firm's name to meet a disadvantaged, minority, women or emerging small business enterprise goal or requirement on a public contract when the firm does not in fact intend to or does not actually perform the work under the subcontract or purchase and supply material to the project under a material supply contract.

(b) Use of any personnel of an uncertified business to operate, manage or otherwise control the disadvantaged, minority, women or emerging small business enterprise.

(c) Failure to perform a commercially useful function in carrying out its functions under a subcontract or a material supply contract entered into with a contractor or subcontractor on a public contract when represented as a certified business to meet an established goal or requirement.

(3) For the purpose of this section "commercially useful function" means the actual performance of a function or service by the business for which there is a demand in the marketplace, and for which the business receives payment not disproportionate to the work performed or in conformance with industry standards. Acting as a broker to provide for the performance of work by others does not constitute a "commercially useful function." [1987 c.893 §11; 1989 c.1043 §6; 1991 c.91 §1; 1995 c.452 §21]

200.085 [1987 c.893 §1; repealed by 1989 c.1043 §14]

RESPONSIBILITY OF PUBLIC AGENCIES

200.090 Public agencies to pursue policy of providing opportunities. Public agencies shall aggressively pursue a policy of providing opportunities for available contracts to emerging small businesses and shall cooperate with the Advocate for Minority, Women and Emerging Small Business to determine the best means by which to make such opportunities available. [1989 c.1043 §10]

MENTOR PROGRAM

200.100 Definitions for ORS 200.100 to 200.120. As used in ORS 200.100 to 200.120:

(1) "Contractor" means a person who contracts on predetermined terms to be responsible for the performance of all or part of a job of preparation or construction in accordance with established specifications or plans, retaining control of means, method and manner of accomplishing the desired result, and who provides:

- (a) Labor at the site; or
- (b) Materials, supplies and labor at the site.

(2) "Disadvantaged business enterprise" means a small business concern that is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any corporation, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

(3) “Minority or women business enterprise” means a small business concern which is at least 51 percent owned by one or more minorities or women, or in the case of a corporation, at least 51 percent of the stock of which is owned by one or more minorities or women, and whose management and daily business operations are controlled by one or more of such individuals.

(4) “Minority individual” means a person who is a citizen or lawful permanent resident of the United States, who is:

- (a) Black who is a person having origins in any of the black racial groups of Africa;
- (b) Hispanic who is a person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race;
- (c) Asian American who is a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands;
- (d) Portuguese who is a person of Portuguese, Brazilian or other Portuguese culture or origin, regardless of race;
- (e) American Indian or Alaskan Native who is a person having origins in any of the original peoples of North America; or
- (f) A member of another group, or another individual that is socially and economically disadvantaged as determined by the Advocate for Minority, Women and Emerging Small Business.

(5) “Subcontractor” means a contractor who has no direct contractual relationship with the owner. [1991 c.559 §1]

200.110 Mentor program; guidelines; eligibility. (1) The Economic and Community Development Department may recognize the mentor relationship between contractors and minority business enterprises or women business enterprises certified under this chapter. The mentor relationship shall offer the opportunity to foster and encourage minority and women business enterprises, to expand the capacity of presently existing minority and women businesses and to offer the opportunity for less experienced minority and women businesses to gain training and assistance.

(2) Guidelines for eligibility for the mentor relationship include, but are not limited to:

- (a) Minority and women business enterprises that meet the certification requirements of the U.S. Department of Transportation are eligible for participation in a mentor program. Other minority and women business enterprises are also eligible if they meet the certification requirements of this chapter. An agency may grant approval of an enterprise application for certification concurrent with approval of a mentor arrangement.
- (b) The minority or women business enterprise must be an independent organization, and the ownership by the individuals must be real. Other employment and business interests by the individuals are not precluded, if such employment or business interests do not conflict with the power of the minority or women owners to direct the management and policies of the minority or women enterprise to make day-to-day as well as major decisions on matters of management, policy and operations.
- (c) The mentor program is intended to provide minority and women business enterprises with advice, assistance and training. The enterprise shall be responsible for management and operations of the business. The mentor shall not be responsible for the management of the firm.

The mentor and the enterprise shall remain separate and independent business entities with the exception that facilities may be provided to the enterprise by the mentor if a separate lease agreement is maintained by the parties.

(d) Part ownership in a minority or women business enterprise by a non-disadvantaged party, including a mentor, is permitted if in compliance with 49 C.F.R. 23. Any property, equipment, supplies or other services which are sold, rented or donated to the enterprise and any investment made by nondisadvantaged individuals must be reported to the agency involved in the mentor program. Documentation shall be provided by bills of sale, lease agreements or similar documents.

(e) The mentor relationship may include an arrangement with an independent third party, such as a bank or accountant, to act as an agent. Third parties may receive progress payments for work accomplished by the minority or women business enterprise, made out jointly to the agent and the enterprise, and make payments, on behalf of the enterprise, to material suppliers or for federal and state payroll taxes.

(3) Types of assistance a mentor may provide to the minority or women business enterprise include:

- (a) Financial assistance;
- (b) Technical and management assistance;
- (c) Equipment rental and use of personnel; and
- (d) Bonding assistance. [1991 c.559 §2]

200.120 Standards for program participation. (1) Mentor relationships may be documented by a written development plan, approved by the Economic and Community Development Department in consultation with the Oregon Association of Minority Entrepreneurs. The development plan shall:

- (a) Clearly set forth the objectives of the parties and their respective roles;
- (b) Be for a specified length of time;
- (c) Determine measurable goals to be reached by the minority or women business enterprise; and
- (d) Provide that if resources of the mentor are utilized by the minority or women business enterprise in the performance of contracts or subcontracts for the mentor or for another contractor, the resources shall be separately identified, accounted for and compensated directly by the minority or women business enterprise to the mentor. If the plan provides for extensive use of the mentor's resources by the minority or women business enterprise, the arrangement may be closely monitored.

(2) The development plan may also include training to be provided by the mentor to the minority or women business enterprise. Training may include:

- (a) Business planning;
- (b) Record keeping;
- (c) Technical training;
- (d) Capital formation;
- (e) Loan packaging;
- (f) Financial counseling;
- (g) Bonding; and
- (h) Equipment utilization.

