

# 49 CFR Part 26 Sample Disadvantaged Business Enterprise Program

## Overview

The Department of Transportation (DOT) has prepared this sample program to help recipients comply with 49 CFR Part 26, the DOT DBE rule. We published Part 26 in the Federal Register on February 2, 1999, and it became effective March 4 (64 F.R. 5096). It made extensive revisions to DOT's DBE program, formally administered under 49 CFR Part 23.

This sample program supersedes guidance issued by the operation administrations under former part 23. It does not address the separate DBE program for airport concessionaires, which continues to be administered in accordance with 49 CFR Part 23.

We are providing this sample DBE program for informational purposes, and recipients are not required to use it or its format. However, recipients may wish to use it as a guide in preparing their program documents. Recipients may customize the sample program to fit their circumstances. The three DOT operating administrations with DBE program responsibilities - the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA) - may provide additional guidance for program matters that are specific to their programs. This sample program should, however, lead to greater consistency among recipients' submissions.

At a number of points, the sample program refers to provisions of part 26. Recipients may quote referenced portions of the rule in their program if they wish, but they are not required to do so. The sample program also provides language for some documents that are part of the program (e.g. policy statements, contract clauses). Except where otherwise noted, recipients are not required to use this language, and may use their own language as long as it meets regulatory requirements.

In the sample program, we have put instructions and notes in italics. Recipients would not put this italicized material into their program documents.

You may obtain an electronic version of this document, the DBE regulation themselves and other DOT guidance here.

*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.*

**The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.**

# Sample DBE Program

## Policy Statement

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## Policy Statement

### Section 26.1, 26.23 Objectives / Policy Statement

The [Recipient's name] 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 [Recipient] has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, the [Recipient] has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of the [Recipient] to ensure that DBEs are 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.

[Name or title of appropriate person or office] has been delegated as the DBE Liaison Officer. In that capacity, [Name or title] is 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 [Name Recipient] in its financial assistance agreements with the Department of Transportation.

[Name Recipient] has disseminated this policy statement to the [identify the governing board or officials of the recipient] 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. [Specify how this distribution is accomplished]

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[Signature of Recipients Chief Executive Officer] Date

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## **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 [Recipient] is the recipient of federal airport funds authorized by 49 U.S.C. 47101, et seq.

The [Recipient] is the recipient of federal -aid highway funds authorized under Titles I and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21, Pub. L. 105-178, 112 Stat. 107.

The [Recipient] is the recipient of 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, II, and V of the Teas-21, Pub. L. 105-178.

### **Section 26.5 Definitions**

The [Recipient] will adopt the definitions contained in Section 26.5 for this program.

### **Section 26.7 Non-discrimination Requirements**

The [Recipient] 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 [Recipient] 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:

[FAA Recipients] - We will submit annually DOT Form 4630, as modified for use by FAA recipients.

[FTA Recipients] - We will report DBE participation on a quarterly basis, using DOT Form 4630. These reports will reflect payments actually made to DBEs on DOT-assisted contracts.

[FHWA Recipients] - We will report DBE participation on a quarterly basis, using DOT form 4630.

### **Bidders List: 26.11(c)**

The [Recipient] 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.

We will collect this information in the following ways:

[Note-Program should indicate the methods the recipient will use to obtain this information. The regulation does not mandate a particular method. Options include, but are not limited to, a contract clause requiring prime bidders to report the names/addresses, and possibly other information, of all firms who quote to them on subcontracts; a recipient-directed survey of a statistically sound sample of firms on a name/address list to get age/size information; a notice in all solicitations, and otherwise widely disseminated, request to firms quoting on subcontracts to report information directly to the recipient, etc.]

### **Section 26.13 Federal Financial Assistance Agreement**

[Recipient] has signed the following assurances, applicable to all DOT-assisted contracts and their administration:

#### **Assurance: 26.13(a)**

[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 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.

[Note: This language is to be used verbatim, as it is stated in 26.13(a).]