(3) The development plan may be reviewed annually by the Economic and Community Development Department and the Oregon Association of Minority Entrepreneurs to review the progress of the mentor program.

(4) The development plan shall contain a provision that the mentor relationship may be terminated by mutual consent or upon determination that:

(a) The mentor firm no longer meets the eligibility standards for certification as a minority or women business enterprise;

(b) Either party has failed or is unable to meet its obligations under the development plan;

(c) The minority or women business enterprise is not progressing or is not likely to progress in accordance with the development plan;

(d) The minority or women business enterprise has reached a satisfactory level of self-sufficiency to compete without resorting to special treatment provided in the development plan;

or

(e) The plan or provisions thereof are contrary to the requirements of federal, state, or local law or regulation, or otherwise contrary to public policy.

(5) Copies of the development plan shall be retained by all parties to it, and by the Economic and Community Development Department and the Oregon Association of Minority Entrepreneurs.

(6) The development plan may include a provision that the arrangement shall be dissolved by either party for reason by notifying the Economic and Community Development Department and the Oregon Association of Minority Entrepreneurs. [1991 c.559 §3]

EMERGING SMALL BUSINESS ASSISTANCE PROGRAM

200.150 Definitions for ORS 200.150 to 200.200. As used in ORS 200.150 to 200.200:

(1) “Emerging small business” means:

(a) A business with its principal place of business located in this state;

(b) A business with average annual gross receipts over the last three years not exceeding \$1 million for construction firms and \$300,000 for nonconstruction firms;

(c) A business which has fewer than 20 employees;

(d) An independent business; and

(e) A business properly licensed and legally registered in this state.

(2) “Emerging small business” does not mean a subsidiary or parent company belonging to a group of firms which are owned and controlled by the same individuals which have aggregate annual gross receipts in excess of \$1 million for construction or \$300,000 for nonconstruction firms over the last three years.

(3) A business may be certified under ORS 200.005 to 200.075 as an emerging small business for no more than seven years. [1991 c.517 §1]

200.160 Transportation Commission duties; report. The Oregon Transportation Commission shall appoint a committee to recommend plans whereby the Department of Transportation may assist emerging small businesses in overcoming barriers to participation in state public

improvement and maintenance projects and shall report its recommendation to the commission and the Legislative Committee on Trade and Economic Development. [1991 c.517 §2]

200.170 Eligibility for assistance. (1) Subject to subsection (2) of this section, in order to be eligible for assistance under ORS 200.005 and 200.150 to 200.200, the applicant must:

- (a) Be determined to be an emerging small business pursuant to ORS 200.150;
- (b) Have not been found to be eligible for such assistance in more than seven calendar years;
- (c) Show that the applicant's place of business and the work in which the applicant seeks to participate are located in this state; and
- (d) Show that the applicant is in compliance with applicable licensing and registration requirements.

(2) The Department of Transportation may limit eligibility for assistance on a specific project or contract to emerging small businesses that are located in or draw a part of their workforce from economically depressed areas in this state, as designated by the Economic and Community Development Department in consultation with the Employment Department.

(3) The applicant for assistance under ORS 200.005 and 200.150 to 200.200 must perform at least 51 percent of the labor on any public improvement or maintenance project for which assistance is received using the applicant's own workforce. [1991 c.517 §§3, 6]

200.180 Emerging Small Business Account; uses. The Emerging Small Business Account is established within the Consumer and Business Services Fund. The Emerging Small Business Account is an investment fund for purposes of ORS 293.701 to 293.820. Moneys in the account and the interest thereon are continuously appropriated for the purposes of assisting emerging small businesses under the plans recommended under ORS 200.160. [1991 c.517 §4; 1993 c.744 §189b]

200.190 Deposit of one percent of highway construction contract amount. The Department of Transportation, when undertaking a public improvement highway construction contract, shall deposit with the State Treasurer an amount equal to not more than one percent of the contract award amount. The State Treasurer shall credit the amount reserved to the Emerging Small Business Account within the Consumer and Business Services Fund. The deposit shall be made within 30 days of the date on which the contract award is made. [1991 c.517 §5; 1993 c.744 §189c]

200.200 Security for performance by emerging small business. (1) When any requirement exists under ORS chapter 279 to provide a surety bond or other security for the faithful performance of a public contract, an emerging small business may provide:

- (a) A surety bond issued by a corporate surety qualified by law to issue surety insurance as defined in ORS 731.186;
- (b) A stipulation or undertaking with one or more individual sureties; or
- (c) Any other form of security specified in the statute requiring the security.

(2) When the security for the faithful performance of a public contract is in the form of a stipulation or undertaking with one or more individual sureties, the individual sureties must be residents of this state. The total net worth of all the individual sureties on the stipulation or

undertaking must be at least twice the sum specified in the stipulation or undertaking. The public agency requiring the security shall determine if the sureties possess the qualifications prescribed by this subsection. [1991 c.517 §8]

Note: The amendments to 200.200 by section 217, chapter 794, Oregon Laws 2003, become operative March 1, 2005, and apply only to public contracts first advertised, but if not advertised then entered into, on or after March 1, 2005. See sections 336 and 337, chapter 794, Oregon Laws 2003. The text that is operative on and after March 1, 2005, is set forth for the user's convenience.

200.200. (1) When any requirement exists under ORS chapter 279, 279A, 279B or 279C to provide a surety bond or other security for the faithful performance of a public contract, an emerging small business may provide:

- (a) A surety bond issued by a corporate surety qualified by law to issue surety insurance as defined in ORS 731.186;
- (b) A stipulation or undertaking with one or more individual sureties; or
- (c) Any other form of security specified in the statute requiring the security.

(2) When the security for the faithful performance of a public contract is in the form of a stipulation or undertaking with one or more individual sureties, the individual sureties must be residents of this state. The total net worth of all the individual sureties on the stipulation or undertaking must be at least twice the sum specified in the stipulation or undertaking. The public agency requiring the security shall determine if the sureties possess the qualifications prescribed by this subsection.

Attachment C

DIVISION 50
DBE/MBE/WBE/ESB CERTIFICATION PROCEDURES
Disadvantaged/Minority/Woman
Business Certification Procedures

445-050-0000

Attorney General's Model Rules

Pursuant to ORS 183.341 the Department of Consumer and Business Services -- Office of Minority, Women and Emerging Small Business adopts the Model Rules of Procedure as promulgated by the Attorney General of the State of Oregon under the Administrative Procedures Act as amended and effective September 17, 1997.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 183 & ORS 200.055

Stats. Implemented: ORS 183 & ORS 200.055

Hist. MWESB 1-1998, f. & cert. ef. 4-9-98

445-050-0001

Purpose

(1) The purpose of OAR 445-050-0001 to 445-050-0090 is to adopt a standard application form and procedure designed to provide complete documentation for certification of businesses as disadvantaged (DBE) or minority/woman (MBE/WBE). A Disadvantaged Business Enterprise shall be certified under the federal criteria set out in 49 CFR 26. Minority Business Enterprises and Woman Business Enterprises shall be certified under the State of Oregon certification program based on ORS 200.005. Firms that are certified DBEs are eligible to participate on federally funded projects to meet DBE commitment requirements. Any certified firms are eligible to participate in private or non-federally funded public sector projects.

(2) These rules also cover publication of a directory, as well as procedures for handling complaints, challenges and appeals.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: MWESB 1-1998, f. & cert. ef. 4-9-98; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0000 [EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97]; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

445-050-0005

Definitions

As used in these rules, the following terms shall have the following definitions, unless the context requires otherwise:

(1) "Contribution of Capital" means a real and substantial contribution of capital, tangible personal assets, or expertise to acquire ownership interest in the firm. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an

owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee.

(2) "Control" or "Controlled" means that Operational and Managerial Control of all aspects of the business is exercised by one or more Qualifying Individual(s).

(3) "Disadvantaged Business Enterprise" or "DBE" means a business that meets the eligibility standards set out in OAR 445-050-0020 and 49 CFR 26.

(4) "Independence" or "Independent" means:

(a) The business must not be inextricably associated with or dependent upon any non-Disadvantaged, non-Minority or non-woman owned firm;

(b) The business owns or leases equipment and resources necessary to perform its work, (where leasing is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm); and

(c) The business owner has sufficient expertise in the firm's field of operation to operate the firm independently.

(5) "Management Control" or "Management" means that the Qualifying Individual(s) has/have responsibility for the critical areas of business operations and has the demonstrated ability to make independent and unilateral business decisions needed to guide the future of the business.

When the actual management of the business is contracted out to individuals other than the owner or is delegated to employees, those persons who have the power to hire and fire these managers exercise Management Control. Areas of control include, but are not limited to:

(a) Authority and responsibility to sign pay checks and letters of credit;

(b) Authority to negotiate and sign for insurance and/or bonds;

(c) Authority to negotiate for banking services;

(d) Authority to negotiate and sign contracts.

(6)(a) "Minority" means a person who is a citizen or lawful permanent resident of the United States, who is a:

(A) Black American which includes persons having origins in any of the Black racial groups of Africa;

(B) Hispanic American which includes persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish or Portuguese culture or origin, regardless of race;

(C) Native American which includes persons who are American Indians, Eskimos, Aleuts or Native Hawaiians;

(i) A person must prove he/she is enrolled or registered by the tribe, clan, nation or Alaskan Native Regional or Village Corporation. Alternatively, the person can provide state or federal certification of enrollment in these groups.

(ii) If a person cannot prove enrollment or registration, he/she must provide proof of qualification to participate in awards or judgments rendered by a federal or state judicial body in favor of the tribe, clan, nation or Alaskan Native Regional or Village corporation.

(iii) A person does not need to reside on a federal or state Indian reservation.

(D) Asian-Pacific American which includes persons whose origin is from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the United States Trust Territories of the Pacific Islands, the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirabati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(E) Subcontinent Asian Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(F) Women;

(G) Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration and/or that are designated under 49 CFR Part 26.

(6)(b) Bona fide Minority group membership shall be established on the basis of evidence to support the individual's claim that the individual is a member of a Minority group and is so regarded by the particular Minority community. However, the OMWESB is not required to accept this claim if it determines the claim to be invalid. If the Minority community does not exist in Oregon, the burden of proof shifts to the applicant to prove he/she is a Socially and Economically Disadvantaged Individual.

(7) "Minority Business Enterprise" or "MBE" means a business that meets the eligibility standards set out in OAR 445-050-0030.

(8) "OMWESB" means the Office of Minority, Women and Emerging Small Business in the Department of Consumer and Business Services.

(9) "Operational Control" or "Operations" means the Qualifying Individual(s) independently makes the basic decisions for the daily operations of the business. The Qualifying Individual(s) must possess the requisite experience in the field of operations for which certification is sought, control the board of directors or management of the business, and receive salary or profits commensurate with his/her ownership interest. Absentee ownership or title ownership by an individual who does not take an active role in making the basic decisions for the daily operations of the business does not constitute Operational Control.

(a) The Qualifying Individual(s) should have training and experience in the field(s) of operation for which certification is sought. The Qualifying Individual(s) does not need to have hands on or direct control of, or expertise in, every aspect of the business' affairs so long as the owner is able to intelligently use and critically evaluate information presented by employees.

(b) The possession of a specialty license by the Qualifying Individual(s) is not a prerequisite for Operational Control. The Qualifying Individual(s) must possess sufficient knowledge about the business to enable him, or her, to maintain day to day control over the operational aspects of the business. In order to determine that the Qualifying Individual(s) has/have the technical expertise and competence to maintain Operational Control, the Qualifying Individual(s) will be required to submit proof of expertise. Expertise can be documented in two ways for trades or professions requiring a specialty license:

(A) The Qualifying Individual(s) may submit a copy of their essential license(s), or

(B) OMWESB may employ the assistance of state resources to help evaluate whether a Qualifying Individual(s) possesses a working knowledge of the technical requirements of their field and is able to evaluate information provided by subordinates in a critical and intelligent manner. State resources may include technical experts from state agencies such as the Building Codes Division, the Board of Engineering Examiners, the Landscape Contractors Board and the Real Estate Agency.