### **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.

[Note: This language is to be used verbatim, as it is stated in 26.13(b)]

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## **SUBPART B - ADMINISTRATIVE REQUIREMENTS**

### **Section 26.21 DBE Program Updates**

Since the [Recipient] has received a grant of [For FAA Recipients: \$250,000 or more for airport planning or development,] [For FTA recipients: \$250,000 or more in FTA planning capital, and or operating assistance in a federal fiscal year,] [For FHWA recipients: authorized by the statute for which this part applies,] 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:

[Provide the name, address, telephone number, and e-mail address]

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that the [Recipient] complies with all provision of 49 CFR Part 26. The DBELO has direct, independent access to the [indicate chief executive officer of recipient] concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in Attachment \_\_\_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 [indicate the number of staff] 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 [Name Recipient]'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 [name of State].
14. Provides outreach to DBEs and community organizations to advise them of opportunities.
15. Maintains the [Recipient]'s updated directory on certified DBEs.

[Note: List responsibilities of other personnel responsible for DBE Program implementation].

### **Section 26.27 DBE Financial Institutions**

It is the policy of the [Recipient] 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: [specify].

To date we have identified the following such institutions: [List]

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

### **Section 26.29 Prompt Payment Mechanisms**

The [Recipient] 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 [specify number] days from the receipt of each payment the prime contract receives from [Recipient]. The prime contractor agrees further to return retainage payments to each subcontractor within [specify same number as above] days after the subcontractors 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 [Recipient]. This clause applies to both DBE and non-DBE subcontracts.

[Note - This is sample language, and recipients can use existing prompt payment clause or draft their own, as long as they meet the substantive requirements of 26.29. This portion of the program must also state what sanctions/consequences the recipient attaches to noncompliance with the prompt payment clause and the procedures through which they are enforced. In addition, this portion of the program may also include other prompt payment - related provisions, such as an alternative dispute resolution mechanism that the recipient chooses to use.]

### **Section 26.31 Directory**

The [Recipient] maintains a directory identifying all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as a DBE. We revise the Directory [state interval; must be at least annually.] We make the Directory available as follows: [list address, phone number, website, or other means by which interested persons can obtain access to the Directory]. The Directory may be found in Attachment \_\_\_ to this program document.

[Note: All recipients are required to participate in a combined statewide directory when the Uniform Certification Program becomes operational. At that time, this portion of the program will state how interested persons can obtain access to this combined directory.]

### **Section 26.33 Overconcentration**

[Recipient] has not identified that overconcentration exists in the types of work that DBEs perform.

Or

[Recipient] has identified that overconcentration exists in the area of [state area].

[Note: If a recipient has identified overconcentration, then please describe the rationale for having the program element, the specific provisions of the element (e.g., what is the overconcentration that has been identified, how does the program element work, and how interested persons would obtain information about the program element.)

### Section 26.35 Business Development Programs

[Recipient] has a business development program. The rationale for the program is [describe rationale for having the program element, the specific provisions of the element (e.g., who is eligible to participate, how does the program element work), and how interested persons would obtain information about the program element].

Or

[Recipient] has not established a business development program.

### **Section 26.37 Monitoring and Enforcement Mechanisms**

The [Recipient] will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26.

1. We will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109.
2. We will consider similar action under our own legal authorities, including responsibility determinations in future contracts. Attachment \_\_\_ 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.
3. We will also provide a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by the DBEs. This will be accomplished by [describe the mechanism].
4. We will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.

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## **SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING**

### **Section 26.43 Set-asides or Quotas**

The [Recipient] 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 \_\_\_ to this program. This section of the program will be updated annually.

In accordance with Section 26.45(f) the [Recipient] will submit its overall goal to DOT on August 1 of each year. [If you are a FAA or FTA recipient, or you are submitting a contract goal, the date of submission will be determined by the operating administration.] Before establishing the overall goal each year, [Recipient] will consult with the [Note-Program should identify the persons or groups with whom this consultation normally occurs, without limiting consultation to these persons or groups.] to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the [Recipients] efforts to establish a level playing field for the participation of DBEs.

[Note: The consultation should include, but not necessarily be limited to, minority, women's and general contractor groups, community organizations, and other officials or organizations.]

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. [Program should state the media in which this notice was issued: e.g. newspapers, available minority- focus media, trade publications, websites.] Normally, we will issue this notice by June 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 26.49 Transit Vehicle Manufacturers Goals**

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

[Note: this element applies only to FTA recipients' programs. If an FAA or FHWA recipient uses this approach to purchases of equipment, it would add a similar element to its program.]

## **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 \_\_\_ to this program. This section of the program will be updated annually when the goal calculation is updated.

[Note: If the recipient intends to use any race-conscious means of obtaining DBE participation other than contract goals it should describe them here.]