(10) "Ownership" or "Owned" means the Qualifying Individual(s) own a minimum of 51% of each class of voting stock and at least 51% of the aggregate of all classes of stock or own a minimum of 51% of the membership interests.

(11) "Qualifying Individual(s)" means owners/applicants who belong to one of the recognized ethnic Minority Groups, women, or other individuals determined by OMWESB on a case-by-case basis to be socially and economically disadvantaged. For DBE certification the individuals

must meet the requirements of 49 CFR 26. The Qualifying Individual(s) must be a citizen of the United States or a permanent resident.

(12) "Small Business" means a small business as defined pursuant to 13 CFR 121. A Small Business shall not include any concern or group of concerns controlled by the same Qualifying Individual or individuals which have average annual gross receipts in excess of the North American Industry Classification System (NAICS) size limit over the previous three fiscal years. A Small Business must not exceed the following size standards:

(a) General Contractors -- \$28,500,000;

(b) Specialty Contractors -- \$12,000,000;

(c) For firms not included in subsections (a) and (b) -- Small Business Administration (SBA) the North American Industry Classification System (NAICS) code size standard established under 13 CFR 121.

(d) Firms seeking federal DBE certification must meet current Small Business Administration (SBA) business size standard limits for each type of work the firm seeks to perform not to exceed 17,420,000. Firms seeking state MBE/WBE certification must meet the current SBA business size standard limit for a primary area of work. The firm's primary area of work is determined by percentage of income.

(13) "Socially and Economically Disadvantaged Individuals" means those individuals who are citizens of the United States or lawfully admitted permanent residents and who are women, Minorities or any other minorities or individuals found to be disadvantaged by the SBA pursuant to Section 8(a) of the Small Business Act.

(a) It is a rebuttable presumption that Minorities and women are socially and economically disadvantaged.

(b) The OMWESB may also determine on a case by case basis that individuals who are not women or Minorities are Socially and Economically Disadvantaged Individuals.

(c) Socially disadvantaged individuals are people who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as members of a group without regard to their individual qualities.

(A) The social disadvantage must stem from the individual's color, national origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause beyond the individual's control. Social disadvantage cannot be based on factors common to small business.

(B) The individual must demonstrate that:

(i) He or she personally suffered the disadvantage as a result of treatment experienced in the United States;

(ii) The disadvantage was chronic, long-standing, and substantial, not fleeting or insignificant; and

(iii) The disadvantage negatively affected his or her entrance or advancement in the business world.

(d) Economically disadvantaged individuals are Socially disadvantaged individuals whose ability to compete in the United States economy has been impaired due to diminished capital and credit opportunities compared to non-socially disadvantaged individuals in the same or similar business. The Socially and Economically Disadvantaged Individual(s) will be required to submit a Certification of Social and Economic Disadvantage and Statement of Personal Net Worth.

(14) "USDOT" means the United States Department of Transportation.

(15) "Woman Business Enterprise" or "WBE" means a business that meets the eligibility standards set out in OAR 445-050-0030.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.005

Stats. Implemented: ORS 200.005

Hist.: EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0005; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

445-050-0020

Eligibility Standards for Disadvantaged Business Enterprises

(1) To be eligible for certification as a Disadvantaged Business Enterprise, a business must meet the following criteria:

(a) The business must be in existence, operational and in business for a profit.

(b) The business must be a Small Business, but in no case may the average annual gross receipts exceed \$17,420,000.

(c) The business must be Controlled by one or more Socially and Economically Disadvantaged Individual(s).

(d) The business must be Owned by one or more Socially and Economically Disadvantaged Individual(s).

(e) The one or more Socially and Economically Disadvantaged Individual(s) must have made a contribution of capital to the business, which is commensurate with their ownership interest.

(f) The business must be Independent.

(g) The business must be properly licensed and registered in the state of Oregon.

(h) The business must have or lease (where leasing is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm) sufficient machinery, equipment and employees to operate. In making this determination the OMWESB shall compare the operations of the DBE to a non-DBE operation in the same or similar business.

(2) The OMWESB will utilize 49 CFR 26 to review for eligibility for certification as a DBE. In addition, OMWESB will apply written directives of the USDOT, administrative guidelines and written decisions of the USDOT on appeals of state certification decisions so long as they are in accord with these rules.

(3) In making determinations under this section the OMWESB shall not consider whether the business has previously performed or would be able to perform a commercially useful function. Repeated failure by a business to perform a commercially useful function may, however, indicate that the business is not Independent, Owned or Controlled by a Socially and Economically Disadvantaged Individual.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.005 & 200.055

Stats. Implemented: ORS 200.005 & 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0020; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

445-050-0030

Eligibility Standards for Minority and Women Business Enterprises

To be eligible as a Minority or Woman Business Enterprise, a business must meet the following criteria. The OMWESB may perform on-site investigations to verify any of the requirements of this rule.

(1) The business must be a Small Business. The average annual gross receipts for a firm and its affiliates for the previous three fiscal years must not exceed the amounts established under SBA's NAICS codes.

(2) The business must be Controlled by one or more Qualifying Individual(s).

(a) The Qualifying Individual(s) must establish Minority Group or gender status by identification, US citizenship, birth certificate, driver's license, state identification cards, naturalization documents, military discharge papers, visa, passport, etc., or evaluation for social and economic disadvantage.

(3) The business must be Owned by one or more Minority or women owners.

(4) The one or more Qualifying Individual(s) must have made a contribution of assets to the business .

(5) The business must be Independent.

(6) The business must be in existence, operational and in business for profit.

(7) The business must be properly licensed, and if required, legally registered in the state.

(8) The business must have or lease (where leasing is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm) sufficient machinery, equipment and employees to operate. In making this determination the OMWESB shall compare the operations of the MBE/WBE to a non-MBE/WBE operation in the same or similar business.

(9) The Qualifying Individual(s) must have training and experience in the field(s) of operation for which certification is sought. Examples of construction related activities, including but not limited to:

(a) Currently holds or has previously held the essential license in the field in which this firm operates;

(b) Has read and interpreted blueprints and specifications;

(c) Has done take offs;

(d) Has prepared estimates and bids;

(e) Goes on site and determines if the work is proceeding in accordance with the plans;

(f) Answers technical questions from subordinates;

(g) Resolves field problems;

(h) Supervises field operations.; Examples of professional related activities, including but not limited to;

(i) Has a college degree in the field of expertise;

(j) Has years of experience and training in the field of expertise;

(k) Has experience in project management in the field of expertise.

Stat. Auth.: ORS 200.005 & 200.055

Stats. Implemented: ORS 200.005 & 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert.

ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0030; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

445-050-0040 - Application Form and Procedure

- (1) Application Form(s). Businesses wishing to be certified as Disadvantaged Business Enterprises must complete the Uniform Certification Application form required by the 49 CFR 26, Appendix G. Minority or Woman Business Enterprises shall complete the application form designed by the OMWESB. The application forms are designed to solicit information to determine whether an applicant business is eligible for certification as a DBE, MBE, or WBE under this chapter. The applications are designed to provide the OMWESB with sufficient information to determine whether an applicant is eligible for certification for both federally assisted and non-federally assisted contracts. Incomplete applications will be "Denied."
- (2) Submittal of Application. The completed application form, together with all required supporting documentation, shall be submitted by mail or in person to the Office of Minority, Women and Emerging Small Business, P.O. Box 14480, Salem, OR 97309-0405
- (3) Processing Applications. The OMWESB will conduct a review and take action on completed applications as promptly as its resources permit. The order of priority for processing applications shall be the date received by OMWESB.
- (4) On-site Investigations. The OMWESB must conduct an on-site investigation and interview at the owner's place of business for all applicants seeking DBE certification. The purpose of the on-site investigation is to verify the information submitted with the application form. The applicant shall fully cooperate with such an investigation and make available any additional information requested by the OMWESB. DBEs applying from outside the State of Oregon are required to have an on-site interview conducted by their home state jurisdiction. The OMWESB may conduct an on-site investigation and interview at the owner's place of business to verify information necessary for making eligibility decisions for applicants seeking MBE/WBE certification. Last minute on-site cancellations and no shows by a DBE Applicant could result in a DBE being denied certification for failure to submit information needed to make a determination.
- (5) Determination. The OMWESB shall make a determination based on the eligibility standards included in this chapter and the federal requirements (49 CFR Part 26). As part of its investigation, the OMWESB may require all firms to provide information in addition to that requested on the application form. The applicant has the burden of proving that it is eligible for certification and recertification at all levels of review. Applicants shall be notified by mail promptly after a decision has been made. Where the OMWESB has denied an application, the letter shall set forth the specific reasons for the denial. The DBE/MBE/WBE shall notify the OMWESB of any changes in its Ownership or Management which may affect its continued eligibility as a DBE/MBE/WBE within 30 days of the change. Failure to notify OMWESB may result in denial/decertification.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0040; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

445-050-0050 - Directory

The OMWESB shall maintain a state-wide unified directory of certified firms as follows:

(1) Certified firms shall use the current business name as registered with the Secretary of State Corporation Division for the OMWESB directory (sole proprietorships not registered with the Secretary of State Corporation Division shall use the name listed on their business license), and will use no other name in contracting business. An Assumed Business Name may be used for contracting purposes, but only if it is written in conjunction with the registered business name.

(2) The directory will be maintained in an electronic format and available on-line. It shall indicate the certification status of each firm: DBE, MBE, WBE and/or ESB. The directory information shall include firm's telephone/fax numbers and mailing addresses. The directory shall also list the firm's capabilities.

(3) The OMWESB shall update the directory on a quarterly basis, with certifications, recertifications, change of business address, phone number, etc. It is the responsibility of the applicant to assure that OMWESB has a current address and phone number.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0050; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

445-050-0060

Recertification

(1) Certification as a DBE/MBE/WBE is valid for three years from the date of certification.

(2) A recertification notice shall be sent to certified DBE/MBE/WBEs approximately two months prior to expiration of the current certification. The DBE/MBE/WBE shall promptly return the recertification application along with any requested documentation (by-law amendments, evidence of changes in ownership, etc). The signed and notarized recertification application shall be reviewed by the OMWESB to determine continued eligibility. An on-site investigation may be conducted to verify information submitted to the OMWESB. It is the responsibility of the DBE/MBE/WBE to provide the information deemed necessary by the OMWESB to ascertain eligibility for recertification.

(3) Failure to return the completed recertification application by the expiration date shall lead to administrative closure. Recertification is not automatic. The DBE/MBE/WBE must demonstrate that their business currently meets the qualifications as listed in this chapter.

(4) An affidavit of "no change" will be sent to DBE firms annually approximately 30 days prior to the one-year and two-year anniversaries of the certification date. The completed affidavit, along with federal tax information for the previous years and documentation of any changes, must be submitted prior to the anniversary date, or the firm will be decertified. MBE and WBE firms are exempt from this requirement.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0060; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

445-050-0070

Decertification/Denial of DBE

This rule applies only to the decertification or denial of a DBE under 49 CFR Part 26. A DBE may be decertified at any time the OMWESB determines that the firm no longer meets the eligibility standards set out in OAR 445-050-0020 and 49 CFR 26. The OMWESB may also deny certification to any DBE applicant that does not meet the eligibility standards set out in OAR 445-050-0020 and 49 CFR 26. The procedure is as follows:

(1) In the case of decertification, the OMWESB shall issue a Notice of Intent to Decertify the DBE 21 days prior to the date of the decertification, and indicate the specific reasons for decertification.

(2) In the case of denial of initial certification or recertification, the DBE or applicant will be notified in writing of the denial and the reasons therefore.