## **Section 26.51(d-g) Contract Goals**

The [Recipient] will use contract goals to meet any portion of the overall goal [Recipient] 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 [total amount of a DOT-assisted contract] or [the Federal share of a DOT-assisted contract].

[Note: Recipients can choose either approach; program should mention which choice the recipient made].

## **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 following personnel are 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 or responsible] [Note: Recipients can choose either approach].

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

### **Information to be submitted (26.53(b))**

[Recipient] treats bidder/offers' compliance with good faith efforts' requirements as a matter of [responsiveness] or [responsibility].

Each solicitation for which a contract goal has been established will require the bidders/offerors 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 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 \_\_ days of being informed by [Recipient] that it is not [responsive or responsible] 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: [provide name, address, phone number, e-mail address.] 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.

[Note - If there are more detailed reconsideration procedures, the recipient can include them here or in an attachment reference here.]

### **Good Faith Efforts when a DBE is replace on a contract (26.53(f))**

[Recipient] 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 DBE Liaison officer 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.

[Note: Include the administrate remedies you will use for noncompliance (see 26.53(f)(3)). The following two sentences are examples of such remedies]

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 [Name of Recipient] 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 \_\_\_\_ 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.

[Note: When a contract goal is established pursuant to the recipient's DBE program, the sample bid specification can be used to notify bidders/offerors of the requirements to make good faith efforts. The forms found at Attachment \_\_\_ can be used to collect information necessary to determine whether the bidder/offeror has satisfied these requirements. The sample specification is intended for use in both nonconstruction and construction contracts for which a contract goal has been established. Thus, it can be included in invitations for bid for construction, in requests for proposals for architectural/engineering and other professional services, and in other covered solicitation documents. A bid specification is required only when a contract goal is established.]

### **Section 26.55 Counting DBE Participation**

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

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## **SUBPART D - CERTIFICATION STANDARDS**

### **Section 26.61 - 26.73 Certification Process**

[Recipient ] 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: [Provide name, address, phone number, and e-mail address of contact person]

Our certification application forms and documentation requirements are found in Attachment \_\_\_ to this program.

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## **SUBPART E - CERTIFICATION PROCEDURES**

### **Section 26.81 Unified Certification Programs**

[Recipient] is the member of a Unified Certification Program (UCP) administered by [Name]. The UPC will meet all of the requirements of this section. The following is a description of the UCP: [describe UCP]

Or

[Recipient] is not a member of a UCP at this time. We intend to have a program established by [state date]. The steps we have taken to help create an UCP in our state are: [describe steps].

[Note: This is also the place in the program to describe certification reciprocity or coordination mechanisms that exist with other recipients (e.g. a regional certification consortium).]

## **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. Our schedule for this review process will be: [Include milestones; e.g., our {number} most active firms by {date}, our {number} next most active firms by {date}, etc.]

For firms that we have certified or reviewed and found eligible under part 26, we will again review their eligibility [state interval at which you intend such reviews. Part 26 says you may not conduct such reviews more often than every three years, but you are not required to conduct them at any specific interval.] These reviews will include the following components: [List elements of review; e.g., will an on-site review or a filling out a new application be mandated, or will recipient make these determinations 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 [Recipients] 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: [This is sample language consistent with the regulatory provision. You may substitute other language consistent with the rule.]:

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 [Recipient] 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 \$16.6 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 [program should state how and when]. 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 [select number of months up to 12] have passed from our 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\_\_\_ to this program sets forth these procedures in detail. [Note - Recipients should create and append such a procedural attachment.] To ensure separation of functions in a de-certification, we have determined that [name of official or office] will serve as the decision-maker in de-certification proceedings. We have established an administrative "firewall" to ensure that [same official or office named in previous sentence] 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:

U.S. Department of Transportation  
Departmental Office of Civil Rights  
External Civil Rights Programs Division (S-33)  
1200 New Jersey Ave., S.E.  
Washington, DC 20590  
Phone: (202) 366-4754

TTY: (202) 366-9696  
Fax: (202) 366-5575

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).

[Note: If a recipient has a system for administrative appeals of certification decision, it should mention it here and provide details of the procedure in an Attachment. The program should inform the public that resort to this system is not a remedy a firm need exhaust before making a certification appeal to DOT under 26.89].

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## **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. [Program should summarize applicable state and local law, such as state FOIA laws and how they apply.]