(3) In either a decertification or denial of initial certification or recertification of a DBE, the DBE or applicant has 21 calendar days from the date of the Notice of Intent to Decertify or the letter of denial in which to submit a written request for a contested case hearing. If the DBE or applicant requests a contested case hearing, the decertification or denial of recertification will be stayed pending the issuance of a final order. Contested case hearings will be conducted in accordance with ORS 183.310 to 183.550 and OAR 445-050-0000. Following the contested case hearing, the proposed order issued by the Hearings Officer will be forwarded to the Manager of the OMWESB for issuance of the final order. If no written request for a contested case is received by OMWESB within the 21-day period, the decertification/denial will be final.

(4) Any applicant or DBE that believes it has been wrongly decertified or denied certification or recertification by the OMWESB may also file an appeal in writing, signed and dated, with the USDOT. The applicant or DBE must provide the OMWESB with a copy of the USDOT appeal at the same time it submits the appeal to the USDOT. The appeal shall be filed no later than 90 days after the date of decertification or denial of certification or recertification. The Secretary of Transportation may extend the time for filing or waive the time limit, specifically listing the reasons in writing, in the interests of justice. The appeals procedure to the USDOT is set out in 49 CFR 26.

(5) A DBE may be decertified if the Socially and Economically Disadvantaged Individual dies or leaves the business.

(6) Any business denied certification as a DBE will be ineligible to reapply for a period of 12 months.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; Former (1)(c)(A) through (3) renumbered to 121-50-075; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0070; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

445-050-0075

Decertification/Denial of MBE/WBE

This rule applies only to the decertification or denial of MBE/WBE status under Oregon law. An MBE/WBE may be decertified at any time the OMWESB determines that the firm no longer meets the eligibility standards set out in OAR 445-050-0030. If the Minority or woman owner dies or leaves the business, the MBE/WBE may be decertified. The OMWESB may also deny certification to any MBE/WBE applicant that does not meet the eligibility standards set out in OAR 445-050-0030. The procedure is as follows:

(1) In the case of decertification, the OMWESB shall issue a Notice of Intent to Decertify the MBE/WBE 21 days prior to the date of the decertification, and indicate the specific reasons for decertification.

(2) In the case of denial of initial certification or recertification, the MBE/WBE will be notified in writing of the denial and the reasons therefore.

(3) In either a decertification or denial of initial certification or recertification of a MBE/WBE, the MBE/WBE or applicant has 21 calendar days from the date of the Notice of Intent to Decertify or the letter of denial in which to submit a written request for a contested case hearing.

(4) If the MBE/WBE or applicant requests a contested case hearing, the decertification or denial of recertification will be stayed pending the issuance of the final order. Contested case hearings will be conducted in accordance with ORS 183.310 to 183.550 and OAR 445-050-0000.

Following the contested case hearing, the proposed order issued by the Hearings Officer will be forwarded to the Manager of the OMWESB for issuance of the final order. If no written request for a contested case is received by OMWESB within the 21-day period, the decertification/denial will be final.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; Renumbered from former 121-50-070(1)(c)(A) through (3); BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0075; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

445-050-0080

Third Party Complaints

Third party complaints regarding certification of DBE/MBE/WBEs may be submitted to the OMWESB and will be processed according to the following procedure:

(1) Any individual, firm or agency who believes that an applicant certified as a DBE/MBE/WBE does not qualify under the standards of eligibility for certification may file a third party complaint with the OMWESB.

(2) The third party complaint must be submitted to the OMWESB in writing, and must set forth facts which indicate that the DBE/MBE/WBE is not eligible, along with copies of any supporting documents the complainant may have. Facts should be described in as much detail as possible.

(3) The complainant must sign the third party complaint and give an address and telephone number where complainant may be reached during the investigation. In responding to requests for information concerning any aspect of the DBE, MBE, or WBE programs, OMWESB complies with provisions of the Federal Freedom of Information and Privacy Acts and the State of Oregon Freedom of Information and Privacy Acts. The OMWESB may make available to the

public any information concerning the DBE, MBE, WBE program release of which is not prohibited by federal or state law. OMWESB may maintain the identity of complainants confidential throughout the course of the investigation, 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.

(5) The OMWESB will investigate each third party complaint as promptly as resources allow. If preliminary investigative results show good cause for in-depth investigation, The OMWESB will notify the DBE/MBE/WBE of the third party complaint by certified mail. The DBE/MBE/WBE shall cooperate fully in the OMWESB's investigation.

(6) After the investigation is completed, the OMWESB shall issue a written decision, either a rejection of the third party complaint or a Notice of Intent to Decertify. The written decision shall be mailed to the DBE/MBE/WBE involved and to the complainant. No DBE/MBE/WBE will be decertified based on a third party complaint without first having an opportunity to respond to OMWESB regarding the complaint. DBE firms may request a contested case hearing and/or appeal directly to USDOT as set out in OAR 445-050-0070. If an MBE/WBE receives the notice of intent to decertify, the MBE/WBE may request a contested case hearing as set out in 445-050-0075.

(7) If the decision of the OMWESB is to continue certification of the DBE, the complainant may submit a complaint to the Secretary of USDOT.

(8) Information received about an applicant prior to the initial certification being made will not be considered a third party complaint, but will be considered in the investigation of the application for certification.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0080; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

445-050-0090

Challenges

(1) Any third party may challenge a Socially and Economically Disadvantaged Individual if the individual is an owner of a business certified or seeking certification as a DBE, MBE, or WBE. The challenge shall be made in writing to the OMWESB.

(2) Within the letter, the challenging party shall include all information available that is relevant to a determination of whether the challenged party is, in fact, a Socially and Economically Disadvantaged Individual.

(3) The OMWESB shall determine, on the basis of the information provided by the challenging party, whether there is reason to believe that the challenged party is, in fact, not a Socially and Economically Disadvantaged Individual:

(a) If the OMWESB determines that there is no reason to believe that the challenged party is not a Socially and Economically Disadvantaged Individual, the OMWESB shall so inform the challenging party in writing;

(b) If the OMWESB determines that there is reason to believe that the challenged party is not a Socially and Economically Disadvantaged Individual, the OMWESB shall begin a proceeding, as set out below, to analyze this determination;

(c) The OMWESB shall notify the challenged party in writing that his/her status as a Socially and Economically Disadvantaged Individual has been challenged;

(d) The notice shall summarize the grounds for the challenge. The notice shall also require the challenged party to provide to the OMWESB (within a reasonable period specified by the OMWESB) information sufficient to permit the OMWESB to evaluate his/her status as a Socially and Economically Disadvantaged Individual;

(e) The OMWESB shall evaluate the information available to it and make a proposed determination of whether the challenged party is a Socially and Economically Disadvantaged Individual. The OMWESB shall notify both parties of this proposed determination in writing, setting forth the reasons for this determination;

(f) During the pendency of a challenge under this rule, the presumption that the challenged party is a Socially and Economically Disadvantaged Individual shall remain in effect.

(4) After the investigation is completed, the OMWESB shall issue a written decision, either a rejection of the third party challenge, Notice of Intent to Decertify or Denial. The written decision shall be mailed to the DBE, MBE or WBE involved and to the complainant. No firm will be decertified or denied certification based on a third party challenge without first having an opportunity to respond to OMWESB regarding the complaint.

(5) DBE firms may appeal the final determination of OMWESB, under subsection (3)(e) of this rule, and request a contested case hearing and/or appeal directly to USDOT as set out in OAR 445-050-0070 and in accordance with 49 CFR 26. If an MBE/WBE receives the Notice of Intent to Decertify, the MBE/WBE may request a contested case hearing as set out in 445-050-0075.

(6) In responding to requests for information concerning any aspect of the DBE, MBE, or WBE programs, OMWESB complies with provisions of the Federal Freedom of Information and Privacy Acts and the State of Oregon Freedom of Information and Privacy Acts. The OMWESB may make available to the public any information concerning the DBE, MBE, WBE program release of which is not prohibited by federal or state law. OMWESB may maintain the identity of complainants confidential throughout the course of the investigation, 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.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0090; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

Emerging Small Business Certification Procedures

445-050-0105 - Purpose

(1) The purpose of OAR 445-050-0105 to 445-050-0165 is to adopt a standard application form and procedure designed to provide complete documentation for certification of businesses as Emerging Small Businesses (ESBs); to adopt a procedure for the handling of complaints; to adopt a procedure for the handling of investigations; and to adopt a procedure for the issuing of sanctions. An enterprise certified by OMWESB pursuant to these rules shall be considered so certified by any public contracting agency as defined in ORS 279.011 (5), in the State of Oregon. The OMWESB is the sole certification agency for the State of Oregon and all political subdivisions.

(2) These rules also cover publication of a directory as well as procedures for complaints and appeals.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0105;

445-050-0106 - Rulemaking: Attorney General's Model Rules

Pursuant to ORS 183.341 the Department of Consumer and Business Services -- Business Administration Division adopts the Model Rules of Procedures as promulgated by the Attorney General of the State of Oregon under the Administrative Procedures Act as amended and effective September 17, 1997.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183 & ORS 200.055

Hist.: MWESB 1-1998, f. & cert. ef. 4-9-98

445-050-0115 - Eligibility Standards

(1) To be eligible for certification as an ESB, a business must meet all the following criteria:

- (a) A firm must be in existence, operational and in business for a profit;
- (b) Have average, annual gross receipts over the last three years not exceeding \$1 million for construction firms and \$300,000 for non-construction firms;
- (c) Have its principal place of business located in the State of Oregon, as determined by tax filing status;
- (d) Be independent. An ESB is not eligible if it is a subsidiary of or its parent company belongs to a group of firms which are owned and controlled by the same individuals which have aggregate, annual gross receipts in excess of the amounts set out in (b);
- (e) Be properly licensed and if required, legally registered in this state: (e.g., registered as a domestic corporation or partnership, assumed business name filed, Construction Contractors Board registration, etc.);
- (f) Have no more than 19 full-time equivalent employees. A full-time equivalent employee is calculated as follows:
 - (A) Hours worked by part-time and seasonal employees shall be converted into full-time equivalent employee hours by dividing the total hours worked by all part-time and seasonal employees by 2080.
 - (B) The owners of the firm shall not be considered full-time equivalent employees.

(C) The year period during which full-time equivalent employees shall be calculated shall be the same period as the ESB's tax year.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0115; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

445-050-0125 - Application Form and Procedure

(1) OMWESB will utilize ORS 200.005 to review for eligibility for certification as an ESB.

(2) Application Form. Firms wishing to be certified as ESBs shall complete the application form provided by OMWESB.

(3) Submittal of application. The completed application form, together with all required supporting documentation, shall be submitted to the Office of Minority, Women and Emerging Small Business, 350 Winter St NE, Salem, OR 97301-3878.

(4) Processing applications. The OMWESB will conduct a review and take action on completed applications as promptly as its resources permit. The order of priority for processing applications shall be the date received by OMWESB.

(5) Determination. The OMWESB shall make a determination based on the eligibility standards included in this chapter and the applicable laws of the State of Oregon. As part of its investigation, OMWESB may require owners to provide information in addition to that requested on the application forms. The applicant has the burden of proving that it is eligible for certification and re-certification at all levels of review. Applicants shall be notified by mail promptly after a decision has been made. Where the OMWESB has denied an application, the letter shall set forth the specific reasons for the denial. Certification may be revoked at any time if the OMWESB determines that the ESB no longer meets the eligibility standards. The ESB shall notify OMWESB within 30 days of any changes in its ownership which may affect its continued eligibility as an ESB. Failure to notify OMWESB may result in denial/decertification.

(6) Submittal of Application. The completed application form, together with all required supporting documentation, shall be submitted by mail or in person to the Office of Minority, Women and Emerging Small Business, 350 Winter St. N.E., Salem, OR 97301-3878.

(7) The applicable emerging small business size standard for each applicant set out in OAR 445-050-0115(1)(b) shall be determined by the firm's primary area of work. Registration of the firm with Construction Contractors and/or Landscape Contractors Board will establish a firm as a construction firm. A construction-related trucking firm will also be considered a construction firm for the purposes of this program.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0125; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

445-050-0135 - Recertification

(1) Certification as an ESB is valid for three years from the date of certification.