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 make available for inspection upon request by any authorized representative of the [Recipient] 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 states in the schedule of DBE participation.

## **ATTACHMENTS**

[List and append; we recommend that a copy of part 26 be attached to the program so that public users to whom we send copies can have it handy]

- Attachment 1 Organizational Chart
- Attachment 2 DBE Directory
- Attachment 3 Monitoring and Enforcement Mechanisms
- Attachment 4 Overall Goal Calculation
- 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 CRR part 26

### **Attachment 1**

#### Organizational Chart

Airport Board of Commissioners

Executive Director

Airport Director

Airport Operations Division    Airport Grant Administration

DBE Liaison Officer

### **Attachment 2**

#### **DBE Directory**

ABC Mechanical Services, Inc  
123 Airport Drive  
Anywhere, Anystate, 12345  
(123) 555-1111    Sheet Metal

ABC Electrical  
567 Plug Drive  
Circuit City, Anystate, 12345  
(123) 555-2222    Electrical

### **Attachment 3**

#### **Monitoring and Enforcement Mechanisms**

The Airport Authority 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. Breach of contract action, pursuant to [State Code Section X];
3. [List the 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. [Recipient]'s overall goal for FY 20\_\_ is the following: \_\_\_% of the Federal Financial assistance we will expend in DOT-assisted contracts. [FTA recipients add: exclusive of FTA funds to be used for the purchase of transit vehicles.]

or

1. [Recipient]'s overall goal for the following time period 20\_\_-20\_\_ is the following: \_\_\_% of the Federal financial assistance we will expend in DOT-assisted contracts. [FTA recipients add: exclusive of FTA funds to be used for the purchase of transit vehicles.]

2. \$\_\_\_\_\_ is the dollar amount of DOT-assisted contracts that [Recipient] expects to award during FFY20\_\_. This means that [Recipient] has set a goal of expending \$\_\_\_\_\_ with DBEs during this fiscal year/project.

##### **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 DBE's was calculated as follows:

Ready, willing, and able DBEs

Base figure = \_\_\_\_\_ All firms ready, willing and able

The data source or demonstrable evidence used to derive the numerator was:

The data source or demonstrable evidence used to derive the denominator was:

When we divided the numerator by the denominator we arrived at the base figure for our overall goal and that number was:

### **Step 2: 26.45(d)**

After calculating a base figure of the relative availability of DBEs, evidence was examined to determine what 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 we would expect in the absence of discrimination we have adjusted our base figure by \_\_%.

The data used to determine the adjustment to the base figure was:

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

From this data, we have adjusted our base figure to:

### **Public Participation**

We published our goal information in these publications:

We received comments from these individuals or organizations:

Summaries of these comments are as follows:

Our responses to these comments are:

## **Attachment 5**

### **Section 26.51: Breakout of Estimated**

#### **Race-Neutral & Race Conscious Participation**

[Recipient] will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. The [Recipient] uses the following race-neutral means to increase DBE participation: [List the things that you actually do. See Section 26.51(b) for examples]

We estimate that, in meeting our overall goal of \_\_%, we will obtain \_\_% from race-neutral participation and \_\_% through race-conscious measures.

The following is a summary of the basis of our estimated breakout of race-neutral and race-conscious DBE participation: [summarize how the estimate was derived: from private sector MBE/WBE participation, DBE participation of DBEs in local procurement programs in which there are no DBE contract goals, extend of your race-neutral business assistance efforts.]

In order to ensure that our DBE program will be narrowly tailored to overcome the effects of discrimination, if we use contract goals we will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual DBE participation (see 26.51(f)) and we will track and report race-neutral and race conscious participation separately. 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**

[Forms 1 and 2 should be provided as part of the solicitation documents.]

#### **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**

[Include in this attachment a copy of the certification forms that you require the DBE to fill out. Also make sure to include the affidavit of personal net worth.]

**Attachment 8**

**Procedures for Removal of DBE's Eligibility**

[Set out the procedures in 26.87 for the removal of DBE's eligibility in this attachment.]

## **Attachment 9**

### **Regulations: 49 CFR Part 26**

[ We recommend that you attach a copy of the regulations to your program so that the public users to whom you send copies can have it handy.]

[You may attach other documents as you see necessary to make your program as complete as possible. The current list of attachments is an example and can be modified at your convenience.]

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***\*\*\*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.\*\*\****

**The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.**

**Updated: Tuesday, June 25, 2013**