(2) A recertification notice shall be sent to certified ESBs 60 days prior to expiration of current certification. The ESB shall promptly return the recertification application along with any requested documentation (e.g., evidence of change in ownership; federal tax returns for the last

year, etc.). Recertification is not automatic. The applicant must demonstrate that their business still meets the criteria set out in OAR 445-050-0105 through 445-050-0165.

(3) The signed and notarized recertification application shall be reviewed by the OMWESB staff to determine the ESB's continued eligibility. A request to verify information submitted to OMWESB may be required.

(4) Failure to return the completed recertification application by the expiration date shall result in administrative closure of the file.

(5) Firms may only be certified as an ESB for a maximum of seven years from original certification date.

(6) An annual affidavit of "no change" will be sent to the firm approximately 30 days prior to the one-year and two-year anniversaries of the certification date. The completed affidavit, along with federal tax information for the previous year, and documentation of any changes, must be submitted prior to the anniversary date, or the firm will be decertified.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0135; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

445-050-0145 - Decertification, Denial of Certification or Denial of Recertification

This rule applies only to the decertification or denial of ESB status under Oregon law. An ESB may be decertified at any time the OMWESB determines that the firm no longer meets the eligibility standards set out in OAR 445-050-0115. The OMWESB may also deny certification to any ESB applicant that does not meet the eligibility standards set out in OAR 445-050-0115. The procedure is as follows:

(1) In the case of decertification, the OMWESB shall issue a Notice of Intent to Decertify the ESB 21 days prior to the date of the decertification, and indicate the specific reasons for decertification.

(2) In the case of denial of initial certification or recertification, the ESB will be notified in writing of the denial and the reasons therefore.

(3) In either a decertification or denial of initial certification or recertification of a ESB, the ESB or applicant has 21 calendar days from the date of the Notice of Intent to Decertify or the letter of denial in which to submit a written request for a contested case hearing.

(4) If the ESB or applicant requests a contested case hearing, the decertification or denial of recertification will be stayed pending the issuance of the final order. Contested case hearings will be conducted in accordance with ORS 183.310 to 183.550 and OAR 445-050-0000. Following the contested case hearing, the proposed order issued by the Hearings Officer will be forwarded to the Manager of the OMWESB for issuance of the final order. If no written request for a contested case is received by OMWESB within the 21-day period, the decertification/denial will be final.

Stat. Auth.: ORS 200.055, Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; Renumbered from 121-050-0145 by MWESB 2-1998, f. & cert. ef. 12-11-98; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

445-050-0155 - Complaints

(1) Complaints regarding certification of an ESB may be submitted to the OMWESB and will be processed according to the following procedure:

- (2) Any individual, firm or agency who believes that an applicant certified as an ESB does not qualify under the standards of eligibility for certification may file a complaint with the OMWESB Manager.
- (3) The complaint must be submitted to the OMWESB Manager, must be in writing, and must set forth facts which indicate that the ESB is not eligible, along with copies of any supporting documents the complainant may have. Facts should be described in as much detail as possible.
- (4) The complainant must sign the complaint and give an address and telephone number where he or she may be reached during the investigation.
- (5) The OMWESB will investigate each complaint as promptly as resources allow. The ESB shall cooperate fully in the OMWESB's investigation. The OMWESB will notify the ESB of the complaint by certified mail.
- (6) After the investigation is completed, the OMWESB shall either issue a written decision to the ESB and the complainant, stating that there are no grounds for decertification or the OMWESB shall provide a Notice of Intent to decertify in accordance with OAR 445-050-0145.
- (7) In responding to complaints or requests for information concerning any aspect of the ESB program, OMWESB complies with provisions of the State of Oregon Freedom of Information and Privacy Acts. The OMWESB may make available to the public any information concerning the ESB program release of which is not prohibited by state law.
- (a) Notwithstanding the provisions of paragraph (7) of this section, the identity of complainants may be kept confidential throughout the course of the investigation, 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.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0155; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

445-050-0165 - Directory

OMWESB shall maintain a directory of certified ESBs as follows:

- (1) The Directory information shall indicate the status of each firm as an ESB and include:
- (a) Mailing address and telephone/fax numbers of firm;
 - (b) Description of the services the firm provides.
- (2) OMWESB shall update the directory with certifications, recertifications, denials, change of business address, phone number, etc. It is the responsibility of the applicant to assure that OMWESB has a current address and phone number.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0165

445-050-0170 - Representation of OMWESB by Officer or Employee in Contested Case Hearings

- (1) Subject to the approval of the Attorney General, an officer or employee of OMWESB is authorized to appear on behalf of OMWESB in contested case hearings.
- (2) The OMWESB representative may not make legal argument on behalf of OMWESB.
 - (a) "Legal argument" includes arguments on:
 - (A) The jurisdiction of OMWESB to hear the contested case;
 - (B) The constitutionality of a statute or rule or the application of a constitutional requirement to OMWESB; and
 - (C) The application of court precedent to the facts of the particular contested case proceeding.
 - (b) "Legal argument" does not include presentation of evidence, examination and cross-examination of witnesses or presentation of factual arguments or arguments on:
 - (A) The application of the facts to the statutes or rules directly applicable to the issues in the contested case;
 - (B) Comparison of prior actions of OMWESB in handling similar situations;
 - (C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case; and
 - (D) The admissibility of evidence of the correctness of procedures being followed.
- (3) When an officer or employee of OMWESB represents OMWESB, the presiding officer shall advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver of the duty to make timely objection. Where such objections involve legal argument, the presiding officer shall provide reasonable opportunity for the agency officer or employee to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after conclusion of the hearing.
Stat. Auth.: ORS 183.450(7) & ORS 183.450(8)
Stats. Implemented: ORS 183.450(7)(b)
Hist.: MWESB 2-1998 f. & cert. ef. 12-11-98; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

Notification to Advocate of Solicitations

445-050-0200 - Timely Notice

"Timely notice" as used in ORS 200.035 shall mean at the time the state agency publicly releases the contract and bid request solicitations.

Stat. Auth.: ORS 200.035

Stats. Implemented: ORS 200.035

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0200

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